

Note

From Opportunity to Right: Constitutional Change and the Establishment Clause

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*From such State rights, good Lord deliver us! I utterly repudiate
them from the creed of my political faith!*

—Georgia Supreme Court Justice Joseph Henry Lumpkin, 1852¹

INTRODUCTION

In *Living Originalism*, Jack Balkin encourages us to consider the Constitution as a “framework,” a solid base upon which generations of Americans build up and out to create a structure whose façade the Framers might hardly recognize, but whose foundation should always remain familiar.² Sometimes—as during the New Deal—entire floors of the

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1. *Campbell v. State*, 11 Ga. 353, 367 (1852) (discussing whether states may rightfully violate the individual liberties expressed in the Federal Bill of Rights).

2. JACK M. BALKIN, *LIVING ORIGINALISM* 20-21 (2011) (“Later generations have a lot to do to

building are renovated overnight.³ Other parts take decades to create; Americans of one era think they can envision the finished structure, yet their successors tear it down or build in another direction, public opinion having shifted to favor a different plan altogether.⁴

An important example of the latter mode of construction involves the issue of government-imposed religious establishments. As several scholars have suggested, Americans' interpretation of the First Amendment's Establishment Clause experienced a remarkable transformation in the eighty years between the framings of the First and Fourteenth Amendments.⁵ Examining state constitutions' establishment clauses and their interpretations by state courts—important sources heretofore largely ignored in this discussion—this Note reinforces this story of change. As I will argue, these documents show that in 1789, lawmakers and courts saw state religious establishments as consistent with personal religious freedom; whether to establish religion—in the most basic sense, to devote government money to churches—was simply a *choice* to be made by legislatures. By Reconstruction, however, Americans had come to understand the values embodied by the Clause differently. Proscribing religious establishments by means of state constitutional provisions, many nineteenth-century Americans believed religious establishments necessarily violated a treasured individual *right*—just the sort of freedom the Fourteenth Amendment forbade states to infringe.

The argument that the Fourteenth Amendment prohibited state establishments is not uncontroversial. More than sixty-five years after *Everson v. Board of Education*,⁶ Justice Thomas, for example, continues to criticize the Vinson Court's decision to apply the Establishment Clause against the states. According to Justice Thomas, incorporation is inconsistent with the eighteenth-century understanding of the Clause. "I accept that the Free Exercise Clause, which clearly protects an individual right [to practice one's religion], applies against the States through the

build up and implement the Constitution, but when they do so they must always remain faithful to the basic framework.").

3. See *id.* at 138-39.

4. Consider, for example, the death penalty and the Cruel and Unusual Punishment Clause. Though the Framers endorsed the use of capital punishment for a broad range of crimes, see John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishment Clause*, 97 VA. L. REV. 899, 959 (2011), more recent discussions about drastically limiting its use often "turn on whether the Court has adequately recognized a genuine trend [in state practices], and whether the trend marks a truly enduring constitutional value or merely reflects a temporary and revisable policy preference." Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 571 n.65 (2009).

5. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 248-54 (1998); Kent Greenawalt, *Common Sense About Original and Subsequent Understandings of the Religion Clauses*, 8 U. PA. J. CONST. L. 479, 511-12 (2006); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995).

6. 330 U.S. 1 (1947).

Fourteenth Amendment,” he explains.⁷ On the other hand, “the Establishment Clause is best understood as a federalism provision” that prevents the federal government both from instituting and from dismantling state establishments, “but [that] does not protect any individual right.”⁸ Since the Clause does not safeguard a “privilege[or] immunit[y] of citizenship,”⁹ he argues, incorporation is irrational.¹⁰ For Justice Thomas, the consequence is clear: “[T]he Establishment Clause restrains only the Federal Government,” not the states.¹¹

Academics have long expressed ideas similar to Justice Thomas’s.¹² Daniel O. Conkle helpfully summarizes this view: “[The Establishment Clause] embraced only a policy of *federalism* on the subject of church and state” rather than “a general principle concerning the proper role of government and the rights of individuals.”¹³ Thus, “[t]o ‘incorporate’ this policy of states’ rights for application *against* the states would be utter nonsense”¹⁴ In a 1991 article, Akhil Amar also cited the Clause’s federalist origins to argue against incorporation: “to apply the clause against a state government is precisely to eliminate its rights to choose whether to establish a religion—a right explicitly confirmed by the establishment clause itself!”¹⁵

7. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49 (2004) (Thomas, J., concurring). Justice Thomas also elaborates on his opposition to the incorporation of the Establishment Clause in *Zelman v. Simmons-Harris*, 536 U.S. 639, 676-80 (2002) (Thomas, J., concurring). See also *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Thomas, J., concurring) (repeating that the Clause’s “original meaning”—in Balkin’s “expected application” sense—militates against incorporation); *Cutter v. Wilkinson*, 544 U.S. 709, 727 n.3 (2005) (Thomas, J., concurring) (“The text and history of the Clause may well support the view that the Clause is not incorporated against the States precisely because the Clause shielded state establishments from congressional interference.”). Others argue against a federalist interpretation of the Clause’s original meaning. See, e.g., *Everson*, 330 U.S. at 8-16; and Steven K. Green, *Federalism and the Establishment Clause: A Reassessment*, 38 CREIGHTON L. REV. 761, 767 (2005). See generally Steven D. Smith, *The Jurisdictional Establishment Clause: A Reappraisal*, 81 NOTRE DAME L. REV. 1843 (2006) (providing a useful summary of both sides of the debate).

8. *Elk Grove*, 542 U.S. at 50 (Thomas, J., concurring).

9. U.S. CONST. amend. XIV, § 1.

10. See *Elk Grove*, 542 U.S. at 49 (Thomas, J., concurring).

11. *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 21 (2011) (Thomas, J., dissenting).

12. See LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 167-68 (1986) (noting that early opponents of *Everson* included “eminent constitutional scholars . . . Edward S. Corwin and Robert G. McCloskey”). Some also make textualist arguments, insisting that the word “respecting” indicates a neutrality about the desirability of state establishments. See, e.g., Smith, *supra* note 7, at 1882. This evidence would be more relevant to an inquiry into “original meaning as original semantic content,” though the very vagueness of the words “respecting” and “establishment” invite future generations to fill in content. Balkin, *supra* note 2, at 552-53.

13. Daniel O. Conkle, *Towards a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1141 (1988).

14. *Id.*; see also Vincent Philip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 631 (2006) (“Because the original meaning [of the Establishment Clause] only recognizes a jurisdictional boundary that protects state authority, it cannot logically be incorporated to apply against state governments.”).

15. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1158 (1991) [hereinafter Amar, *Constitution*]. Amar later adjusted his view. See AMAR, *supra* note 5, at 254 (“[A]

However, as this Note will suggest, such analysis misses the point. To reach the question of whether the Fourteenth Amendment compels the incorporation of the Establishment Clause, we must look to Americans' understanding of the Clause in the 1860s rather than in the 1790s. The question is simple: In the nineteenth-century view, did the Establishment Clause protect a fundamental personal liberty rightfully protected by the Fourteenth Amendment? When it comes to the Fourteenth Amendment, the inquiry is profoundly originalist; it demands attention to the "original meaning" of the Fourteenth Amendment as intended by its framers, as well as its "original expected application" as understood by its ratifiers.¹⁶ Yet its answer also demands an exercise in (historical) living constitutionalism. As I will argue, investigating how Reconstruction-era Americans interpreted the meaning of the Establishment Clause requires not simply a reference to the previous century's history, as if the Clause were etched in stone, but a recognition of, as Balkin writes, nineteenth-century "changes in constitutional culture—what ordinary citizens and legal and political elites believe[d] the Constitution mean[t]."¹⁷

As the first comprehensive examination of state religious freedom provisions and their interpretations by state courts, this Note explores these changes. That these sources have been neglected is surprising. Unlike selected state court decisions from Northern states or evidence from Congress's territorial administration, state constitutions and their interpretations shed light on nineteenth-century lawmakers', judges', and citizens' changing understanding of religious freedom *throughout the nation*; in Balkin's words, they show us decisively what was "on-the-wall" in "constitutional [and political] common sense."¹⁸ A thorough analysis of these sources will lead to two related conclusions: first, that the right "to be free from government-imposed religious establishments"¹⁹—a right associated with Establishment Clause—was presented as a fundamental individual right of all Americans by the 1860s; and, second, that the line between free exercise and nonestablishment—the absence of government involvement in religion—was less distinct than it is today, as, in the nineteenth-century view, both concepts combined to form the amorphous

law that proclaimed Utah a Mormon state should be suspect whether we call this a violation of the establishment principles, free-exercise principles, equal-protection principles, equal-citizenship principles, or religious-liberty principles."); AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* 171 (2012) ("To the extent that the establishment clause was, like the Tenth Amendment, a states'-rights provision, the clause did not sensibly incorporate against the states. Yet deep principles of American religious liberty and religious equality did apply against the states as proper 'privileges or immunities' of American citizenship.").

16. BALKIN, *supra* note 2, at 100-01.

17. *Id.* at 320.

18. Jack M. Balkin, *Wrong the Day It Was Decided: Lochner and Constitutional Historicism*, 85 B.U.L. REV. 677, 702 (2005).

19. Lash, *supra* note 5, at 1088.

individual liberty of “freedom of conscience.”²⁰ The latter’s implication is clear. If nonestablishment was considered inextricable from the individual right of freedom of conscience, a theory like Justice Thomas’s that presents the issues of establishment and free exercise as fundamentally different rests on a shaky foundation. To corroborate these ideas, this Note will examine two kinds of sources from the time: those that likewise link nonestablishment to an individual right, and those that present alternative interpretations to more recent views of religious freedom that either feature specific definitions of nonestablishment and free exercise or clearly differentiate between the two.²¹

But that is not enough. To justify the incorporation of the Establishment Clause, it is necessary also to learn how this change in constitutional culture affected the Fourteenth Amendment’s framers. An examination of documents written in the 1860s and 1870s will suggest that nonestablishment was on lawmakers’ (and Americans’) minds, and thus that the new understanding of the Establishment Clause is rightfully incorporated according to the original understanding of the Fourteenth Amendment.

This Note will proceed in four parts. Part I will examine changes in the religion clauses of state constitutions. As I will demonstrate, while many eighteenth-century state constitutions sanctioned or mandated religious establishments, many of those written closer in time to the Fourteenth Amendment’s framing include the principle of *nonestablishment* in the personal rights sections of the documents. Furthermore, many state constitutions feature provisions containing both nonestablishment and free-exercise concepts, suggesting that the two ideas were considered either interchangeable or inextricably linked in the nineteenth century, and thus that nonestablishment was not a choice to be made by state governments, but rather an integral component of individuals’ religious liberty.

Parts II and III will turn to state court decisions and other primary sources, respectively. By studying the language of state court judges as they interpreted their state constitutions, I will show that they, too, often referred to nonestablishment as a fundamental right of Americans and did not employ the twentieth-century distinction between nonestablishment and free-exercise concepts. The popular writings about church and state and the contemporaneous legal analyses examined in Part III will confirm that many nineteenth-century Americans beyond the courts shared these views. Parts II and III, in short, examine changes in constitutional culture.

20. See *id.* at 1141 (“Nonestablishment in the mid-nineteenth century was an aspect of the ‘rights of conscience’”); see also Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346 (2002) (detailing the history and meaning of “freedom of conscience”).

