Justice Scalia and the Religion Clauses: A Comment on Professor Epps

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In his Article *Some Animals Are More Equal than Others*,[1] Professor Garrett Epps has made an important analytical contribution to the scholarship on the Religion Clauses. Epps persuasively shows that Justice Antonin Scalia exerted substantial influence on the religion cases decided by the Supreme Court's five-vote moderate-to-conservative majority. Epps makes a particularly novel insight when he suggests that Scalia developed a rhetoric of neutrality and equality to roll back anti-establishment case law. Epps identifies features of Scalia's religion opinions that accord with more general and surprising tendencies in Scalia's jurisprudence. Epps's portrait confirms that Scalia is a partial originalist; he justifies "majority rules" results not only with originalism, but also with theories of judicial restraint and moral positivism that entitle democratic majorities to make important policy choices.

At the same time, observers who do not embrace Professor Epps' substantive views about law and religion need not agree with his conclusions. Analytically, I am concerned that Professor Epps overstates his contribution. His interpretation casts Justice Scalia as the field general of the Rehnquist Court's moderate-to-conservative bloc. He also suggests that the other moderates and conservatives act as "his troops,"—note the "his"—ready to "storm the next walled city of separation."[2] I believe the other Justices are capable of acting for

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1. Garrett Epps, *Some Animals Are More Equal than Others: The Rehnquist Court and "Majority Religion*," 21 WASH. U. J.L. & POL'Y 323 (2006).

2. *Id*. at 326.

themselves and have sided with Scalia's equality/neutrality theory only when and to the extent that it happened to dovetail with their own agendas. Normatively, I must respectfully part ways with Epps when he turns from interpretation to critical evaluation. Although he does not lay out his normative priors fully, Epps critiques the cases as strong separationists do. By contrast, I follow original-meaning principles in constitutional interpretation, and I also believe that the original meanings of the Religion Clauses are quite defensible on their substantive merits. In this Comment, I hope to identify the areas in which Professor Epps makes novel and important insights, and the areas in which originalists and religionists will disagree with how he evaluates those insights.

I. A RELIGIONIST'S HISTORY OF THE RELIGION CLAUSES

An old saying goes: "Where you stand depends on where you sit." Readers who want to sort out the valuable and the controversial in Professor Epps' Article need to first know where he and I both sit. Epps leans toward the "separationist" side of the Religion Clauses debate, which construes the First Amendment generally "to prohibit any governmental support of religion."[3] While Epps assumes his priors more than he states them, he appeals to separationists in the audience when he says, when speaking of the division between church and state, "[F]or old time's sake, let us call it a 'wall of separation.'"[4] He places high value on ensuring that members of minority religions do not feel stigmatized.[5] He concludes his Article by arguing that "religious ill will" ensues when political groups appeal to religion in politics.[6] If one reads the cases with these priors, the Religion Clauses case law peaked during the middle of the Warren Court and has become more depressing ever since. That mood more or less informs Professor Epps' interpretation of the cases.

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3. Robert L. Cord & Howard Ball, *The Meaning of Church and State: A Debate*, 1987 UTAH L. REV. 895, 920.
4. Epps, *supra* note 1, at 326.
5. Epps, *supra* note 1.
6. *Id*. at 346.

By contrast, I approach the cases as a "religionist" and an originalist. As a religionist, I believe that government has good reasons to rely on religious groups and to promote respect for organized religion when discharging its general duties.[7] As an originalist, I read the historical record to confirm that the Religion Clauses' original public meanings allow governments to do so. While I cannot give a comprehensive account of the Religion Clauses here, the following account accords in substantial respects with the portrait painted in recent surveys of the development of Religion Clause doctrine by Philip Hamburger[8] and Noah Feldman.[9] For originalists, this account is relevant for understanding the original public meanings of the Religion Clauses. Non-originalists may want to consider the political theory reflected in this history, the early Enlightenment/classical-liberal theory of religious toleration evident in the writings of John Locke[10] and Alexis de Tocqueville,[11] and the public speeches and acts of many of America's founders.[12]

At the Founding, many authorities assumed that the Religion Clauses left Congress and the states considerable leeway to promote religious belief. Many assumed that the term "establishment" in the

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7. *Cf.* Edmund N. Santurri, *Religion, the Constitution, and Rawlsian Justice: A Critical Analysis of David A.J. Richards on the Religion Clauses*, 9 J.L. & RELIGION 325, 326 (1992) (reviewing DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION (1986)).

8. PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002).

9. NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT (1st ed. 2005). To be sure, Feldman's account differs from Hamburger's in important particulars. On one hand, Feldman criticizes Hamburger's account for not sufficiently emphasizing how liberty of conscience and religious plurality propelled the anti-establishment movement at the Founding, *see id.* at 26; on the other, he insists that mid-twentieth-century legal secularism was informed more by non-religious political liberalism and less by Protestant nativism than Hamburger's account suggests, *see id*. at 278 n.46. Even so, the two accounts are closer to one another than the conventional "wall of separation" account that informs Professor Epps' Article and most contemporary religion constitutional law and scholarship.

10. *See* JOHN LOCKE, *A Letter Concerning Toleration*, *reprinted in* TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 168 (Charles L. Sherman ed., Irvington Press 1979) (1689); *see also* JOHN LOCKE, THE REASONABLENESS OF CHRISTIANITY (Douglas C. Macintosh ed., C. Scribner's Sons 1925) (1695).

11. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA I.ii.9 (Harvey C. Mansfield & Delba Winthrop trans. & eds., Univ. of Chi. Press 2000) (1835).

12. On which, consider 5 THE FOUNDERS' CONSTITUTION 43–111 (Philip B. Kurland & Ralph Lerner eds., 1987), *available at* http://press-pubs.uchicago.edu/founders/tocs/amendI_religion.html.

Establishment Clause referred to one of two things: a legislative act designating a single church as *the* sole state-approved sect, or state funding of church ministers, churches, and church property.[13] Many believed that the term "free exercise" in the Free Exercise Clause referred to the freedom to worship publicly and peacefully in one's chosen church or sect without physical or legal interference.[14] For example, the Pennsylvania Constitution of 1776 declared that "all men have a natural and unalienable right to worship Almighty God according to the dictates over their own consciences and understanding," to be free from being "compelled to attend any religious worship," and to be free from being compelled to "erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent."[15] "Free exercise" economically referred to the first two rights, while freedom from "establishment" economically referred to the third.