21. See, e.g., Amar, *Constitution*, *supra* note 15, at 1159 (“The Fourteenth Amendment might best be read as incorporating free exercise, but not establishment, principles against state governments.”).

Finally, Part IV will return to originalism, addressing the Fourteenth Amendment's framers' and their contemporaries' understanding of the Amendment's provisions. By examining the statements of nineteenth-century lawmakers and legal scholars, I will argue that the Establishment Clause is rightfully applied against the states. Of course, for living originalists, such an inquiry is largely unnecessary; what Balkin calls the "glittering generalities" of the Fourteenth Amendment leave room for construction regardless of original meaning and/or original expected application.²² However, this Note aims to justify Establishment Clause incorporation even to those who demand its consistency with the Fourteenth Amendment's original meaning—and, at the same time, to apply to an historical period one of Balkin's key points: that actors outside the Supreme Court play important roles in constitutional construction.

I. STATE CONSTITUTIONS

State constitutions provide an ideal starting point for an examination of changing conceptions of nonestablishment in the years between the framings of the U.S. Constitution and the Fourteenth Amendment. For the simple reason that they are much more numerous than the single federal Constitution, state constitutions provide a window into the values of Americans throughout the growing nation. Major regional differences were not uncommon in antebellum America—views on slavery, among other issues, divided nineteenth-century citizens—so cross-regional commonalities in state constitutions speak to the widespread acceptance of certain fundamental principles.²³ Furthermore, the large number of state constitutions is commensurate with a greater volume of judicial opinions interpreting them. Especially at a time when U.S. Supreme Court decisions on the issue of religion were few and far between, the opinions of states' highest courts provide important insights about how state governments—and, through them, state citizens—understood constitutions and the rights contained therein. But that is the subject of Part II.

State constitutions also have other advantages for this study. For one thing, they were often amended or replaced. Thus, both what is changed and what is retained between versions of constitutions are likely illustrative of the prevailing views in the state at the time. Moreover, many constitutions are clearly organized. Specifically, they contain clear sections or categories (for example, "Declaration of Rights") that suggest how those who framed and ratified the constitutions understood specific

22. See Balkin, *supra* note 4, at 555.

23. For an analysis of fundamental rights in state constitutions, see Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7 (2008).

provisions in the context of the document as a whole. Given that state constitutions are often organized differently from their federal counterpart—in many cases, the states copied the U.S. Constitution and Bill of Rights in neither form nor substance²⁴—the classification of state establishment clauses is particularly significant.

A. How Many State Constitutions Had Establishment Clauses, and How Did They Classify Them?

Analogs to the federal Establishment Clause were commonplace in pre-1868 state constitutions. By Steven Calabresi and Sarah Agudo's count, "[t]wenty-seven states—or two-thirds of the thirty-seven states that formed the United States in 1868—had clauses in their constitutions that . . . explicitly prohibited the establishment of a state religion."²⁵ Moreover, seventy-one percent of the population resided in these states.²⁶ As noted by Calabresi and Agudo, this evidence on its own provides at least some support for this Note's hypothesis: the great majority of mid-nineteenth-century Americans lived with the expectation that their state was—and, perhaps, should be—constitutionally forbidden from establishing religion;²⁷ indeed, these constitutions' framers did not even want to give state legislators the *option* of establishing religion. Applying the federal Establishment Clause to these states, therefore, would seemingly make little difference. But Calabresi and Agudo take their analysis a step further. "The fact that establishment clauses were so common in state constitutions," they argue, "impl[ies] that freedom from an establishment was an individual fundamental right" at the time of the Fourteenth Amendment.²⁸

Calabresi and Agudo, however, skip a step in their reasoning. It does not follow that because most Americans lived in an establishment-free state, they necessarily saw nonestablishment as a *personal* right. Alternatively, nineteenth-century Americans might simply have believed that their states *chose* constitutionally to forbid establishment, but that adopting an official religion is not necessarily inconsistent with fundamental individual rights. After all, as Lash notes, "[u]nder the federal Establishment Clause,

24. For example, Alabama's constitution splits up its free exercise and establishment clauses into different sections. See ALA. CONST. of 1819, art. 1, §§ 5, 7, *reprinted in* 1 BENJAMIN PERLEY POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 32, 33 (photo. reprint 2001) (2d ed. 1878). One of Connecticut's constitutions includes an entire article devoted solely to religion. See CONN. CONST. of 1818, art. 7, *reprinted in* 1 POORE, *supra*, at 258, 264.

25. Calabresi & Agudo, *supra* note 23, at 31-32. In their analysis, Calabresi and Agudo include clauses that specifically forbade the establishment of a state religion and those that "prohibit[ed] establishment by preventing the government from forcing citizens to financially support any specific religion." *Id.*

26. *Id.* at 32.

27. *See id.*

28. *Id.*

religious establishments were neither good nor bad—they were simply a matter left to the states.”²⁹

Instead, it is the way in which states classified and presented their establishment clauses—not simply the provisions’ existence—that suggests that “[m]ost Americans in 1868 would have thought that their privileges or immunities included an individual right to be free from a religious establishment.”³⁰ The states in which nonestablishment is listed under “Rights” or a similar heading form a diverse group culturally and geographically, from rural Alabama³¹ to industrial New Jersey,³² and from Florida³³ in the Southeast to Oregon³⁴ in the Northwest, among many others.³⁵ That the establishment clauses are included in these articles—

29. Lash, *supra* note 5, at 1091-92.

30. Calabresi & Agudo, *supra* note 23, at 32.

31. ALA. CONST. of 1867 art. 1, § 5, *reprinted in* 1 POORE, *supra* note 24, at 60, 61 (Declaration of Rights); ALA. CONST. of 1865, art. 1, § 4, *reprinted in* 1 POORE, *supra* note 24, at 48, 48 (Declaration of Rights); ALA. CONST. of 1819, art. 1, § 7, *reprinted in* 1 POORE, *supra* note 24, at 32, 33 (Declaration of Rights).

32. N.J. CONST. of 1844, art. 1, § 4, *reprinted in* 2 POORE, *supra* note 24, at 1314, 1314 (Rights and Privileges).

33. FLA. CONST. of 1868, art. 1, § 23, *reprinted in* 1 POORE, *supra* note 24, at 347, 348 (Declaration of Rights); FLA. CONST. of 1865, art. 1, § 3, *reprinted in* 1 POORE, *supra* note 24, at 332, 333 (Declaration of Rights); FLA. CONST. of 1838, art. 1, § 3, *reprinted in* 1 POORE, *supra* note 24, at 317, 317 (Declaration of Rights).

34. ORE. CONST. of 1857, art. 1, § 5, *reprinted in* 2 POORE, *supra* note 24, at 1492, 1492 (Bill of Rights).

35. See ARK. CONST. of 1864, art. 2, § 3, *reprinted in* 1 POORE, *supra* note 24, at 120, 121 (Declaration of Rights); ARK. CONST. of 1836, art. 2, § 3, *reprinted in* 1 POORE, *supra* note 24, at 101, 102 (Declaration of Rights); ILL. CONST. of 1870, art. 2, § 3, *reprinted in* 1 POORE, *supra* note 24, at 470, 471 (Bill of Rights); ILL. CONST. of 1848, art. 13, § 3, *reprinted in* 1 POORE, *supra* note 24, at 449, 466 (Declaration of Rights); IND. CONST. of 1851, art. 1, § 4, *reprinted in* 1 POORE, *supra* note 24, at 512, 513 (Bill of Rights); IOWA CONST. of 1857, art. 1, § 3, *reprinted in* 1 POORE, *supra* note 24, at 552, 552-53 (Bill of Rights); IOWA CONST. of 1846, art. 1, § 3, *reprinted in* 1 POORE, *supra* note 24, at 536, 537 (Bill of Rights); KAN. CONST. of 1859, Bill of Rights, § 7 *reprinted in* 1 POORE, *supra* note 24, at 629, 631 (Bill of Rights); KAN. CONST. of 1858, art. 1, § 7, *reprinted in* 1 POORE, *supra* note 24, at 613, 615 (Bill of Rights); KAN. CONST. of 1855, art. 1, § 7, *reprinted in* 1 POORE, *supra* note 24, at 580, 581 (Bill of Rights); KY. CONST. of 1850, art. 13, § 5, *reprinted in* 1 POORE, *supra* note 24, at 668, 684 (Bill of Rights); ME. CONST. of 1820, art. 1, § 3, *reprinted in* 1 POORE, *supra* note 24, at 788, 788-89 (Declaration of Rights); MINN. CONST. of 1857, art. 1, § 16, *reprinted in* 2 POORE, *supra* note 24, at 1029, 1030 (Bill of Rights); MO. CONST. of 1865, art. 1, § 11, *reprinted in* 2 POORE, *supra* note 24, at 1136, 1137 (Declaration of Rights); MO. CONST. of 1820, art. 13, §§ 4, 5, *reprinted in* 2 POORE, *supra* note 24, at 1104, 1114 (Declaration of Rights); NEB. CONST. of 1866-67, art. 1, § 16, *reprinted in* 2 POORE, *supra* note 24, at 1203, 1204-05 (Declaration of Rights); OHIO CONST. of 1851, art. 1, § 7, *reprinted in* 2 POORE, *supra* note 24, at 1465, 1466 (Bill of Rights); PA. CONST. of 1838, art. 9, § 3, *reprinted in* 2 POORE, *supra* note 24, at 1557, 1564 (Declaration of Rights); S.C. CONST. of 1868, art. 1, § 10, *reprinted in* 2 POORE, *supra* note 24, at 1646, 1646 (Declaration of Rights); TENN. CONST. of 1870, art. 1, § 3, *reprinted in* 2 POORE, *supra* note 24, at 1694, 1695 (Declaration of Rights); TENN. CONST. of 1834, art. 1, § 3, *reprinted in* 2 POORE, *supra* note 24, at 1677, 1677 (Declaration of Rights); TENN. CONST. of 1796, art. 11, § 3, *reprinted in* 2 POORE, *supra* note 24, at 1667, 1673-74 (Declaration of Rights); TEX. CONST. of 1868, art. 1, § 4, *reprinted in* 2 POORE, *supra* note 24, at 1801, 1801 (Bill of Rights); TEX. CONST. of 1866, art. 1, § 4, *reprinted in* 2 POORE, *supra* note 24, at 1784, 1784 (Bill of Rights); TEX. CONST. of 1845, art. 1, § 4, *reprinted in* 2 POORE, *supra* note 24, at 1767, 1767 (Bill of Rights); W. VA. CONST. of 1861-63, art. 2, § 9, *reprinted in* 2 POORE, *supra* note 24, at 1977, 1978-79 (Bill of Rights); WISC. CONST. of 1848, art. 1, § 18, *reprinted in* 2 POORE, *supra* note 24, at 2028, 2029 (Declaration of Rights); see also, e.g., CONN. CONST. of 1818, art. 1, § 4, *reprinted in* 1 POORE, *supra* note 24, at 258, 259 (including in the Declaration of Rights a provision forbidding

instead of under a more general heading³⁶—speaks to the way in which the constitutions’ framers, and the states’ citizens, thought about freedom from establishment. For Pennsylvanians, for example, nonestablishment was not simply one of two acceptable choices; it was nothing less than a “general, great, and essential principle[] of liberty and free government.”³⁷ An Alabama Supreme Court Justice made it even clearer that that state’s Declaration of Rights presented *individual* liberties. The document, he noted, is “nothing more than an enumeration of certain rights,” yet its provisions are sacred: “[W]e look in vain to any other source, to ascertain the rights secured to the citizen”³⁸ And, in almost every state, nonestablishment was one of them.

The syntax of many religious freedom provisions likewise reflects nonestablishment’s status as an individual liberty. Indeed, many state constitutions, especially those framed later in the nineteenth century, featured clauses that banned mandatory contributions to churches—an important nonestablishment principle—that read like individual-rights provisions. The Wisconsin Constitution’s provisions are illustrative: “The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed, nor shall any man be compelled to attend, erect, or support any place of worship, or maintain any ministry, against his consent.”³⁹

favoritism towards one Christian group over another); DEL. CONST. of 1792, art. 1, § 1, *reprinted in* 1 POORE, *supra* note 24, at 278, 278-79 (classifying its establishment clause as a provision “reserved out of the general powers of Government,” thus echoing the Tenth Amendment of the federal Constitution); ILL. CONST. OF 1818, art. 8, § 3, *reprinted in* 1 POORE, *supra* note 24, at 439, 446 (identifying nonestablishment as among the “general, great, and essential principles of liberty and free government”); IND. CONST. of 1816, art. 1, § 3, *reprinted in* 1 POORE, *supra* note 24, at 499, 500 (same); KY. CONST. of 1799, art. 10, § 3, *reprinted in* 1 POORE, *supra* note 24, at 657, 666 (same); MD. CONST. of 1776, art. 33, *reprinted in* 1 POORE, *supra* note 24, at 817, 819-20 (including in the Declaration of Rights that citizens are not compelled to support any specific religious sect but leaving the legislature the option to support Christianity generally through taxes); N.H. CONST. of 1792, art. 1, § 6, *reprinted in* 2 POORE, *supra* note 24, at 1294, 1294 (asserting in the Bill of Rights that no one may be compelled to support a church or sect that he does not agree with, though Christianity was established); N.H. CONST. of 1784, art. 1, § 6, *reprinted in* 2 POORE, *supra* note 24, at 1280, 1281 (same); OHIO CONST. of 1802, art. 8, § 3, *reprinted in* 2 POORE, *supra* note 24, at 1455, 1461 (identifying nonestablishment as among the “general, great, and essential principles of liberty and free government”); PA. CONST. of 1790, art. 9, § 3, *reprinted in* 2 POORE, *supra* note 24, at 1548, 1554 (referring to nonestablishment as one of the “general, great, and essential principles of liberty and free government”).

36. The Alabama Constitution of 1819’s Article 6, for example, is entitled “General Provisions” and includes sections on education, establishment of banks, and slavery. ALA. CONST. of 1819, art. 6, *reprinted in* 1 POORE, *supra* note 24, at 32, 41-44; *cf.* TEX. CONST. of 1845, art. 7, *reprinted in* 2 POORE, *supra* note 24, at 1767, 1776-79 (including provisions on women’s property rights and the quartering of soldiers under the heading “General Provisions”).

37. PA. CONST. of 1838, art. 9, *reprinted in* 2 POORE, *supra* note 24, at 1557, 1564.

38. *In re Dorsey*, 7 Port. 293, 362 (Ala. 1838).

39. WISC. CONST. of 1848, art. 1 § 18, *reprinted in* 2 POORE, *supra* note 24, at 2028, 2029; *see* ALA. CONST. of 1865, art. 1, § 4, *reprinted in* 1 POORE, *supra* note 24, at 48, 48 (“[N]o one shall be compelled by law to attend any place of worship, nor to pay any tithes, taxes, or other rate, for building or repairing any place of worship, or for maintaining any minister or ministry”); ARK. CONST. of 1864, art. 2, § 3, *reprinted in* 1 POORE, *supra* note 24, at 120, 121 (“[N]o man can, of right,

be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent"); ARK. CONST. of 1836, art. 2, § 3, *reprinted in* 1 POORE, *supra* note 24, at 101, 102 ("[N]o man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent."); DEL. CONST. of 1831, art. 1, § 1, *reprinted in* 1 POORE, *supra* note 24, at 289, 289 ("[N]o man shall, or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his own free will and consent"); DEL. CONST. of 1792, art. 1, § 1, *reprinted in* 1 POORE, *supra* note 24, at 278, 278 ("[N]o man shall or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his own free will and consent"); GA. CONST. of 1798, art. 4, § 10, *reprinted in* 1 POORE, *supra* note 24, at 388, 395 ("No person within this State shall, upon any pretence, . . . be compelled to attend any place of worship contrary to his own faith and judgment; nor shall he ever be obliged to pay tithes, taxes, or any other rate, for the building or repairing any place or worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or hath voluntarily engaged to do."); ILL. CONST. of 1870, art. 2, § 3, *reprinted in* 1 POORE, *supra* note 24, at 470, 471 ("No person shall be required to attend or support any ministry or place or worship against his consent"); ILL. CONST. of 1848, art. 13, § 3, *reprinted in* 1 POORE, *supra* note 24, at 449, 466 ("[N]o man can of right be compelled to attend, erect, or support any place or worship, or to maintain any ministry against his consent"); ILL. CONST. of 1818, art. 8, § 3, *reprinted in* 1 POORE, *supra* note 24, at 439, 446 ("[N]o man can of right be compelled to attend, erect, or support any place or worship, or to maintain any ministry against his consent"); IND. CONST. OF 1851, art. 1, § 4, *reprinted in* 1 POORE, *supra* note 24, at 512, 513 ("[N]o man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent."); IND. CONST. of 1816, art. 1, § 3, *reprinted in* 1 POORE, *supra* note 24, at 499, 500 ("[N]o man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent"); IOWA CONST. of 1857, art. 1, § 3, *reprinted in* 1 POORE, *supra* note 24, at 552, 552-53 ("[N]or shall any person be compelled to attend any place or worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister or ministry."); IOWA CONST. of 1846, art. 1, § 3, *reprinted in* 1 POORE, *supra* note 24, at 536, 537 ("[N]or shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister or ministry."); KAN. CONST. of 1859, Bill of Rights, § 7, *reprinted in* 1 POORE, *supra* note 24, at 629, 631 ("[N]or shall any person be compelled to attend or support any form of worship"); KAN. CONST. of 1858, art. 1, § 7, *reprinted in* 1 POORE, *supra* note 24, at 613, 615 ("No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship against his consent"); KAN. CONST. of 1855, art. 1, § 7, *reprinted in* 1 POORE, *supra* note 24, at 580, 581 ("No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship against his consent"); KY. CONST. of 1850, art. 13, § 5, *reprinted in* 1 POORE, *supra* note 24, at 668, 684 ("[N]o man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent"); KY. CONST. OF 1799, art. 10, § 3, *reprinted in* 1 POORE, *supra* note 24, at 657, 666 ("[N]o man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent"); KY. CONST. of 1792, art. 12, *reprinted in* 1 POORE, *supra* note 24, at 647, 654 ("[N]o man of right can be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent"); MD. CONST. of 1867, Declaration of Rights, art. 36, *reprinted in* 1 POORE, *supra* note 24, at 888, 890 ("[N]or ought any person to be compelled to frequent or maintain or contribute, unless on contract, to maintain any place of worship, or any ministry"); MD. CONST. of 1864, Declaration of Rights, § 36, *reprinted in* 1 POORE, *supra* note 24, at 859, 861 ("[N]or ought any person to be compelled to frequent or maintain, or contribute, unless on contract, to maintain any place of worship or any ministry"); MD. CONST. of 1851, Declaration of Rights, § 33, *reprinted in* 1 POORE, *supra* note 24, at 837, 839 ("[N]or ought any person to be compelled to frequent or maintain or contribute, unless on contract, to maintain any place of worship or any ministry"); MICH. CONST. of 1835, art. 1, § 4, *reprinted in* 1 POORE, *supra* note 24, at 983, 983 ("[N]o person can of right be compelled to attend, erect, or support, against his will, any place of religious worship, or pay any tithes, taxes, or other rates for the support of any minister of the gospel or teacher of religion."); MINN. CONST. of 1857, art. 1, § 16, *reprinted in* 2 POORE, *supra* note 24, at 1029, 1030 ("[N]or shall any man be compelled to attend, erect, or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent"); MO. CONST. of 1865, art. 1, § 10, *reprinted in* 2 POORE, *supra* note 24, at 1136, 1137 ("[N]o person can be compelled to erect, support, or attend any place of worship, or maintain any minister of the gospel or teacher of religion"); MO. CONST. of 1820, art. 13, § 4, *reprinted in* 2 POORE, *supra* note 24, at 1104, 1114 ("[N]o man can be compelled to erect, support, or attend any place of worship, or to maintain any minister of the gospel or teacher of