For those who understood "establishment" and "free exercise" as such precise terms of art, the First Amendment left considerable leeway for state and federal governments to promote religion and morality. Because the First Amendment bars *Congress* from "making any law respecting" any establishment or "prohibiting" free exercise, it leaves alone state establishments or non-establishments and state regulation of religious exercise.[16] Separately, when Congress properly exercises federal jurisdiction—say, in the U.S. capitol or in federal territories—the Religion Clauses leave Congress free to pass laws and the President free to use his bully pulpit to promote religion and religious morality in many ways that fall short of establishing a

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13. *See, e.g.*, HAMBURGER, *supra* note 8, at 89–107; Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105 (2003); Douglas G. Smith, *The Establishment Clause: Corollary of Eighteenth-Century Corporate Law?*, 98 NW. U. L. REV. 239 (2003). *But see* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 94–111 (2d ed., rev. 1994).

14. *See, e.g.*, Philip A. Hamburger, *A Constitutional Right of Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 933–36 (1992). *But see* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

15. PA. CONST. of 1776, Decl. of Rts. art. II (1776).

16. *See* STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 18–22 (1995); Steven D. Smith, *The Jurisdictional Establishment Clause: A Reappraisal*, 81 NOTRE DAME L. REV. (forthcoming 2006).

U.S. church or coercing or limiting peaceable public worship. Thus, in 1787, the Articles Congress passed the Northwest Ordinance, which, in the process of providing for the government of the Northwest Territory, specified: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[17] The first Congress referred the First Amendment to the states, but it also ratified and effectively reenacted these provisions of the Northwest Ordinance.[18] During the first Congress, the U.S. House of Representatives also called for a national day of prayer and thanksgiving—the day after it passed the First Amendment.[19] In 1789, President Washington issued a proclamation to "recommend and assign Thursday the 26th day of November next to be devoted by the people of these States to the service of that great and glorious Being, who is the beneficent Author of all the good that was, that is, or that will be."[20]

Similarly, many understood the Free Exercise Clause to leave Congress free to pass general regulations that limited individual conduct in order to uphold the public health, safety, and morals. So understood, citizens could not cite the amendment to claim an exemption from such regulations for religious conscience. Thus, the New York Constitution provided:

> [F]ree exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.[21]

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17. NORTHWEST ORDINANCE, art. 3 (1787), *available at* www.yale.edu/lawweb/avalon/nworder.htm.

18. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 106, 112–13 (1997).

19. 1 ANNALS OF CONG. 948, 949–50 (Joseph Gales & William Winston Seaton eds., 1789).

20. George Washington, Thanksgiving Proclamation (Oct. 3, 1789), *available at* http://gwpapers.virginia.edu/documents/thanksgiving/transcript.html.

21. N.Y. CONST. art. 38 (1777); *accord* MASS. CONST., Decl. of Rts. art. II (1780),

These documents promote a theory of religious toleration substantially different from the "wall of separation" theory that informs Epps' Article and much contemporary scholarship. According to Michael Novak's analogy, reason and revelation are "two wings" supporting the same understanding of truth and morals.[22] In his farewell address, George Washington called religion and morality "indispensable supports" for a government dedicated to securing natural rights.[23]

By the same token, while political society needs religion and is obligated to respect it, religion is also judged under the standards prescribed by natural law and natural rights. As Locke put it, in the good life "lies the safety both of men's souls and of the commonwealth…. Moral actions belong therefore to the jurisdiction both of the inward and outward court . . . both of the magistrate and the conscience."[24]

The U.S. Supreme Court followed this understanding in *Reynolds v. United States*, an 1878 case that rejected a free-exercise challenge to an anti-polygamy law in the federal territories.[25] The Court assumed that free-exercise principles left Congress free to use its territorial police powers "to reach actions which were in violation of social duties or subversive of good order,"[26] and noted that to hold otherwise "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[27] As one of several corollaries, Locke and leading Americans assumed that government could discriminate among different religious sects depending on whether a particular sect's practices were consistent with the

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available at http://www.founding.com/library/1body.cfm=478&parent=475 ("[N]o subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.").

22. MICHAEL NOVAK, ON TWO WINGS: HUMBLE FAITH AND COMMON SENSE AT THE AMERICAN FOUNDING (1st ed. 2002).

23. George Washington, Farewell Address, *in* GEORGE WASHINGTON: A COLLECTION 521 (W.B. Allen ed., 1988).

24. LOCKE, *A Letter Concerning Toleration*, *supra* note 10, at 206.

25. 98 U.S. 145 (1879).

26. *Id.* at 164.

27. *Id.* at 167.

requirements of republican government. The Justices who decided *Reynolds* understood that polygamy laws were supported by the religious beliefs of some Mormons. Locke excluded Catholics and Muslims of the time from the commonwealth, because those sects' doctrines then required believers "*ipso facto* [to] deliver themselves up to the protection and service of another prince."[28] As President, George Washington noted that Jews had more religious liberty in the United States than elsewhere,[29] but he also suggested politely to Quakers that they shirked republican duties by refusing to serve in the military because of religious objections to war.[30]

Of course, one must be careful not to attribute this general understanding to everyone who lived at the Founding or thereafter. As Steven Smith suggested, different actors and religious groups had different attitudes, ranging from the fairly "traditional" position just described, to the "voluntarist," and perhaps even "heretical," positions of Jefferson, Madison, and other more separationist-minded actors.[31] Even so, what Smith calls the "traditional" view continued to influence public-morals regulation substantially, even if it did not shape conventional wisdom dispositively.[32] Moreover, many of the dissenters respected the traditional view in their public speeches and actions. For example, the same Thomas Jefferson who authored the "wall of separation" letter to the Danbury Baptists also asserted in his first presidential inaugural that Americans were

> enlightened by a benign religion, professed, indeed, and practiced in various forms, yet all of them inculcating honesty,

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28. LOCKE, *A Letter Concerning Toleration*, *supra* note 10, at 208–09, 212. Note that the Catholic Church's current teaching differs substantially from the views Locke attributed to Catholics in his day. *See* Pope Paul VI, *Declaration on Religious Freedom: On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious*, *in* THE DOCUMENTS OF VATICAN II 675 (Walter M. Abbott ed. & Joseph Gallagher trans., 1966); *see also* JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION (1960).

29. George Washington, Letter to the Hebrew Congregation in Newport, Rhode Island (Aug. 18, 1790), *reprinted in* 6 THE PAPERS OF GEORGE WASHINGTON 284 (Dorothy Twohig ed., 1996).

30. George Washington, Letter to the Society of Quakers (Oct. 1789), *reprinted in* 4 THE PAPERS OF GEORGE WASHINGTON, *supra* note 29, at 265.

31. SMITH, FOREORDAINED FAILURE, *supra* note 16, at 19–21.

32. *Id*. at 19–20.