religion”); NEB. CONST. of 1866-1867, art. 1, § 16, *reprinted in 2 POORE, supra note 24*, at 1203, 1204 (“No person shall be compelled to attend, erect, or support any place of worship . . . against his consent”); N.J. CONST. of 1844, art. 1, § 3, *reprinted in 2 POORE, supra note 24*, at 1314, 1314 (“[N]or shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged to perform.”); N.J. CONST. of 1776, art. 18, *reprinted in 2 POORE, supra note 24*, at 1310, 1313 (“[N]or shall any person, within this Colony, ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform.”); N.C. CONST. of 1776, section 34, *reprinted in 2 POORE, supra note 24*, at 1409, 1413-14 (“[N]either shall any person, on any pretence whatsoever, . . . be obliged to pay, for the purchase of any glebe, or the building of any house of worship, or for the maintenance of any minister or ministry, contrary to what he believes right, or has voluntarily and personally engaged to perform”); OHIO CONST. of 1851, art. 1, § 7, *reprinted in 2 POORE, supra note 24*, at 1465, 1466 (“[N]o person shall be compelled to attend, erect, or support any place of worship, or maintain any ministry, against his consent”); OHIO CONST. of 1802, art. 8, § 3, *reprinted in 2 POORE, supra note 24*, at 1455, 1461 (“[N]o man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent”); PA. CONST. of 1838, art. 9, § 3, *reprinted in 2 POORE, supra note 24*, at 1557, 1564 (“[N]o man can of right be compelled to attend, erect, or support any place or worship, or to maintain any ministry, against his consent”); PA. CONST. of 1776, art. 2, *reprinted in 2 POORE, supra note 24*, at 1540, 1541 (“[N]o man ought or of right can be compelled to . . . erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent”); R.I. CONST. of 1842, art. 1, § 3, *reprinted in 2 POORE, supra note 24*, at 1603, 1604 (“[N]o man shall be compelled . . . to support any religious worship, place, or ministry whatever, except in fulfillment of his own voluntary contract”); S.C. CONST. of 1778, art. 38, *reprinted in 2 POORE, supra note 24*, at 1620, 1627 (“No person shall, by law, be obliged to pay towards the maintenance and support of a religious worship that he does not freely join in, or has not voluntarily engaged to support.”); TENN. CONST. of 1870, art. 1, § 3, *reprinted in 2 POORE, supra note 24*, at 1694, 1695 (“[N]o man can, of right, be compelled to attend, erect, or support any place of worship, or to maintain any minister, against his consent”); TENN. CONST. of 1834, art. 1, § 3, *reprinted in 2 POORE, supra note 24*, at 1677, 1677 (“[N]o man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister, against his consent”); TENN. CONST. of 1796, art. 11, § 3, *reprinted in 2 POORE, supra note 24*, at 1667, 1673 (“[N]o man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent”); TEX. CONST. of 1868, art. 1, § 4, *reprinted in 2 POORE, supra note 24*, at 1801, 1801 (“[N]o man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent.”); TEX. CONST. of 1866, art. 1, § 4, *reprinted in 2 POORE, supra note 24*, at 1784, 1784 (“[N]o man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent”); TEX. CONST. of 1845, art. 1, § 4, *reprinted in 1 POORE, supra note 24*, at 1767, 1767 (“[N]o man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent”); VT. CONST. of 1793, chapter 1, art. 3, *reprinted in 2 POORE, supra note 24*, at 1875, 1875 (“[N]o man ought to, or of right can, be compelled to attend any religious worship, or erect or support any place or worship, or maintain any minister, contrary to the dictates of his conscience”); VT. CONST. of 1786, chapter 1, art. 3, *reprinted in 2 POORE, supra note 24*, at 1866, 1868 (“[N]o man ought, or of right can be compelled to attend any religious worship, or erect, or support any place or worship, or maintain any minister, contrary to the dictates of his conscience”); VT. CONST. of 1777, chapter 1, art. 3, *reprinted in 2 POORE, supra note 24*, at 1857, 1859 (“[N]o man ought, or of right can be compelled to attend any religious worship, or erect, or support any place or worship, or maintain any minister, contrary to the dictates of his conscience”); W. VA. CONST. of 1861-1863, art. 2, § 9, *reprinted in 2 POORE, supra note 24*, at 1977, 1978 (“No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever”); *see also* CONN. CONST. of 1818, art. 7, § 1, *reprinted in 1 POORE, supra note 24*, at 258, 264 (establishing Christianity, but stating that “no person shall by law be compelled to join or support, nor be classed with, or associated to, any congregation, church, or religious association”); MD. CONST. of 1776, Declaration of Rights, art. 33, *reprinted in 1 POORE, supra note 24*, at 817, 819 (establishing Christianity, but explaining that no person “ought . . . to be compelled to frequent or maintain, or contribute, unless on contract, to maintain any particular place of worship, or any particular ministry”). *But see* MICH. CONST. of 1850, art. 4, §§ 39-42, *in 1 POORE, supra note 24*, at 995, 999-1000 (classifying the state’s religious freedom provisions under the article entitled “Legislative Department,” and thus presenting religious freedom

By making the citizen the subject of the state's establishment clause, the constitution's framers make clear that nonestablishment is not simply a principle of good government, but rather a personal right affecting individuals. Not surprisingly, the syntax of the state's double-jeopardy clause—which undoubtedly expresses an individual right—is identical.⁴⁰

B. Did State Constitutions Differentiate Between Nonestablishment and Free-Exercise Rights?

But an investigation of state establishment clauses requires more than an examination of their classification and syntax; it is important also to consider both their content and their context within the state constitutions' (and the federal Constitution's) religious freedom provisions. In doing so, we will find that nineteenth-century Americans understood nonestablishment and free exercise quite differently from the twentieth-century Justices who devised the doctrine of incorporation.

In *Everson*,⁴¹ Justice Black imbued the few words of the federal Establishment Clause with copious—and specific—meaning. Writing for the Court, Justice Black explained that

[t]he “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups or vice versa.⁴²

Justice Black's definition stuck. Law students today learn not only that certain laws implicate “establishment interests,” but also that

as a limitation on the legislature rather than as a right of the people).

40. WIS. CONST. of 1848, art. 1, § 8, *reprinted in* 2 POORE, *supra* note 24, at 2028, 2028 (“[N]o person for the same offence shall be put twice in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself.”). Other constitutions had individual-rights provisions that mirrored the structure (“No person shall be . . .”) of many religion clauses. *See, e.g.*, ILL. CONST. of 1818, art. 8, § 11, *reprinted in* 1 POORE, *supra* note 24, at 439, 447 (“No person shall, for the same offense, be twice put in jeopardy of his life and limb . . .”); NEB. CONST. of 1866-1867, art. 1, § 8, *reprinted in* 2 POORE, *supra* note 24, at 1203, 1204 (“[N]o person for the same offence shall be put twice in jeopardy of punishment . . .”).

41. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

42. *Id.* at 15-16.

“establishment interests” are different from “free exercise interests”⁴³—though, as Justice Black admits, the two are undoubtedly “interrelat[ed]” and “complementary.”⁴⁴ The stark distinction is not illogical. For one thing, it is consistent with the text of the First Amendment, which separates the two clauses with a comma.⁴⁵ Moreover, it reflects the experience of the contemporary United Kingdom, for example, which maintains a religious establishment but still protects the rights of free exercise. Nonetheless, the framers of many of the pre-Fourteenth Amendment state constitutions did not see such a clear-cut difference. The early state constitutions indicate both that establishment itself was much more ill-defined than Justice Black admitted and that free exercise and establishment interests were not well differentiated but instead together constituted a more general individual right, the freedom of conscience.

The Alabama Constitution of 1819 illustrates these points. Though the document features typical (and fairly detailed) establishment⁴⁶ and free-exercise⁴⁷ provisions, it also includes another section that combines establishment and free-exercise ideas:

No person within this State shall, upon any pretence, be deprived of the inestimable privilege of worshipping God in the manner most agreeable to his own conscience [free exercise]; nor be compelled to attend any place of worship [establishment]; nor shall any one ever be obliged to pay any tithes, taxes, or other rate, for the building or repairing any place of worship, or for the maintenance of any minister or ministry [establishment].⁴⁸

This eclectic section demonstrates two things: first, that establishment and free exercise themselves were not particularly well-defined ideas (one

43. *Id.* at 15.

44. Indeed, that Justice Black includes the principle that “[n]o person can be punished for entertaining or professing religious beliefs or disbeliefs”—a provision that reads like a definition of the Free Exercise Clause—in his explanation of the Establishment Clause suggests just how fundamentally intertwined the two concepts still are, despite assertions to the contrary.

45. U.S. CONST. amend. I.

46. “There shall be no establishment of religion by law; no preference shall ever be given by law to any religious sect, society, denomination, or mode of worship; and no religious test shall ever be required as a qualification to any office or public trust under this state.” ALA. CONST. of 1819, art. 1, § 7, *reprinted in* 1 POORE, *supra* note 24, at 32, 33.

47. “No person shall be hurt, molested, or restrained, in his religious profession, sentiments, or persuasions, provided he does not disturb others in their religious worship.” ALA. CONST. of 1819 art. 1, § 5, *reprinted in* 1 POORE, *supra* note 24, at 32, 33.

48. ALA. CONST. of 1819, art. 1, § 3, *reprinted in* 1 POORE, *supra* note 24, at 32, 33. The Georgia Constitution of 1798 likewise curiously combines the two concepts. The first clause of the establishment section combines both free-exercise and establishment provisions—“No person within this State shall, upon any pretense, be deprived of the inestimable privilege of worshipping God in a manner agreeable to his own conscience [free exercise], nor be compelled to attend any place of worship contrary to his own faith and judgment [establishment]”—while the second clause only addresses establishment: “[N]or shall he ever be obliged to pay tithes, taxes, or any other rate, for the building or repairing any place of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right or hath voluntarily engaged to do.” GA. CONST. of 1798, art. 4, § 10, *reprinted in* 1 POORE, *supra* note 24, at 388, 395.

would think that the Establishment Clause alone would foreclose the possibility of state-compelled tithes);⁴⁹ and, second, that establishment and free exercise were not clearly differentiated.

The North Carolina Constitution of 1776 articulates yet another kind of association between free exercise and establishment. Rather than presenting the two as separate yet complementary concepts, the document sets up the existence of a state-imposed religious establishment in direct *opposition* to free exercise by using the word “but”: “[T]here shall be no establishment of any one religious church or denomination in this State, in preference to any other . . . *but* all persons shall be at liberty to exercise their own mode of worship”⁵⁰ In other words, a government-imposed religious establishment is nothing short of antithetical to the free exercise of religion. If this is so, applying the Free Exercise Clause against the states—without simultaneously guaranteeing nonestablishment—is not sufficient (ironically) to protect individuals’ free exercise rights. The opinions of states’ highest courts, as we shall see in Part II, similarly created complicated connections between establishment and free exercise.

C. What Do Changes in Constitutions Say About Popular Views of Nonestablishment?

It is important to remember, however, that such establishment clauses were not so common in the earlier years of the nineteenth century. Indeed, their introduction into state constitutions reflects an important alteration in state legislatures’—and state citizens’—views of establishment in America’s first few decades. According to Amar, “[i]n the 1780s, several

49. The Iowa Constitution of 1846 is also illustrative. Its nonestablishment section echoes the federal Establishment Clause—“[t]he general assembly shall make no law respecting an establishment of religion”—yet nevertheless declares that no one may “be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister of ministry.” IOWA CONST. of 1846, art. 1, § 3, *reprinted in* 1 POORE, *supra* note 24, at 536, 537.

50. N.C. CONST. of 1776, art. 34, *reprinted in* 2 POORE, *supra* note 24, at 1409, 1413-14; *accord* W. VA. CONST. of 1861-1863, art. 2, § 9, *reprinted in* 2 POORE, *supra* note 24, at 1977, 1978-79 (“No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever; nor shall any man be enforced, restrained, molested, or burdened in his body or goods, or otherwise suffer, on account of his religious belief; *but* all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and the same shall in no wise affect, diminish, or enlarge their civil capacities.”) (emphasis added); *see also* MISS. CONST. of 1868, art. 1, § 23, *reprinted in* 2 POORE, *supra* note 24, at 1081, 1082 (“[N]o preference shall ever be given by law to any religious sect or mode of worship, *but* the free enjoyment of all religious sentiments and the different modes of worship shall ever be held sacred”) (emphasis added). Interestingly, the Connecticut Constitution of 1818—which does privilege Christians over non-Christians—sets up a similar relationship between free exercise and establishment, suggesting that nonestablishment principles make the free exercise of religion possible:

It being the duty of all men to worship the Supreme Being, the great Creator and Preserver of the Universe, and their right to render that worship in the mode most consistent with the dictates of their consciences, no person shall by law be compelled to join or support, nor be classed with, or associated to, any congregation, church, or religious association
CONN. CONST. of 1818, art. 7, § 1, *reprinted in* 1 POORE, *supra* note 24, at 258, 264.

states featured sectarian establishments; by the 1860s none did.”⁵¹ The changes were dramatic. In general, state legislators did not simply vote to abolish their state’s establishment; instead, they crafted entirely new constitutions or extensive amendments, putting the proposals to a vote of the citizens. In fact, in Massachusetts, it was the citizens themselves who rejected “a modified establishment that extended benefits to non-Protestant teachers,”⁵² a vote that paved the way for the establishment’s complete abolition in 1833. The amendment that dissolved the establishment represented the only time in a century that a provision in the Massachusetts’s Declaration of Rights was replaced,⁵³ symbolizing the shift in public opinion on the subject of nonestablishment as the nineteenth century progressed: it had become a new right.

Another kind of constitutional transformation also affected Americans’ understanding of nonestablishment. As the nation expanded, Congress took control of numerous territories, yet, despite the Establishment Clause’s limitations on federal legislative action, “various territorial governments aided and sponsored religion in sundry ways.”⁵⁴ Amar explains this apparent paradox by suggesting that “Congress, when legislating in a plenary way for a territory, stood in the shoes of a state government and could adopt the same kinds of proreligion laws that states could.”⁵⁵

This regime did not last, however, as nineteenth-century Americans began to apply the Bill of Rights’s restraints on Congress’s power to territorial governments. This transition gave new meaning to the federal Establishment Clause—and to the idea of nonestablishment—by deemphasizing the Clause’s federalist origins. Amar writes:

[T]o say that, for example, the Iowa territorial legislature “shall make no law respecting an establishment of religion” was rhetorically to say something rather different than that Congress should make no such law. . . . [T]o say that *this* legislature should make no law obviously implied no law *in the territory*.⁵⁶

Then, as territories sought to be states, delegates to constitutional

51. AMAR, *supra* note 5, at 251.

52. DEMOCRACY, LIBERTY, AND PROPERTY: THE STATE CONSTITUTIONAL CONVENTIONS OF THE 1820S, at xiii (Merrill D. Peterson ed., 2010).

53. See MASS. CONST. of 1780, part 1, art. 3, reprinted in 1 POORE, *supra* note 24, at 956, 957, amended by MASS. CONST. of 1780 amend. art. 11, reprinted in 1 POORE, *supra* note 24, at 956, 975.

54. See AMAR, *supra* note 5, at 248; Greenawalt, *supra* note 5, at 500 (“In governing the territories, Congress set aside land for religious purposes, and it financed missions, even naming particular religious groups to receive funds.”) (internal citation omitted).

55. AMAR, *supra* note 5, at 248. Greenawalt counters that the laws can be attributed to the fact that “most members of Congress lacked a highly expansive view of what the Establishment Clause prohibited . . .” Greenawalt, *supra* note 5, at 503.

56. AMAR, *supra* note 5, at 249; BALKIN, *supra* note 2, at 203 (“Not surprisingly, the citizens in these territories understood the establishment clause primarily as a ban on religious establishments rather than a federalism provision . . .”).

conventions sometimes drafted provisions modeled on the Federal Clause,⁵⁷ underlining the connection between the Establishment Clause and a new “(substantive) nonestablishment rule” that had come to protect citizens’ individual liberty.⁵⁸ “Words once intended to signal a reservation of power *to* state majorities were now invoked to express the rights of citizens *against* state majorities,” writes Kurt Lash. “[T]he core value [was] transformed from federalism to nonestablishment.”⁵⁹ Constitutional culture had changed.

II. STATE CONSTITUTIONAL INTERPRETATION

The documents themselves, however, are only part of the story; it is necessary also to understand the way in which states’ highest courts interpreted their constitutions’ religious freedom provisions. Though courts did not see eye to eye on all issues of religious freedom,⁶⁰ they were generally united on an important point: nonestablishment—whatever it meant—was a prized American freedom in the mid-nineteenth century.

A. *Did Americans Consider Nonestablishment a Fundamental Right of U.S. Citizens?*

On one issue, the text of the First Amendment seems clear: it only applies to the federal government (“Congress”). In 1866, a lawyer arguing before the Supreme Court reminded the Justices of the First Amendment’s federalist origins:

Even the freedom of religious opinion, and the rights of conscience which we so highly prize, are secured to us by the State constitutions, and find no protection in the Constitution of the United States. If any State were so unwise as to establish a *State religion*, and require every priest and preacher to be licensed before he attempted to preach or teach, there is no clause in the Federal Constitution that would authorize this court to pronounce

57. See, e.g., IOWA CONST. of 1857, art. 1, § 3, reprinted in 1 POORE, *supra* note 24, at 552, 552 (“The general assembly shall make no law respecting an establishment of religion . . .”); IOWA CONST. of 1846, art. 1, § 3, reprinted in 1 POORE, *supra* note 24, at 536, 537 (“The general assembly shall make no law respecting an establishment of religion . . .”). The constitution of the proposed state of Deseret, which later became Utah, contained an identical provision. See DESERET CONST. of 1862, art. 2, § 3, reprinted in CONSTITUTION OF THE STATE OF DESERET: MEMORIAL OF THE LEGISLATURE AND CONSTITUTIONAL CONVENTION OF UTAH TERRITORY, PRAYING FOR THE ADMISSION OF SAID TERRITORY INTO THE UNION AS THE STATE OF DESERET 4 (Gov’t Printing Office 1862) (“[T]he general assembly shall make no law respecting an establishment of religion . . .”).

58. See AMAR, *supra* note 5, at 249. For more on an emerging national standard on freedom of religion, see *infra* Section II.A.

59. Lash, *supra* note 5, at 1140.

60. Compare, e.g., *Mohney v. Cook*, 26 Pa. 342, 347 (1855) (“The declaration that Christianity is part of the law of the land, is a summary description of an existing and very obvious condition of our institutions.”), with *Bloom v. Richards*, 2 Ohio St. 387, 390 (1857) (“[N]either Christianity, nor any other system of religion, is a part of the law of this state.”). Pennsylvania and Ohio had very similar establishment clauses.

the act unconstitutional or void⁶¹

But other Americans—including the supreme court justices of many states—did not adhere to such a literal interpretation of the First Amendment. Instead, they presented nonestablishment as an American value on both the federal and state levels.

In the 1840s, just a decade after America's last establishment was dissolved, state court justices began to present the idea of a national standard in issues of religion. Their statements reflected a reading of the First Amendment that acknowledged its federalist origins but also considered it—and other Bill of Rights provisions—as symbolic of “great principles of civil liberty” that neither the national nor the state governments may rightfully transgress.⁶² One Georgia Supreme Court justice, for example, opined that the ideals enshrined in the First Amendment would be meaningless if states did not also follow them:

[T]he doctrine is, that Congress may not [establish religion], but that each State Legislature may do so for itself. As if a National religion and State religion, a National press and State press, were quite separate and distinct from each other; and that the one might be subject to control, but the other not! Such logic, I must confess, fails to commend itself to my judgment.⁶³

A year later, a lawyer told the Supreme Court of Georgia that the First Amendment removed all remnants of Christianity from the state's law.⁶⁴

But Georgia was no special case. Indeed, similar arguments gained steam in the next several decades as state supreme court justices throughout the United States insisted that the federal Constitution stood for religious freedom on both a national and a state level. In Kentucky, for example, one justice confidently stated that “according to the Constitution of the United States, politics and religion move in separate spheres clearly defined.”⁶⁵ A Pennsylvania justice claimed that the state judicial system was dedicated to “preserving and protecting the unrestrained liberty of conscience guaranteed by the constitution of the United States.”⁶⁶ In West Virginia, a justice cited the First Amendment when he explained that “[f]reedom and toleration in religion are characteristics of our State and Federal governments.”⁶⁷ And, not long before the Fourteenth Amendment's adoption, a Texas justice echoed the language of the First Amendment as he insisted that both nonestablishment and free exercise

61. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 295 (1866). Note that the lawyer's argument also assumes that nonestablishment secures freedom of conscience. For more on the relationship between nonestablishment and the individual right of freedom of conscience, see *infra* Section II.B.

62. *Campbell v. State*, 11 Ga. 353, 368 (1852).

63. *Id.* at 366.

64. *Cheeseborough, Stearns v. Van Ness*, 12 Ga. 380, 383 (1853).

65. *Gartin v. Penick*, 68 Ky. (5 Bush) 110, 116 (1868).

66. *Specht v. Commonwealth*, 8 Pa. 312, 322 (1848) (emphasis added).

67. *Raines v. Watson*, 2 W. Va. 371, 406 (1868).

are American values:

That all people of this country shall have the right to worship God according to the dictates of their own consciences, or not at all, if they prefer, and that the government shall not establish any religion for the people to obey, or prohibit the free exercise thereof, appears to be now the settled American doctrine, well established in the organic law of the nation and the states.⁶⁸

The Establishment Clause thus stood for a nationally recognized principle. The emergence of a national standard for freedom of religion was also evident from the increased tendency of courts to cite cases from other states when deciding religion cases. Courts in Maine,⁶⁹ Ohio,⁷⁰ California,⁷¹ and West Virginia⁷² all researched other states' laws or constitutions extensively; if each state were rightfully entitled to make its own decisions about religion, examining other states' standards would seemingly be irrelevant.

Perhaps the clearest example comes from Louisiana. Louisiana's admission to the Union was conditioned on the new state constitution's consistency with the federal Constitution. The Supreme Court of Louisiana interpreted this condition as making the federal Establishment Clause—or, more accurately, the individual right of nonestablishment it represented—applicable in Louisiana:

In the treaty of cession, the First Consul of the French Republic exacted a stipulation in favor of the *inhabitants* of the ceded territory, that they should be incorporated into the Union, and admitted as soon as possible according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States The States had already, in the Federal Constitution, forbidden Congress from passing any “law concerning an establishment of religion, or prohibiting the free exercise thereof;” and the people of Louisiana were promised a full participation in the immunities and blessings, which such a provision was calculated to afford.⁷³

The fact that nonestablishment contributed to the “immunities and

68. *Gabel v. City of Houston*, 29 Tex. 335, 337 (1867).

69. *See, e.g., Donahoe v. Richards*, 38 Me. 379, 403, 405, 410-11 (1854) (citing cases from Massachusetts, Ohio, and Pennsylvania).

70. *See, e.g., Bloom v. Richards*, 2 Ohio St. 387, 392-97 (1853) (citing cases from Pennsylvania and South Carolina but contrasting Ohio's Sunday contracts statutes with other states').

71. *See, e.g., Ex Parte Andrews*, 18 Cal. 678, 681 (1861) (“The general principles announced by [the California constitution's religion provision] are not peculiar to the Constitution of California. They are principles expressly asserted or impliedly recognized in almost every one of the Constitutions of our sister States. And in almost every State [Sabbath observance] acts . . . have been passed; and in every instance, it is believed, where their constitutionality has been considered, it has been affirmed.”).

72. *See, e.g., Raines*, 2 W. Va. at 392-96 (noting statutes in Kentucky, Wisconsin, New Hampshire, Alabama, Maine, Pennsylvania, Massachusetts, Connecticut, Ohio, and New York).

73. *Wardens of the Church of St. Louis v. Blanc*, 8 Rob. 51, 86-87 (La. 1844).

“blessings” of Americans underlines its status as an *individual* right recognized throughout the nation—an important part of American constitutional culture.

B. What Was the Relationship Between Nonestablishment, Free Exercise, and Freedom of Conscience?

Nonestablishment, however, was not only an individual right on its own; as in the state constitutions themselves, it was also inextricably connected with the personal liberty of free exercise. Though, as I will show, state courts disagreed about the exact relationship between the two, both were discussed as aspects of freedom of conscience. The link between nonestablishment and freedom of conscience underlines the former’s status as a fundamental right of citizens in mid-nineteenth century America.

In antebellum America, liberty of conscience was an important individual freedom.⁷⁴ Indeed, courts throughout the nation went out of their way to underline its significance. The rights of conscience are “invaluable,”⁷⁵ declared the Pennsylvania Supreme Court; they should be “sacred and inviolate,”⁷⁶ added their colleagues in Virginia. In Arkansas, they were “indefeasible,”⁷⁷ and, in Maine, “inalienable.”⁷⁸ But even if there was broad consensus over the importance of the rights of conscience, courts were divided over exactly what the rights consist of.