> truth, temperance, gratitude, and the love of man; acknowledging and adoring an overruling Providence, which by all its dispensations proves that it delights in the happiness of man here and his greater happiness hereafter.[33]

Similarly, on the same day that James Madison introduced Virginia's Statute for Religious Freedom, he also sponsored a bill (drafted by Jefferson) to punish Sabbath breakers.[34]

This religionist consensus influenced American law and policy for at least a century.[35] It was first attacked openly and on a wide-ranging basis in the second half of the nineteenth century by thinkers that Noah Feldman has generally described as "secularists."[36] In the 1860s and 1870s, leading academics worried that "interference with science in the supposed interest of religion . . . has resulted in the direst evils both to religion and to science," while "all untrammeled scientific investigation . . . has invariably resulted in the highest good both of religion and of science."[37] A couple of decades later, such academic doubts burgeoned into a broader political movement, the

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33. Thomas Jefferson, First Inaugural Address at Washington, D.C. (Mar. 4, 1801), *in* INAUGURAL ADDRESSES OF THE UNITED STATES FROM GEORGE WASHINGTON 1789 TO RICHARD MILHOUSE NIXON 1973, at 13, 15 (1974). Separately, Daniel L. Dreisbach has questioned whether Jefferson's Danbury letter confirms its standard separationist reading in his book, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 25–54 (2002).

34. *See* 2 THE PAPERS OF THOMAS JEFFERSON 555–56 (J.P. Boyd ed., 1950).

35. I assume in this Comment that the ratification of the Fourteenth Amendment does not affect any of the issues discussed in connection with the First Amendment, for two separate reasons. First, by following this assumption, I stay within most of the contemporary case law and scholarship, which holds that the Fourteenth Amendment Due Process Clause incorporates the requirements of the First Amendment Religion Clauses. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 620 n.4 (1992); Everson v. Bd. of Educ., 330 U.S. 1, 14–15 (1947). Second, even though I doubt that the original meaning of the Fourteenth Amendment incorporates the Bill of Rights, these doubts probably do not make a legal difference on state religion issues. The Fourteenth Amendment may limit state actions respecting religion, if the rights to free exercise or freedom from establishment count as "privileges" or "immunities" covered by the Fourteenth Amendment Privileges or Immunities Clause. If religious rights do not count as "privileges" or "immunities," the federal courts should stay out of local religion disputes even more completely than this Comment argues. If religious rights are constitutional privileges or immunities, I assume that these "privileges" and "immunities" are not substantially broader than the freedoms protected by the First Amendment as described in the text of this Comment.

36. FELDMAN, *supra* note 9, at 113–34.

37. ANDREW DICKSON WHITE, THE WARFARE OF SCIENCE viii (1876), *quoted in* FELDMAN, *supra* note 9, at 116.

"Liberals," who campaigned for state and federal constitutional amendments guaranteeing a separation of church and state.[38] As Philip Hamburger recounted, some of these campaigns succeeded at the state level in the passage of Blaine Amendments barring state support of religious education.[39] However, the Liberal movement failed to the extent that it sought ratification of a national constitutional amendment "to accomplish the total separation of Church and State" by barring Congress from "favoring any particular form of religion."[40]

Yet even if nineteenth-century Liberals failed politically, they succeeded culturally by leaving ideas about the "wall of separation" and "religious divisiveness" as memes in twentieth-century social and political thought. By the 1930s and 1940s, there existed a broad segment of Americans, especially if not exclusively university-educated Americans, who generally agreed that religion should be kept suitably separate from public education and public debate.[41] This shift marks the turn to what Feldman calls "legal secularism," which I will call the "separationism" that Epps assumes as a baseline for analysis and argument in his Article.[42] Liberals and their successors gradually turned away from campaigning for a constitutional amendment to litigating to change the way that courts construed the Religion Clauses, particularly the Establishment Clause.[43]

When the U.S. Supreme Court became involved, it embraced separationism. In the 1940s, in *Everson v. Board of Education*[44] and *McCollum v. Board of Education*,[45] Court majorities announced that the "First Amendment has erected a wall between Church and State

38. *See generally* HAMBURGER, *supra* note 8, at 287–333.

39. *See id.* at 322–28, 335.

40. EQUAL RIGHTS IN RELIGION: REPORT OF THE CENTENNIAL CONGRESS OF LIBERALS 12, 21 (1876), *quoted in* HAMBURGER, *supra* note 8, at 296.

41. One can see leading religionist public intellectuals confronting this separationist school of thought in a 1949 *Law and Contemporary Problems* symposium dedicated to the Supreme Court's first major religion cases. *See, e.g.*, John Courtney Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROBS. 23, 34 (1949) (noting "the existence of a powerful and articulate philosophy of 'American' education in whose explicit tendency is the denial or diminishing of the juridical status of [parochial] schools").

42. *See* FELDMAN, *supra* note 9, at 150–85.

43. *See* HAMBURGER, *supra* note 8, at 334–59.

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

45. McCollum v. Bd. of Educ., 333 U.S. 203 (1948).

which must be kept high and impregnable," on the "premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."[46] A substantial Court minority pressed further to suggest that government invites "divisiveness" when it injects religion into public affairs. For example, Justice Frankfurter concurred separately in *McCollum* to suggest that "[t]he preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious."[47]

However, the post-New Deal Court has been inconsistent in how it has embraced these claims about "divisiveness" and the "wall of separation." *Everson* and *McCollum* took a historical approach, citing Madison and Jefferson for the original meanings and intentions of the Religion Clauses.[48] Other opinions instead took a "living Constitution" approach. For example, in his concurrence in the 1963 decision of *Abington School District v. Schempp*, Justice Brennan acknowledged that the Founders promoted religion in many ways, but adopted a more "purposive"[49] and "living Constitution"[50] approach to conclude that twentieth-century case law should embrace religious neutrality.

The case law reached some sort of equipoise during the Burger Court.[51] While many of the cases were controversial, the law neither tilted sharply back toward the Founders' traditional approach nor forward toward a more purified version of legal secularism.[52] Late in the Burger Court, however, judicial conservatives started to question

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46. *Id.* at 212.

47. *Id.* at 217 (Frankfurter, J., concurring).

48. *See Everson*, 330 U.S. at 8–16; *see also McCollum*, 333 U.S. at 211 (citing *Everson*, 330 U.S. at 15–16).

49. *See* 374 U.S. 203, 241 (1963) (Brennan, J., concurring) ("[O]ur use of the history of [Jefferson and Madison's] time must limit itself to broad purposes, not specific practices.").

50. *See id.* ("[O]ur interpretation of the First Amendment must necessarily be responsive to the much more highly charged nature of religious questions in contemporary society.").

51. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971).

52. *See, e.g.*, Michael W. McConnell, *Religious Freedom at a Crossroads*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 115 (Geoffrey R. Stone et al. eds., 1992); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1.

the Burger Court's compromises and even to challenge *Everson* and *McCollum*. Evangelical Protestants and traditionalist Catholics became more politically active in the 1970s and 1980s in response to cultural debates about abortion, religion, sexual equality and other issues.[53] From among these religious conservatives emerged religious academics who questioned important tenets of separationism. Robert Cord, for example, authored a prominent study attacking *Everson* and *McCollum*'s rendition of history; he concluded that the Founders generally intended to promote religion as long as it was done non-preferentially.[54] These developments, in turn, encouraged then-Associate Justice William Rehnquist to question much of the Court's Establishment Clause case law in a dissenting opinion in the 1985 case of *Wallace v. Jaffree*.[55] The question at the beginning of the Rehnquist Court was whether Rehnquist could find enough current allies and new nominees to question religion law more openly.

II. JUSTICE SCALIA'S POSITIVIST THEORY OF EQUALITY

With that contrast in mind, Professor Epps' most important contributions are these: the Rehnquist Court did veer to some extent from the most extreme separationist claims one sees in *Everson*, *McCollum*, and subsequent precedent; and, when the Court did retrench, it did so in part due to the influence of Justice Scalia's positivist theory of religious group equality. As Epps recounts, in Scalia's dissent in the 1992 opinion of *Lee v. Weisman*, he assumed in a school-prayer case that there was no middle ground between "frustrating th[e] desire of a religious majority" and "imposing 'psychological coercion,' or a feeling of exclusion, upon nonbelievers."[56]

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53. *See, e.g.*, DONALD T. CRITCHLOW, PHYLLIS SCHLAFLY AND GRASSROOTS CONSERVATISM: A WOMAN'S CRUSADE 261–69 (2005).

54. *See* ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION xiv (1982). Not all religion scholars, however, regard Cord's book as "scholarship," as the text assumes. *See, e.g.*, LEVY, *supra* note 13, at 261 (referring to Cord's work as "[m]ostly historical fiction masquerading as scholarship").

55. 472 U.S. 38, 91–114 (1985) (Rehnquist, J., dissenting); *see id.* at 104 (citing CORD, *supra* note 54).

56. Epps, *supra* note 1, at 331.

Such all-or-nothing logic helps explain why, over the next decade, the Court upheld a government commission's decision to allow the public display of a cross on equal time with other similar displays by a private party in *Pinette*;[57] a state university's decision to support a sectarian college paper on equal time with other campus newspapers in *Rosenberger*;[58] states' decisions to support a sectarian school on equal terms with non-sectarian schools in *Mitchell v. Helms*;[59] and vouchers to sectarian schools on equal terms with non-sectarian schools in *Zelman*.[60] Because Justice Scalia's theory of religious group equality was so effective in these cases, Epps worries that it is ominous that last term Scalia abandoned all pretenses of religious equality in *McCreary* and touted instead "a key governmental role for certain religious beliefs designated as 'traditional' or 'majority' beliefs."[61]

Epps' interpretation is important. Justice Scalia is an eloquent defender of originalism,[62] and most Court-watchers assume that he is a diehard originalist. In practice, however, Scalia is only a partial originalist (in his words, a "faint-hearted originalist"),[63] and it is only recently that scholars such as myself,[64] Ralph Rossum,[65] and Randy Barnett[66] have explored the limits of his originalism. While Justice Scalia is committed to the Constitution's original meaning, two factors often either compete with his commitment to or influence how he understands original meaning. One is Justice Scalia's belief in

57. Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995).
58. Rosenberger v. Rector & Visitors, 515 U.S. 819 (1995).
59. Mitchell v. Helms, 530 U.S. 793 (2000).
60. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).
61. Epps, *supra* note 1, at 341; *see* McCreary County v. ACLU, 125 S. Ct. 2722 (2005).
62. *See* ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (Amy Gutmann ed., 1997).
63. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).
64. *See* Eric R. Claeys, Raich *and Judicial Conservatism at the Close of the Rehnquist Court*, 9 LEWIS & CLARK L. REV. 791, 801–15 (2005) [hereinafter Claeys, Raich *and Judicial Conservatism*] ; Eric R. Claeys, *Takings and Private Property on the Rehnquist Court*, 99 NW. U. L. REV. 187, 222–29 (2004) [hereinafter Claeys, *Takings*].
65. *See* Ralph A. Rossum, *The Textualist Jurisprudence of Justice Scalia*, *in* HISTORY OF AMERICAN POLITICAL THOUGHT 787, 792–93 (Bryan-Paul Frost & Jeffrey Sikkenga eds., 2003).
66. *See* Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 74 U. CIN. L. REV. (forthcoming 2006) (manuscript available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=880112).

judicial restraint. Scalia prefers originalism in large part because "the legislature would seem a much more appropriate expositor of social values" than unelected courts.[67] This argument raises questions as to whether Scalia prefers originalism primarily as an end of its own or as a means to restrain judges' policy-making discretion.[68] The other factor consists of the moral language that Scalia often uses to describe the policy choices that the constitutional text raises. Many of the Constitution's individual-rights provisions are informed by background ideas of natural law and rights; Scalia often describes the policy choices raised by those provisions in flatter, positivist terms as value choices that majorities are entitled to make.[69]

Professor Epps' interpretation of Scalia's opinions in religion cases fits this pattern, with some qualifications. Substantively, the Religion Clauses do not force Justice Scalia to make hard choices between originalism and judicial restraint. The original meanings of both clauses are far narrower and rule-oriented than most of the government practices that trigger constitutional religion litigation today. Even so, it is still worth noting that in Religion Clause cases, Scalia defended the rules he favored largely in terms of judicial restraint and majoritarianism. For example, as Epps recounts,[70] in the climactic passage of *Smith*, Scalia argues:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[71]

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67. Scalia, *supra* note 63, at 854.

68. *See, e.g.*, Claeys, Raich *and Judicial Conservatism*, *supra* note 64, at 810–11, 814–15 (describing how Justice Scalia recasts the original meanings of the Necessary and Proper Clause and section five of the Fourteenth Amendment to conform to a theory of judicial restraint).

69. *See, e.g.*, Claeys, *Takings*, *supra* note 64, at 222–29 (describing how Justice Scalia explains the substantive issues raised in regulatory-takings cases in positivist terms).

70. *See* Epps, *supra* note 1, at 331–32.

71. Employment Div. v. Smith, 494 U.S. 872, 879 (1990).

Scalia framed the competing policy interests as a value balance, and placed high priority on the policy interest *against* judges interfering with democratic policy choices.