As Noah Feldman explains, the definitional difficulties of the liberty of conscience are as old as the concept itself.⁷⁹ Though in early nineteenth-century America, liberty of conscience and free exercise were sometimes used interchangeably—and established religion and free exercise were considered compatible⁸⁰—nonestablishment principles were increasingly acknowledged as fundamental to liberty of conscience and to religious freedom in general. Indeed, judges throughout the country emphasized that recognition of nonestablishment rights was a fundamentally American concept. Religious freedom in the United States, as a California Supreme Court justice explained, was not simply about free exercise rights, or “toleration,” as in England: “When our liberties were acquired, our

74. See Vincent Phillip Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. & PUB. POL’Y 1083, 1101 n.98.

75. *Johnston v. Commonwealth*, 22 Pa. 102, 115 (1853).

76. *Maddox v. Maddox’s Adm’r*, 51 Va. (11 Gratt.) 804, 814 (1854).

77. *Shover v. State*, 10 Ark. 259, 262 (1850).

78. *Waite v. Merrill*, 4 Me. 102, 119 (1826). For a discussion of the rights of conscience as a natural right, see Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 919 (1993).

79. See Feldman, *supra* note 20, at 355.

80. See, e.g., *Avery v. Tyringham*, 3 Mass. (3 Tyng) 160, 174 (1807) (“Let the *second* and *third* articles of the declaration of rights for this purpose be candidly and impartially considered In language strong and energetic, the religion of Protestant Christians is *established*. Liberty of conscience is *secured*.”).

republican form of government adopted, and our Constitution framed, we deemed that we had attained not only toleration, but religious liberty in its largest sense—a complete separation between Church and State, and a perfect equality without distinction between all religious sects.”⁸¹ And, a Delaware lawyer explained in 1848, American liberty of conscience embraces much more than toleration; it also includes freedom from establishment.⁸²

Feldman traces the origins of the idea to the eighteenth century: “Establishment of religion, the Framers’ generation thought, often had the effect of compelling conscience. Going beyond compulsory church attendance or required forms of worship, the Framers’ generation worried that conscience would be violated if citizens were required to pay taxes to support religious institutions with whose beliefs they disagreed.”⁸³ Feldman, in fact, goes so far as to say that “protection of liberty of conscience . . . undergird[ed] the Establishment Clause” itself; the only source of disagreement surrounded “hard questions of whether certain forms of government support of religion should be understood as coercing conscience.”⁸⁴

This debate persisted in the nineteenth century. Twenty years before the state dismantled its religious establishment as a result of the political process, the Supreme Court of Massachusetts directly confronted the issue of whether “to compel [a citizen] by law to contribute money for public instruction in such religion or doctrine, is an infraction of his liberty of conscience.”⁸⁵ Though the Massachusetts court decided that the establishment did not violate freedom of conscience, with which they associated free-exercise rights—“[t]he great error,” the court wrote, “lies in not distinguishing between liberty of conscience in religious opinions and worship, and the right of appropriating money by the state”⁸⁶—other courts expressed the opposite view, particularly later in the century. In Alabama, for example, a supreme court justice explained that the state’s establishment clause and the clause that forbids taxes for religious purposes—a nonestablishment principle—both “have for their object, the

81. *Ex parte Newman*, 9 Cal. 502, 502 (1858). A Missouri lawyer also insisted on the distinction between English toleration and American freedom. “Read the statutes passed even since the Reformation, stamped as they are with the spirit of the times, and see how slowly England has learned the duty of tolerance alone; the right of religious freedom she has not yet acquired.” *The Murphy & Glover Test Oath Cases*, 41 Mo. 339, 358 (1867).

82. *Griffith v. State*, 2 Del. Ch. 421, 443 (1848) (“There is no such thing as an established church in the United States; no such thing as toleration where there is universal liberty of conscience.”).

83. Feldman, *supra* note 20, at 351 (citation omitted).

84. *Id.* at 416. Of course, those who favor a federalist interpretation of the original meaning of the Establishment Clause—the viewpoint I assume in this Note—would take issue with the first half of this assertion. For an explanation of this debate, see *supra* note 7 and accompanying text.

85. *Barnes v. Inhabitants of First Parish in Falmouth*, 6 Mass. (5 Tyng) 401, 408 (1810).

86. *Id.* at 409. This issue became irrelevant, of course, when Massachusetts dissolved its establishment.

preservation of the rights of conscience.”⁸⁷ Thus, on this view, nonestablishment is a means to an end—the maintenance of the rights of conscience. An Arkansas judge, however, went even further, insisting that freedom from such taxation *is* one of the rights of conscience: “A portion of those rights [of conscience] consists in a freedom to worship Almighty God according to the dictates of every one’s conscience, and in not being compellable to attend, erect, or support, any place of worship, or to maintain any ministry against their consent.”⁸⁸ But no matter the exact understanding a state adopted, nonestablishment had come to be an important component of an individual’s freedom of conscience throughout the country by the mid-nineteenth century.

III. NONESTABLISHMENT IN AMERICA: LOOKING BEYOND COURTS

Discussion of the emerging norm of nonestablishment in nineteenth-century America extended beyond the courtroom, underlining the importance of Balkin’s emphasis on social and political movements in constitutional understanding.⁸⁹ In the era of the Great Awakening,⁹⁰ numerous commentators presented nonestablishment as a right cherished by Americans and characteristic of the new nation. Writing in the 1830s, Alexis de Tocqueville remarked on Americans’ unanimity on the subject:

To a man, they assigned primary credit for the peaceful ascendancy of religion in their country to the complete separation of church and state. I state without hesitation that during my stay in America I met no one—not a singly clergyman or layman—who did not agree with the statement.⁹¹

This Part will examine primary sources—including popular writings about church and state and contemporaneous legal analyses—that address the subject of nonestablishment in the early years of the new nation. Section III.A looks at writings about church and state in general to determine how everyday Americans—not simply the legal elite—thought about religious freedom. Section III.B discusses academic treatments of the federal Constitution, revealing that many commentators saw the Establishment Clause not as a federalism provision, but as an expression of religious liberty. As Tocqueville suggests, by the mid-nineteenth

87. *Haynes v. Sledge*, 2 Port. 530, 531 (Ala. 1835).

88. *Shover v. State*, 10 Ark. 259, 262 (1850); *see also* *First Congregational Soc. of Woodstock v. Swan*, 2 Vt. 222 (1829) (“The constitution . . . has secured to all the rights of conscience, as to religious worship, to the erecting or supporting places of worship, or to the maintaining of any minister . . .”).

89. *See* Balkin, *supra* note 4, at 562.

90. For a good summary of the status of religion in early nineteenth-century America, *see* DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848*, at 164-202 (2007).

91. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 341 (Arthur Goldhammer trans., 2004) (1835).

century, citizens considered nonestablishment—or a related principle, the separation of church and state⁹²—as an integral component of their American experience.

A. American Freedom of Conscience: Nonestablishment and Free Exercise Combined

That nineteenth-century Americans considered the right of nonestablishment as a fundamental individual liberty is evident in the literature of social and political movements. The debate over Connecticut's religious establishment illustrates this point. Petitioning for disestablishment in the first years of the nineteenth century, the Connecticut Baptists explicitly argued that the state's establishment violated their fundamental rights of conscience. "[I]n the case of the laws establishing religion in this State," they wrote to the state legislature, "it appears to us that we are deprived of those rights of conscience, which the Almighty God hath given us, by that, which we humbly conceive, to be the usurpation of men."⁹³ Baptist minister John Leland even suggested that the state's religious establishment was, in a sense, anti-American—even if not unconstitutional. In *The Rights of Conscience Inalienable*, he imagined the effect the state's laws would have on American hero George Washington:

How mortifying must it be to foreigners, and how far from conciliatory is it to citizens of the American states, that when they come into Connecticut to reside, they must either conform to the religion of Connecticut, or produce a certificate? Does this look like religious liberty, or human friendship? Suppose that man, whose name need not be mentioned, but which fills every American heart with pleasure and awe, should remove to Connecticut for his health, what a scandal would it be to the state, to tax him to support a Presbyterian minister, unless he produced a certificate, informing them that he was an Episcopalian.⁹⁴

The controversy surrounding the delivery of mail on Sundays featured similar rhetoric. Opposing the Sunday mail laws on nonestablishment

92. For an extensive discussion of the separation of church and state, see PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002).

93. *To the Honorable General Assembly of the State of Connecticut, To Be Holden at Hartford, on the Second Thursday of May, 1803, the Remonstrance and Petition of a Convention of Elders and Brethren of the Baptist Denomination, Assembled at Bristol, on the First Wednesday of February, 1803*, in HAMBURGER, *supra* note 92, at 171. In his famous letter in support of the Danbury Baptists during this very controversy, Thomas Jefferson echoed these sentiments, citing the Establishment Clause itself as part of an "expression of the supreme will of the nation in behalf of the rights of conscience." Thomas Jefferson, *Jefferson's Letter to the Danbury Baptists*, LIBRARY OF CONG., <http://www.loc.gov/loc/lcib/9806/danpre.html>.

94. JOHN LELAND, *THE RIGHTS OF CONSCIENCE INALIENABLE*, reprinted in *THE SACRED RIGHTS OF CONSCIENCE: SELECTED READINGS ON RELIGIOUS LIBERTY AND CHURCH-STATE RELATIONS IN THE AMERICAN FOUNDING* 335, 344 (Daniel L. Dreisbach & Mark David Hall eds., 2009) (1791).

grounds, politician Richard Johnson echoed the idea that an establishment violates *individual* liberties: “What other nations call religious toleration, we call religious rights. They are not exercised in virtue of governmental indulgence, but as rights, of which government cannot deprive any portion of citizens, however small. Despotism may invade those rights, but justice still confirms them.”⁹⁵

The suggestion that establishments violated American freedoms persisted later into the nineteenth century. As Philip Hamburger explains, much of this rhetoric had nativist and anti-Catholic overtones, though it became much more widely accepted and employed.⁹⁶ For example, in *A Plea for the West*, published in 1835, Lyman Beecher warned that “a union of church and state” would constitute “treason” against the nation and would “enslav[e] the people.”⁹⁷ Nativist Daniel Ullmann, Know-Nothing candidate for governor of New York, also expressed the idea that the separation of church and state is a well-accepted American principle: “[T]he nation agrees in all its utterances—written Constitutions and unwritten law. The general sentiment, and the settled determination—the profound convictions of the American people are, that there shall be, forever, under this government, an entire and absolute separation between church and state”⁹⁸ Though an opponent of the Know-Nothings and their anti-Catholic campaigns, Alabama Congressman Philip Phillips nevertheless echoed Ullman’s sentiment: “Separation of Church and State, eternal divorce between civil and ecclesiastic jurisdiction, were cardinal principles with the sages and patriots to whom not only we, but all mankind, are indebted for this model of a republican government.”⁹⁹

B. Constitutional Analysis

In their analyses of the Bill of Rights, legal scholars expressed similar views, reflecting the change in constitutional culture. Unlike many of their successors in the twenty and twenty-first centuries, however, these scholars often did not cite the Establishment Clause’s federalist origins,¹⁰⁰ instead discussing the Clause in the same way as they wrote of the other

95. Richard M. Johnson, *A Jacksonian Criticism of the Protestant Phalanx*, in *CHURCH AND STATE IN AMERICAN HISTORY: KEY DOCUMENTS, DECISIONS, AND COMMENTARY FROM THE PAST THREE CENTURIES*, 101, 104 (John F. Wilson & David L. Drakeman eds., 3d ed. 2003).