Similarly, as Epps also recounts,[72] in his *Weisman* dissent, Scalia framed the issue as follows:

> The issue before us today is not the abstract philosophical question whether the alternative of frustrating this desire of a religious majority is to be preferred over the alternative of imposing "psychological coercion," or a feeling of exclusion, upon nonbelievers. Rather, the question is *whether a mandatory choice in favor of the former has been imposed by the United States Constitution*.[73]

In *Weisman*, Scalia showed that he was entirely familiar with the Founders' attitudes toward religion, as discussed above. Immediately after the above-quoted passage, Scalia argued that the Founders "knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration—no, an affection—for one another than voluntarily joining in prayer together, to the God whom they all worship and seek," and criticized the majority for "depriv[ing] our society of that important unifying mechanism."[74] Even so, in the passage he chose to italicize to highlight his criticism, Scalia stressed that the Court majority had religious majorities and religious dissenters.

As will become clear, the results that Scalia defended in these cases deserve more consideration than Epps gives them, for they fairly approximate the original meanings of the Religion Clauses. Even so, Epps has performed a useful service by showing how, in the religion cases as elsewhere, theories of judicial restraint and majoritarian positivism reinforced Scalia's originalist conclusion.

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72. Epps, *supra* note 1, at 331–32.
73. Lee v. Weisman, 505 U.S. 577, 646 (1992) (Scalia, J., dissenting).
74. *Id.*

III. JUSTICE SCALIA'S CONTRIBUTION TO THE MODERATE-TO-CONSERVATIVE MAJORITY

At the same time, it is important not to blow Justice Scalia's views or the Rehnquist Court's legacy out of proportion. I appreciate Professor Epps' perspective. If one thinks that *Everson*, *McCollum*, and *Schempp* got the broad principles correct, the last thirty years are probably depressing, and the last fifteen must be positively alarming.[75] But the perspective changes if one zooms out of the sixty-year range and into the 200-year range, as I do. From my vantage point, the Rehnquist Court's religion docket still seems depressing, but it seems so because it was a wasted opportunity. The Rehnquist Court did not significantly roll back the separationist trends in Establishment Clause law, and Epps' portrait makes Justice Scalia seem more influential than he really was.

Let me start with the skepticism that the Rehnquist Court's work was significant. From the 200-year view, the Rehnquist Court's five-vote moderate-to-conservative majority made substantial changes in Free Exercise law, but not in Establishment Clause law. In *Employment Division v. Smith*,[76] the Court significantly limited Warren and Burger Court Free Exercise precedents that recognized a right of religious conscientious objection from generally applicable laws. *Sherbert v. Verner*[77] and subsequent cases had suggested that governments must satisfy strict scrutiny whenever their policies substantially burden practices informed by legitimate religious beliefs.[78] *Smith* then held that the Free Exercise Clause does not require governments to ameliorate religious burdens created by generally applicable regulations.[79] Of course, the Court then limited

75. Indeed, Professor Epps is not the first to be so appalled. *See, e.g.*, Kent Greenawalt, *Religion and the Rehnquist Court*, 99 NW. U. L. REV. 145 (2004); Norman Redlich, *The Religion Clauses: A Study in Confusion*, *in* THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT 99 (Herman Schwartz ed., 2002).

76. *Smith*, 494 U.S. 872.

77. 374 U.S. 398 (1963).

78. *See, e.g.*, Hernandez v. Comm'r, 490 U.S. 680, 699 (1989); Thomas v. Review Bd., 450 U.S. 707, 717–19 (1981); Wisconsin v. Yoder, 406 U.S. 205, 214–15 (1972); *Sherbert*, 374 U.S. at 403–06.

79. *See Smith*, 494 U.S. at 881–85. The Court's opinion could also be read to limit the *Sherbert* line of cases to exclude only generally-applicable *criminal* laws. *See id.* at 884.

Smith in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, in which it invalidated a local prohibition on ritual animal slaughter on the ground that the anti-slaughter law singled out the religious practices of Santerians.[80] Even so, *Smith* restored *Reynolds* and the Free Exercise Clause's original meaning to a significant extent.

The Court's five-vote moderate-to-conservative majority also made Establishment Clause law significantly more originalist in one line of cases, which generally gave governments more leeway to provide financial and other aid to religious institutions to promote general non-religious policies.[81] The most important case in this line was *Zelman v. Simmons-Harris*, which upheld a voucher program that allowed parents to use government vouchers to pay for parochial schools.[82] The Court also slightly limited Warren and Burger Court precedents that restricted the displays of religious symbols in 1989 in the creche case of *County of Allegheny v. ACLU*,[83] and then again in the 2005 Ten Commandments case of *Van Orden v. Perry*.[84]

All the same, most lines of establishment doctrine remained more firmly separationist. Because the Rehnquist Court remained hostile to the teaching of religious alternatives to evolution,[85] it is not hard to imagine what the Court would have done with a law that, like the Northwest Ordinance, instructed public schools to teach religion as part of inculcating morality. *Zelman* itself made headway not by attacking Warren and Burger Court funding precedents directly, but by insisting that vouchers were different.[86] In contrast to *Allegheny* and *Van Orden*, the Court declared unconstitutional a separate and more overtly-religious display of the Ten Commandments in *McCreary County v. ACLU*.[87] Most notably, in the 1992 decision of

80. 508 U.S. 520 (1993).

81. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793 (2000); Agostini v. Felton, 521 U.S. 203 (1997).

82. 536 U.S. 639 (2002).

83. 492 U.S. 573 (1989).

84. 125 S. Ct. 2854 (2005).

85. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987) (invalidating an attempt to support the teaching of creationism as an alternative to the Darwinian theory of evolution); *see also* Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707 (M.D. Pa. 2005) (invalidating a program teaching intelligent design as an alternative to Darwinian evolution).

86. *See Zelman*, 536 U.S. at 649, 662–63.

87. 125 S. Ct. 2722 (2005).

Lee v. Weisman, the Court rejected requests to reconsider separationist precedents so as to free public schools and other governmental bodies to foster school prayer.[88] Taken together, these various developments suggest that the Rehnquist Court steered Establishment Clause doctrine toward the "non-preferentialism" view that then-Associate Justice Rehnquist advocated in *Jaffree*.[89] But the Rehnquist Court embraced the non-preferential option only incompletely, and it in no way restored the Establishment Clause's original meaning.

Professor Epps' valuable insights about Justice Scalia should thus not be taken out of proportion. Professor Epps makes Justice Scalia out to be the Rasputin of the Rehnquist Court's five-vote moderate-to-conservative wing: He is the "prophetic voice,"[90] the "Court-maker,"[91] the field general whose "troops will storm the next walled city of separation."[92] In reality, the other moderate and conservative Justices, particularly O'Connor and Kennedy, had their own agendas. Indeed, it is telling that Professor Epps organizes much of his interpretation of the cases around Justice Scalia's opinion in *Weisman*.[93] That opinion was a *dissent*, and a particularly exasperated one. I find Epps more persuasive when he acknowledges that the "flood tide" might have come three years before *Weisman*, in 1989 in *Smith*.[94] He also recognizes, as anyone must, that O'Connor's "endorsement" test and Kennedy's "coercion" test in Establishment cases preserved far more of the Warren and Burger Courts' precedents than Scalia would have liked.[95] If *these* insights are right (as I think they are), the logical question is why Scalia's influence peaked in 1989 and ebbed steadily over the next sixteen years.

I do not have a single answer to this question, but I can at least sketch the outlines of what I suspect is the complete answer. In

88. 505 U.S. 577, 586–87 (1992); *accord* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).
89. Wallace v. Jaffree, 472 U.S. 38, 99 (1985) (Rehnquist, J., dissenting).
90. Epps, *supra* note 1, at 325.
91. *Id*. at 328.
92. *Id*. at 326.
93. Lee v. Weisman, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting).
94. Epps, *supra* note 1, at 328.
95. *See id.* at 328–30.

general, while Justice Scalia started many comprehensive constitutional interpretation debates that preoccupied the Rehnquist Court, he did not finish many of them. Justice Scalia's story tracks, in large part, the debate among the Rehnquist Court about the conflict between the "original Constitution" and the "living Constitution." As of 1985, "living Constitution" ideas held prominence in academic and political discussions of constitutional law.[96] Even though Richard Nixon pledged in his presidential campaigns to nominate "strict constructionist" judges,[97] and even though then-Associate Justice Rehnquist railed against the notion of a living Constitution,[98] both advanced fairly extreme views in the climate between 1960 and 1980. Ronald Reagan invested considerable energy trying to change that climate. In 1987, Judge Robert Bork's defeated nomination to the Supreme Court was in large part a raucous debate about the merits of the "original Constitution" and the "living Constitution."[99] Starting in 1986, Reagan nominee Antonin Scalia contributed greatly to forcing this debate into the Rehnquist Court's constitutional docket. He sparred with Justice Brennan—many would say to the point of losing a Court majority—about the legitimacy of living-Constitution substantive due process in the 1989 case of *Michael H. v. Gerald D.*[100] *Lee v. Weisman*[101] and *Planned Parenthood v. Casey*[102] are two of the most revealing cases of the Rehnquist Court. Chief Justice Rehnquist and Justice Scalia tried to persuade their colleagues, especially recent Republican appointees O'Connor, Kennedy, and

96. *See, e.g.*, William J. Brennan, Jr., *Construing the Constitution*, 19 U.C. DAVIS L. REV. 2, 7 (1985) ("[T]he genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and needs.").

97. *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1833 n.208 (2005).

98. *See* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

99. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

100. 491 U.S. 110 (1989). Scalia announced the Court's judgment in a plurality opinion. Justices O'Connor and Kennedy refrained from joining a footnote that proposed a tradition-heavy approach to substantive due process, and Justice Stevens simply concurred in the judgment.

101. 505 U.S. 577 (1992).

102. 505 U.S. 833 (1992).

Souter, to reverse "living Constitution" precedents on school prayer and abortion. The latter three balked and sided with the Court's liberals.

This background offers a few lessons for considering Justice Scalia and the rest of the moderate-to-conservative majority. On one hand, there is *a* place for the original-versus-living Constitution debate as an organizing theme. It captured much of the debate in the first five years of the Rehnquist Court, and this debate still resonates in many leading book- and article-length retrospectives on the Rehnquist Court's legacy.[103] On the other hand, the originalist revival was rejected fairly decisively in 1992 in two climactic cultural and legal cases (*Weisman* on school prayer, and *Planned Parenthood v. Casey* on abortion),[104] but the Rehnquist Court remained in business for another thirteen years. In this regard, I agree with L.A. Powe, Jr., and Mark Tushnet, who, (in Powe's words) "in contrast to those who see revolution[, conclude] that the Court has done remarkably little of genuine importance" since.[105]

A comprehensive retrospective must explain why Scalia and Rehnquist could not make common cause with Kennedy and O'Connor in an all-or-nothing debate such as *Weisman*, but could in many (though by no means all) of the nip-and-tuck debates after 1992. I strongly suspect that two factors deserve special focus. First, in constitutional interpretation, Kennedy and O'Connor, in contrast to Rehnquist, Scalia, and Thomas, sympathize more with mainline academic views about the living Constitution than they do with the views of General Meese or originalist academics. Second, on the merits of religion debates, Kennedy and O'Connor sympathize more with elite separationist attitudes than to they do with grassroots religionist attitudes. The living-Constitution connection is obvious: When Chief Justice Rehnquist and Justice Scalia attempted to overrule *Roe* in *Casey*, Kennedy and O'Connor co-authored the

103. *See, e.g.*, THE REHNQUIST COURT, *supra* note 75; JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT (pbk. ed. 1999); TINSLEY E. YARBROUGH, THE REHNQUIST COURT AND THE CONSTITUTION (2000); Erwin Chemerinsky, *Forword: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989).

104. *Weisman*, 505 U.S. 577; *Casey*, 505 U.S. 833.

105. L.A. Powe, Jr., *The Not-So-Brave New Constitutional Order*, 117 HARV. L. REV. 647, 654 (2003) (reviewing MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER (2003)).

plurality opinion insisting that the Court's substantive due process law builds on a historical tradition that is a "living thing. A decision of this Court which radically departs from it could not long survive."[106]

Kennedy and O'Connor used this general interpretive commitment to ratify separationist ideals in important cases. Kennedy supported some of the Court's religionist tendencies in funding cases, but in *Weisman* he relied heavily on the "potential for divisiveness" theme to reaffirm that school-sponsored prayer unconstitutionally establishes religion.[107] Meanwhile, in many concurrences, Justice O'Connor drew on separationist ideas to qualify her attachment to pro-funding cases.[108] In *Zelman*, for example, O'Connor cited *Everson* approvingly to reaffirm that the "[First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."[109] Professor Greene's Article in this Symposium portrays Justice O'Connor similarly.[110]

I have similar reservations about Professor Epps' "Scalia as field general" thesis to the extent that it tries to explain the positions of Chief Justice Rehnquist or Justice Thomas. While I cannot explore this theme comprehensively here, I suspect it would be extremely interesting to track how the Rehnquist Court's conservatives have developed religionist arguments in response to developments in the academy and among experienced lawyers. The religion cases illustrate an important limitation of the conservatives' approach. Although they buck the academy and the inclinations of most public lawyers in many cases, the conservatives need help from the bar and academy to make sure that the contrarian positions they take are credible. Just as Robert Cord's scholarship made it easier and more

106. *Casey*, 505 U.S. at 850 (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting from denial of certiorari)).

107. *Weisman*, 505 U.S. at 587–88.

108. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 836 (2000) (O'Connor, J., concurring); Bowen v. Kendrick, 487 U.S. 589, 622 (1988) (O'Connor, J., concurring).