96. See HAMBURGER, *supra* note 92, at 193-251.

97. LYMAN BEECHER, *A PLEA FOR THE WEST*, in *CHURCH AND STATE IN AMERICAN HISTORY: KEY DOCUMENTS, DECISIONS, AND COMMENTARY FROM THE PAST THREE CENTURIES*, *supra* note 95, at 100.

98. HAMBURGER, *supra* note 92, at 246.

99. *Id.* at 238.

100. On the other hand, Justice Story, whose *Commentaries on the Constitution* was published earlier in the century, did not make this omission. See 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1873 (1833), available at http://www.constitution.org/js/js_344.htm. The differences in treatment likely reflect the transformation of Americans’ understanding of the Establishment Clause.

freedoms enumerated in the first eight amendments. Given that these books were published around the time of the Fourteenth Amendment's ratification, this treatment is particularly notable.

Timothy Farrar's 1867 volume, *Manual of the Constitution of the United States of America*, is illustrative.¹⁰¹ Listing the provisions of the Bill of Rights, Farrar noted that "certain particular rights are plainly declared or recognized, as natural, legal, and subsisting rights of the people, and so made their constitutional rights . . . These rights are:—1. The free exercise of religion, without any legal establishment thereof."¹⁰² Farrar, in other words, considered nonestablishment as a qualifier of the individual liberty of free exercise; he did not see them as two fundamentally distinct concepts to be treated differently by the ratifiers of the Fourteenth Amendment. For Farrar, in other words, the Establishment Clause's federalist origins had faded.

A year later, John Norton Pomeroy also failed to afford a special status to the Establishment Clause. In his treatise,¹⁰³ he explained that *all* of the provisions of the first eight amendments protect personal rights. The fact that he deliberately omitted the Ninth and Tenth Amendments, which some have compared to the Establishment Clause,¹⁰⁴ suggests that Pomeroy meant to include in his discussion only the provisions that refer specifically to individual liberties. Pomeroy deliberately listed the Establishment Clause among these personal rights provisions:

The constitutional guaranties contained in the first eight amendments [are] intended as barriers against any encroachments of the general government upon the liberties of the citizens . . . The following is the substance of these important restraints. No form of religion shall be established, nor shall the free exercise of religion be prohibited.¹⁰⁵

The failure to differentiate between the status of the Establishment Clause and that of the other personal-rights provisions of the First Amendment supports the argument that the Clause's federalist origins had become unimportant by the mid-nineteenth century—and that the Clause had come to represent the right of nonestablishment, as incorporable a liberty as any other.

Nineteenth-century Americans from many walks of life thus agreed that

101. TIMOTHY FARRAR, *MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* (Boston, Little, Brown, and Co. 1867).

102. *Id.* at 396.

103. JOHN NORTON POMEROY, *AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES: ESPECIALLY DESIGNED FOR STUDENTS, GENERAL AND PROFESSIONAL* (N.Y., Hurd & Houghton 1868).

104. See, e.g., Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *YALE L.J.* 1193, 1263 (1992) ("[S]tate rights are not obviously limited to the Ninth and Tenth Amendments—consider, for example, the establishment clause . . .").

105. *Id.* at 151-52.

nonestablishment, no less than free exercise, was a personal right of all Americans. When the Thirty-Ninth Congress gathered to frame the Fourteenth Amendment, they brought this understanding with them.

IV. THE FOURTEENTH AMENDMENT

But why does this history matter? Without it, an originalist cannot understand the language in which the Fourteenth Amendment's framers discussed the Establishment Clause. This Part will address this issue. Though a complete investigation of the Amendment's framing is outside the scope of this Note, this Part investigates whether, according to statements made in the late 1860s and 1870s, the Establishment Clause should apply against the states. As Section IV.A will show, despite the notoriously sparse (and complicated) historical record, sources indicate that incorporating nonestablishment seems consistent with many nineteenth-century lawmakers' understanding of the Amendment—and thus with what Balkin describes as “original-meaning originalis[m].”¹⁰⁶ By citing these statements, I do not take sides on the *details* of the Amendment's framers' intentions—a study that demands a book, not a Note—but rather show that nonestablishment was on their minds.¹⁰⁷ Section IV.B shifts the focus from lawmakers to commentators and citizens—and, thus, from original meaning to “original expected application.”¹⁰⁸ As I will suggest, public speeches, media coverage, and legal commentary likewise suggest that many Reconstruction-era Americans believed that the Fourteenth Amendment protected them from state-imposed religious establishments.

A. *Original Meaning*

Which rights does the Fourteenth Amendment protect? For nearly 150 years, scholars and jurists have attempted to understand whether the Amendment's framers intended directly to apply none,¹⁰⁹ some,¹¹⁰ or all¹¹¹ of the Bill of Rights's provisions to the states. Given that many members of the Thirty-Ninth Congress as well as contemporary commentators gave an incomplete response to this inquiry,¹¹² the answer was likely somewhat

106. BALKIN, *supra* note 2, at 101.

107. An examination of theories of incorporation is outside the scope of this Note. For a useful summary, see AMAR, *supra* note 5, at 218-21. Instead, I simply aim to show that nonestablishment was part of the discourse of fundamental rights at the time of the Fourteenth Amendment's framing.

108. See BALKIN, *supra* note 2, at 101.

109. See, e.g., RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1989).

110. This idea underlies the current doctrine of “selective incorporation,” by which the Court engages in an historical inquiry as to whether the right in question is “fundamental.” See, e.g., *McDonald v. Chicago*, 130 S. Ct. 3020, 3034 (2010).

111. See, e.g., MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986).

112. See, e.g., Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment:*

opaque then as now. “It would be a curious question to solve what are the privileges or immunities of citizens of each of the States in the several states,” said Michigan Senator Jacob Howard, as Congress was framing the Amendment. “It would be a somewhat barren discussion.”¹¹³

Though nonestablishment (and, sometimes, free exercise) was not always explicitly mentioned as protected by the Fourteenth Amendment,¹¹⁴ several comments suggest that freedom of religion, including nonestablishment values, was included in this group. As Amar explains, its very text links it to the First Amendment, suggesting that Ohio Representative John Bingham, who wrote the Fourteenth Amendment, intended especially to protect First Amendment rights. “Bingham borrowed directly from the Bill [of Rights] itself with his language ‘No . . . shall . . . make . . . law . . .’—all words lifted directly from the First Amendment” (and words that immediately preceded the Establishment Clause).¹¹⁵ Indeed, in many statements, Bingham emphasized the Clause’s connection to the Bill of Rights,¹¹⁶ and thus failed to differentiate between the Clause and traditional individual-rights provisions. In an 1866 pamphlet quoting one of his speeches before Congress, for example, he discussed the Bill of Rights as a whole, without excepting the Establishment Clause.¹¹⁷ In another speech the same year, Bingham was even more explicit about the importance of nonestablishment values. Noting that “we do not ally the church and the State,” Bingham explained that “[f]reedom of conscience is one of the privileges of the citizen and [of] the United States.”¹¹⁸

The Amendment’s author continued to espouse this view after ratification. In an 1871 speech before Congress, Bingham reinforced the connection between nonestablishment and the Fourteenth Amendment. After reading aloud the Bill of Rights—including the Establishment Clause—and insisting that all the provisions should be applied to the states,¹¹⁹ Bingham emphasized the changes that resulted from ratification. Before the Fourteenth Amendment, he said, states “restricted the rights of

Original Public Meaning and the Problem of Incorporation, 18 J. CONTEMP. LEGAL ISSUES 361, 404 (2009) (noting that the historical evidence is “fragmentary,” and thus that any “judgments about original meaning . . . are . . . fraught with peril”).

113. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (Sen. Howard). He later proposed that “some of them [are] secured by the second section of the fourth article of the Constitution, . . . some by the first eight amendments of the Constitution . . .” *Id.* Interestingly, his recitation of the Bill of Rights omitted both of the religion clauses.

114. See, e.g., *id.* (Sen. Howard) (leaving out both religion clauses when listing rights).

115. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 386 (2005).

116. See *id.* at 386-87.

117. See JOHN A. BINGHAM, *ONE COUNTRY, ONE CONSTITUTION, AND ONE PEOPLE: SPEECH OF HON. JOHN A. BINGHAM, OF OHIO IN THE HOUSE OF REPRESENTATIVES, FEBRUARY 28, 1866 IN SUPPORT OF THE PROPOSED AMENDMENT TO ENFORCE THE BILL OF RIGHTS*.

118. This speech is quoted in Richard L. Aynes, *Enforcing the Bill of Rights Against the States: The History and the Future*, 18 J. CONTEMP. LEGAL ISSUES 77, 88 (2009).

119. See CONG. GLOBE, 42d Cong., Special Sess. app. 84 (1871) (Rep. Bingham).

conscience, and [the citizen] had no remedy. . . . Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in States and by States ?”¹²⁰ As this Note (and Bingham’s 1866 speech) suggested, the term “rights of conscience” included freedom from religious establishment.

Bingham was not alone. In 1874, Senator Thomas Norwood of Georgia—whose term in Congress overlapped with a number of the Fourteenth Amendment’s framers’ (including Bingham’s)—echoed the Amendment’s author’s interpretation. In fact, Norwood even selected the Establishment Clause as an example as he explained his understanding of the Amendment. Prior to ratification, “any State might have established a particular religion, or restricted freedom of speech and of the press,” he said. On the other hand,

the instant the fourteenth amendment became a part of the Constitution, every State was that moment disabled from making or enforcing any law which would deprive any citizen of a State of the benefits enjoyed by citizens of the United States under the first eight amendments to the Federal Constitution.¹²¹

Norwood’s statement exemplifies the new understanding of the Establishment Clause as an indispensable guarantor of personal freedom. Like the other First Amendment provisions mentioned along with it, for Norwood the Clause protected an important individual liberty that the Fourteenth Amendment forbade states to abridge. Bingham and Norwood’s statements provide support for the contention that the incorporation of the Establishment Clause is consistent with the intentions of at least some important Reconstruction-era lawmakers.

B. Original Expected Application

Unlike Bingham, many nineteenth-century Americans were nevertheless hesitant specifically to catalogue the rights protected by the Fourteenth Amendment. Several years post-ratification, scholar and jurist Thomas M. Cooley expressed this reticence: “What are privileges and immunities of citizens of the several states[?] [A]n examination of the judicial opinions . . . will illustrate the difficulty to be encountered in an attempt at a satisfactory enumeration.”¹²² Nevertheless, though he did not advocate

120. *Id.* at 85.

121. 2 CONG. REC. app. 242 (1874) (Rep. Norwood); *see also id.* at 241 (noting explicitly that “immunity . . . from the establishment of any religion” is among the “privileges and immunities of a citizen of the *United States*”).