109. Zelman v. Simmons-Harris, 536 U.S. 639, 669 (2002) (O'Connor, J., concurring) (quoting Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947)).

110. Abner S. Greene, *The Apparent Consistency of Religion Clause Doctrine*, 21 WASH. U. J.L. & POL'Y 225 (2006).

respectable for then-Associate Justice Rehnquist to argue for non-preferential funding in *Jaffree*,[111] so subsequent scholarship encouraged Justice Thomas to question whether the Establishment Clause ought to be incorporated into the Fourteenth Amendment at all in *Elk Grove School District v. Newdow*.[112] Thomas cited Akhil Amar on this point,[113] and Steven Smith[114] and V. Phillip Munoz,[115] among others, have defended similar results.

Taking these various themes together, there is a richer and more interesting tale to tell about the moderate-to-conservative coalition on the Rehnquist Court. None of the other Justices are as impressionable as Epps suggests; most Justices form key interpretive or substantive commitments long before reaching the Court.[116] Scalia's equality-neutrality argument was just one of several theories of religion and interpretation vying for control of the Court. Outflanking Scalia on the right, Justice Thomas pursued a more radical and more purely originalist approach in *Newdow*.[117] Kennedy and O'Connor borrowed equality and neutrality themes (from Scalia and elsewhere) when such themes advanced their "separationist-lite" approach to religion cases. At the same time, neither Kennedy nor O'Connor was, and Kennedy is not now, bound to follow Scalia's theories simply because they have conveniently relied on such theories from time to time.

This portrait also helps explain how doctrinal change proceeds in the Supreme Court generally. Conservative political ideas became better respected in elite circles from the 1970s forward. Different wings of the Court's moderate-to-conservative majority illustrated

111. *See supra* notes 54–55 and accompanying text.

112. 541 U.S. 1, 45 (2004) (Thomas, J., concurring).

113. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 36–39 (1998).

114. SMITH, FOREORDAINED FAILURE, *supra* note 16, at 17–43. Smith believes that both religion clauses leave the states alone, whereas Thomas still prefers to incorporate the Free Exercise Clause.

115. Vincent Phillip Munoz, *The Irrelevance of the Founding Fathers for, and the Impossibility of, an Incorporated Establishment Jurisprudence of Original Intent*, 8 J. CONST. L. (forthcoming 2006).

116. "[I]n the field of economic and political philosophy there are not many who are influenced by new theories after they are twenty-five or thirty years of age." JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 384 (1936).

117. *Newdow*, 541 U.S. at 45 (Thomas, J., concurring).

different ways to accommodate them. O'Connor and Kennedy illustrated a gradualist and conventionalist approach. This approach allowed conservative ideas that had become respectable in the 1970s and 1980s, but it did not upset the Court's general "living Constitution" approach. Such gradualism and conventionalism therefore continued to leave the Court free to borrow on broader social and intellectual trends to inform constitutional doctrine. At least in funding cases, O'Connor and Kennedy followed trends in elite and popular conservative thought by agreeing to give governments more leeway to support religious organizations on the same terms as non-religious organizations.[118]

By contrast, Rehnquist and especially Scalia and Thomas preferred a more radical approach. They sought to undo the living-Constitution theory and the substantive tendencies of the Warren and Burger Courts root and branch. To do so, they advocated a consistent legal response of originalism and judicial restraint. That approach was symbolized most by *Weisman*, which invited the Court to reconsider precedents restricting school prayer. If successful, their approach would have forced the Court to substantially limit its ability to draw on social and intellectual trends. From a conservative perspective, their approach was more systematic and ambitious—but it also risked rupturing a working conservative majority.

This portrait also helps appreciate when and to what extent the Supreme Court responds to broader changes in the realm of ideas.[119] The originalism movement associated with Reagan, Meese, Rehnquist, Bork, and Scalia challenged Supreme Court interpretation more than anyone else had since 1937. Because this challenge was in large part theoretical, there was a great discrepancy between originalism's ambitions and its results. It is difficult to transform the Court's decision-making process quickly. When Presidents Reagan and H.W. Bush appointed Justices to the Court, there were not many committed originalists to choose from. Not all constituencies in their

118. *See, e.g.*, Rosenberger v. Rectors & Visitors, 515 U.S. 819 (1995).

119. For other attempts to explore this connection, see THOMAS MOYLAN KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM (2004); John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002).

governing coalition placed high priority on originalism, and the constituencies that did lacked experience in identifying reliable originalists. As a result, while Reagan and Bush nominated two more-or-less consistent originalists (Thomas and, notwithstanding the qualifications in Part II, Justice Scalia), they also nominated three non-originalists (Kennedy, O'Connor, and Souter). If these appointees were not close to conventional academic and precedential wisdom when appointed, they drifted toward that wisdom once confirmed and assured life tenure. Because so many of these appointees subscribed to elite attitudes about living Constitution interpretation and the separation of religion and politics, the Rehnquist Court's originalists could only accomplish modest results in religion law.

This gradualism may change, however, if conservative Republicans manage to appoint one or two more committed originalists. The originalism movement has gained respectability over the last three decades. There now exists a deeper pool of prospective originalist Justices. The Harriet Miers experience confirms that the Republican Party must nominate experienced originalists to satisfy its social and legal conservative constituencies. Those constituencies are more savvy and experienced at choosing nominees, and there exists a broader network of public intellectuals willing to defend originalism in constitutional law and religion in public life. At least by outward appearance, Chief Justice John Roberts and Associate Justice Samuel Alito both seem to be more thoroughgoing originalists and practitioners of judicial restraint than Justices O'Connor or Kennedy; their confirmations leave five living Constitutionalists and four originalists on the Roberts Court. Given one or two more committed originalists, and a network of originalist academics and intellectuals to encourage them and defend their work, Establishment Clause doctrine may change quite suddenly and dramatically.

IV. EVALUATING THE REHNQUIST COURT'S RELIGION CASES

Let us turn now from interpretation to law and policy. I hope to be brief here. All religious scholars can appreciate Professor Epps' interpretive insights, and I have little to add to the debates that divide separationists and religionists. As a compromise, then, let me simply

suggest that Professor Epps has not satisfactorily considered attractive legal and normative arguments for the original meanings of the Religion Clauses.

First, Epps criticizes the religionist tendencies in the Rehnquist Court's religion cases by assuming that text, history, and policy all cut in favor of the separationist view.[120] Pardon the pun, but I wonder whether Epps and other separationists need to make a choice between reason and authority. Curiously, and probably thanks to *Everson* and *McCollum*, the constitutional religion debate stresses history considerably more than the debates over many other individual-rights clauses.[121] When Epps criticizes the religionist trends, I find his policy criticisms more convincing than his textual and historical criticisms. Rather than take my word for it, consider this development: In a review of Philip Hamburger's book, *Separation of Church and State*, religion scholar Kent Greenawalt agreed that Hamburger "demolishes" the historical narrative associated with Jefferson's vision of a "wall of separation," and suggested instead that scholars consider whether separationist arguments are better grounded legally as the product of "normal evolutionary development."[122] In other words, Greenawalt agrees with Hamburger that *Everson* and *McCollum* do not accurately portray the history, and believes that it is more fruitful for scholars to embrace the living-Constitution approach to legal doctrine advanced in Brennan's *Schempp* concurrence.[123] I have a similar reaction toward Professor Epps' argument.