122. Thomas Cooley, *The Fourteenth Amendment*, in 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 648, 655-56 (4th ed., Boston, Little, Brown & Co. 1873) (photo. reprint 2008).

for the incorporation of all Bill of Rights provisions,¹²³ Cooley hinted that he understood the Amendment to prevent the kinds of violations of individual rights that inevitably result from state religious establishments. For one thing, Cooley noted that the “privileges and immunities” guaranteed that citizens are “protected in life and liberty by the law.”¹²⁴ Given the nineteenth-century association of nonestablishment with personal freedom, Cooley’s statement suggests that nonestablishment should be incorporated, regardless of its standing as a Bill of Rights protection.

Moreover, Cooley’s discussion of the Equal Protection Clause implies that it, too, protects individuals from religious establishments. Noting that “[t]he securities of individual rights . . . cannot be too frequently declared, nor in too many forms of words,”¹²⁵ Cooley asks a question that illustrates the connection between religious freedom—both nonestablishment and free exercise—and equality:

Could a law, for instance, for the compulsory attendance of all persons upon the church of the majority . . . be administered merely because everyone was included in its command? Would not, on the contrary, its very universality constitute offensive discrimination, precisely because it would compel conformity where equality of right would demand liberty of choice?¹²⁶

Many members of the ratifying public likely shared Cooley’s belief that the Fourteenth Amendment forbade state establishments. One reason is textual. As Amar explains,

the very text of the Fourteenth Amendment pointed the careful reader to its tight interlinkage with the Bill of Rights. Bingham’s specific phraseology [“privileges and immunities”] made special sense to his 1860s audience, because the most widely read (if also reviled) judicial opinion of the era was [Justice] Taney’s *Dred Scott*, which had explicitly described the Bill of Rights as ‘rights and privileges’ of the citizens.”¹²⁷

But the public’s familiarity with *Dred Scott* did more than suggest that the

123. *Id.* at 666 (“And no more under the [F]ourteenth [A]mendment than previously can the federal government interfere with the mode prescribed for the trial of State offences . . .”).

124. *Id.* at 656. Today, of course, rights are still officially incorporated via the Fourteenth Amendment’s Due Process Clause, *see, e.g.,* *McDonald v. Chicago*, 130 S. Ct. 3020 (2010), given that the *Slaughter-House Cases* severely limited the Privileges and Immunities Clause. *See* 83 U.S. 36 (1872).

125. Cooley, *supra* note 122, at 659.

126. *Id.* at 660. For Cooley, the right to be free from religious establishments was so fundamental that he did not realize it was not recognized in every state constitution. *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 469 (Boston, Little, Brown, and Co. 1868) (“These things which are not lawful under any of the American constitutions may be stated thus:—1. Any law respecting an establishment of religion.”). It is notable that nonestablishment’s status as a personal right was firmly ingrained in the mind of a knowledgeable commentator of the time.

127. AMAR, *supra* note 115, at 387.

Amendment applied most Bill of Rights provisions against the states; it also furthered the popular perception that the Establishment Clause protected an *individual* right. Indeed, like many of his contemporaries, Justice Taney presented the Establishment Clause as an individual-rights provision rather than as a federalist provision, failing to distinguish between the Clause and other Bill of Rights provisions, such as the Free Exercise Clause. “The powers of the government and the rights and privileges of the citizen,” Justice Taney wrote, “are regulated and plainly defined by the Constitution itself [N]o one, we presume, will contend that Congress can make any law in a Territory respecting an establishment of religion, or the free exercise thereof”¹²⁸

Of course, *Dred Scott* was not the only influence on citizens’ understanding of the Amendment; public speeches and media coverage, too, shaped their expectations. The Amendment’s author’s interactions with the public demonstrate that many everyday citizens were acquainted with his interpretation of it. After all, when Bingham declared that “we do not ally church and state,” he did so in a campaign speech in front of Ohio citizens that took place five months before the Ohio legislature voted to ratify the Amendment.¹²⁹ His pamphlet, which declared his “support [f]or the proposed amendment to enforce the Bill of Rights” on the title page itself—likewise sought to communicate the connection between the Fourteenth Amendment and the Bill of Rights to the public.¹³⁰ The press reinforced the linkage. In one instance, “*The New York Times* summarized Bingham’s amendment as ‘a proposition to arm the Congress . . . with the power to enforce the Bill of Rights.’”¹³¹ Such statements indicate that many citizens expected that the Amendment protected them from state religious establishments. Constitutional culture had indeed changed since the eighteenth century, when thousands of Americans lived under constitutions that mandated government support of religion.

CONCLUSION

Influenced by Balkin’s emphasis on the inevitable interconnections between originalism and living constitutionalism, this Note aimed to reopen two important debates about the Establishment Clause. First, it sought to confirm a theory of constitutional change posited by several scholars—that freedom from establishment was considered an individual right by the framing of the Fourteenth Amendment. And, second, it aimed to justify the incorporation of the Establishment Clause as announced in *Everson*.

128. *Dred Scott v. Sandford*, 16 U.S. (19 How.) 393, 449-50 (1856).

129. See Aynes, *supra* note 118.

130. See BINGHAM, *supra* note 117.

131. AMAR, BIOGRAPHY, *supra* note 115, at 387.

I began by considering the establishment clauses in state constitutions, a heretofore neglected source, ultimately drawing several related conclusions. For one, the high percentage of constitutions that featured establishment clauses—a proportion that only grew as the century progressed—suggests that the majority of Americans lived with the expectation that they had a constitutional right to be free from government-imposed religious establishments. Second, the fact that nearly every state's establishment clause was located in the state's Declarations of Rights (or an equivalent section) indicates that freedom from establishment was an individual liberty; the syntax of the provisions—which echoed that of other individual rights provisions—supports this understanding. The conflation of nonestablishment and the personal right of free exercise in state constitutions likewise corroborates this theory.

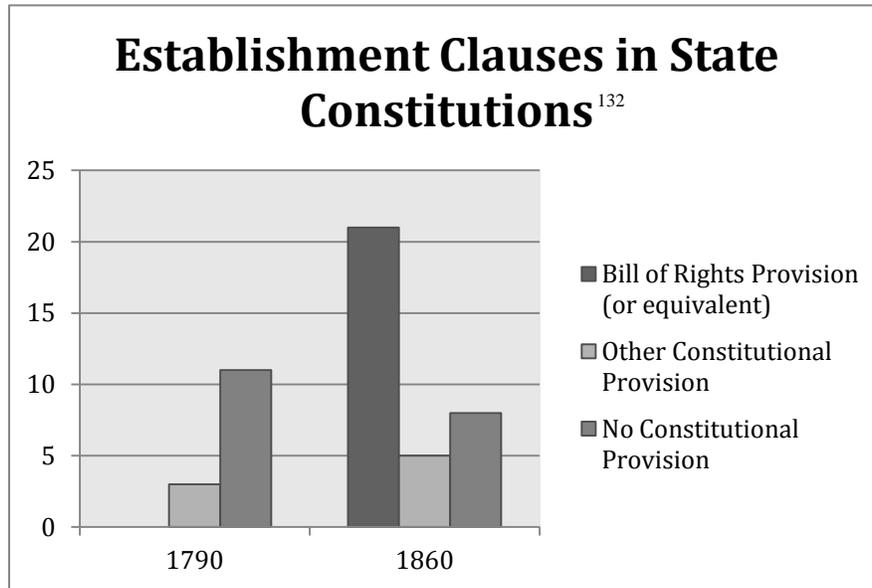
Part II of the Note turned to state constitutional interpretation. Analysis of the opinions of states' highest courts revealed a change in constitutional and political culture: the emergence of a national standard in religious freedom that included nonestablishment principles. No longer was nonestablishment simply a matter of choice left to the states; instead, it was nothing short of an American value. Next, I concluded from state courts' opinions that freedom from establishment was considered a fundamental right of U.S. citizens in the years before the framing of the Fourteenth Amendment. I then considered state courts' discussions of the liberty of conscience, determining that nonestablishment principles came to be inextricably connected with this individual right as the nineteenth century progressed. Finally, I examined the treatment of the Establishment Clause and nonestablishment in nineteenth-century legal treatises and in other genres of writing, determining that Americans outside the courtroom shared those views of religious freedom.

Recognizing that freedom from establishment's status as a privilege of citizenship is not necessarily enough to justify the Establishment Clause's application against the states, Part IV addressed the Fourteenth Amendment in more detail. Building on and illuminated by the examination of changing views of the Establishment Clause, the final Part took an originalist approach, finding that freedom from establishment was on the minds of the Fourteenth Amendment's framers as they devised the Amendment, and of Americans as their legislatures contemplated ratification. Thus, in the end, regardless of contentions about the Clause's federalist origins, the outcome of *Everson* was the right one. And by reaching this originalist-friendly conclusion through an examination of changing constitutional culture both in the courts and beyond them, this Note applied in an historical context one of Balkin's key insights—that originalism and living constitutionalism are not only compatible, but also necessarily interrelated.

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132. Constitutional provisions that forbid the government from giving preference to one religious sect or that prevent the legislature from providing money for religion are considered “Establishment Clause analogs” in this chart, provided that there are no accompanying provisions giving specific benefits to Christians. Because provisions (and their interpretations) vary, the presence of an Establishment Clause analog does not necessarily guarantee that the state government provided no support to religion whatsoever, nor does the absence of a provision mean that the state legislature chose to implement a religious establishment. The data, however, do indicate what citizens and lawmakers included among their constitutional rights. I selected 1860 as the second date as many Southern states experienced a sort of constitutional turmoil later in the decade, passing multiple constitutions in less than five years. Moreover, during Reconstruction, the federal government oversaw the constitution-making process in Southern states. *See Act To Provide for the More Efficient Government of the Rebel States*, 14 Stat. 428 (1867).

State	CONSTITUTIONS IN FORCE IN 1790		CONSTITUTIONS IN FORCE IN 1860	
	Year Adopted	Establishment Clause Analog?	Year Adopted	Establishment Clause Analog?
Alabama	-	-	1819	*YES
Arkansas	-	-	1836	*YES
California	-	-	1849	*YES
Connecticut	1776	NO	1818	NO
Delaware	1776	YES	1831	YES
Florida	-	-	1838	*YES
Georgia	1789	NO	1798	YES
Illinois	-	-	1848	*YES
Indiana	-	-	1851	*YES
Iowa	-	-	1857	*YES
Kansas	-	-	1859	*YES
Kentucky	-	-	1850	*YES
Louisiana	-	-	1852	NO
Maine	-	-	1820	*YES
Maryland	1776	NO	1851	NO
Massachusetts	1780	NO	1833 amend.	*YES
Michigan	-	-	1850	YES
Minnesota	-	-	1857	*YES
Mississippi	-	-	1832	*YES
Missouri	-	-	1820	*YES
New Hampshire	1784	NO	1792	NO
New Jersey	1776	NO	1844	*YES
New York	1777	YES	1846	YES
North Carolina	1776	NO	1776	NO
Ohio	-	-	1851	*YES
Oregon	-	-	1857	*YES
Pennsylvania	1790	NO	1838	*YES
Rhode Island	1663 charter	NO	1842	NO
South Carolina	1790	YES	1790	YES
Tennessee	-	-	1834	*YES
Texas	-	-	1845	*YES
Vermont	1786	NO	1793	NO
Virginia	1776	NO	1850	NO
Wisconsin	-	-	1848	*YES

* Provision is included in the state Bill of Rights or the equivalent.