Let us thus turn to questions of policy,[124] which lead to my second reservation. In my view, Professor Epps understates the extent to

120. *See, e.g.*, Epps, *supra* note 1, at 325 ("[N]ot even remotely tied to the text or history of the Religion Clauses.").

121. A forthcoming symposium suggests that academics may be starting to reconsider this emphasis. *See* Symposium, *The (Re)turn to History in Religion Clause Law and Scholarship*, 81 NOTRE DAME L. REV. (forthcoming 2006).

122. Kent Greenawalt, *History as Ideology: Philip Hamburger's* Separation of Church and State, 93 CAL. L. REV. 367, 368–69 (2005) (reviewing HAMBURGER, *supra* note 8).

123. *See supra* notes 49–50 and accompanying text.

124. Here, of course, originalists like me may want to stop reading. But I assume here that most readers will want to know about the policy. And originalists may want to keep reading anyway, if only to consider why it might not be a good idea to amend the Religion Clauses along lines amenable to Professor Epps.

which federalism and separation of powers can diminish many of the problems with which he is concerned. Cases such as *McCreary*, *Weisman*, and the *Everson-McCollum* pair are offensive to many religious citizens. In such cases, blue-state judges make blue-state assumptions about religion the law of the land, in all states both blue and red. Whatever its limitations, federalism frees separationists to leave red states for blue, and religionists free to leave blue states for red.

Separation of powers also applies as between federal courts and the political branches in the states. Religious accommodations are a delicate business, and the compromise they require is often associated more with politicians than with lawyers. Following these concerns through, Scalia's arguments in *Smith* and *Weisman* make considerable sense: It is better for courts to confess that questions about public worship and religious exemptions require difficult choices, to enforce the Establishment and Free Exercise Clauses only against core violations, and to leave raucous cultural fights and imperfect compromises to local political processes. Readers interested in such arguments may consider the writings of Steven Smith,[125] Richard Garnett,[126] Mark Rosen,[127] and Robert Nagel,[128] among others.

Professor Epps finds such prudential and comparative-institutional arguments unconvincing, of course. He believes that a fully "sophisticated, psychological view of coercion would limit many majority practices that might be permitted under a formalistic test that required legal penalty before a government practice crossed the Establishment Clause line."[129] He also believes that the same reading provides anti-discrimination protections to religious minorities

125. *See* SMITH, FOREORDAINED FAILURE, *supra* note 16.

126. Richard W. Garnett IV, *Religion, Division, and the First Amendment*, 94 GEO. L.J. (forthcoming 2006) (manuscript available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=855104).

127. Mark D. Rosen, *Establishment, Expressivism, and Federalism*, 78 CHI.-KENT L. REV. 669 (2003).

128. *See* ROBERT F. NAGEL, THE IMPLOSION OF AMERICAN FEDERALISM (2001). Although Nagel does not treat our cultural politics over religion, the criticisms he makes of the nationalization of intimacy and politics generally apply equally to the nationalization of religion. *See id.* at 133–65.

129. Epps, *supra* note 1, at 330.

similar to those that the civil rights movement provided to racial and ethnic minorities.[130]

Here lie my deepest differences with Professor Epps. Professor Epps' "sophisticated, psychological" argument captures many tendencies typical of "living Constitution" renditions of the Religion Clauses. Such arguments can be questionable when and to the extent that they tempt us to claim that "we" are wiser as a people solely on the ground that we have more technical and professional expertise than we had 200 years ago. Technical progress is not the same as moral or political progress. We may be more proficient at measuring concrete psychological effects in specific people, but that very proficiency may lead us to overconfidently understate or forget the more general and comprehensive psychological insights one can learn from good literature, religion, or political philosophy. By the same token, Epps' analogies to the civil rights movement beg the most important question. No one chooses his or her skin color, and skin color need not determine one's character or outlook on basic moral and political questions. By contrast, religion is divisive in large part because different religions answer those moral and political questions differently, and because those choices have real consequences for citizens' character and our collective culture.

Since at least *Everson* and *McCollum*, two different versions of liberalism have presented two competing visions of the role that organized religion ought to play in American public life. Epps assumes rather than demonstrates one of those versions—the one that follows *Everson* and *McCollum*. This view (in Hamburger's portrait) is "drawn from European experiences and fears," which worries that "the clerical and creedal religion of most churches appear[s] to threaten the individual equality and mental freedom [deemed] essential for the citizens of a republic."[131] If the mistake the lawgiver is most determined to avoid is eighteenth-century European throne-and-altar dynasticism, he will quite naturally try to foster a secular public square and to make the model citizen the secular and university-trained professional. This view accentuates the dangers to politics, and the psychological harms to non-believers and dissenters,

130. *See id*. at 339.

131. HAMBURGER, *supra* note 8, at 490; *see also* NOVAK, *supra* note 22.

presented when religious believers inject professions of faith into public life.

By contrast, other Americans' views on politics and religion are informed by a more classical-liberal understanding. They may be shaped by parts of American culture conditioned by Locke, Tocqueville, and the experiences of most American Founders, or by similar teachings propagated by the post-Vatican II Catholic Church[132] and other contemporary religions committed to religious pluralism. For these citizens, the religious reformer is a leading citizen. For them, America cannot have a healthy political or cultural atmosphere without a strong common morality, and there cannot be a strong common morality without a religious public square.[133] For these citizens, modern Religion Clauses doctrine takes a risky gamble: It bets that the law can protect non-believers and dissenters from hurt feelings without draining the social and moral capital on which vigorous democracy rests.

To give just one defense of this view, let me conclude by briefly explaining Tocqueville's defense of the American compromise. Tocqueville was definitely sensitive to the danger that religion may create temptations to political tyranny. "Allow the human mind to follow its tendency," he acknowledged, "and it will regulate political society and the divine city in a uniform manner; it will seek, if I dare say it, to *harmonize* the earth with Heaven."[134] At the same time, liberalism, democracy, and republicanism all create tremendous temptations toward political license. That prospect convinced Tocqueville to reject the views of eighteenth-century *philosophes* who expected that "[r]eligious zeal [would] be extinguished as freedom and enlightenment increase."[135] Tocqueville, like contemporary religionists and contrary to contemporary separationists, agreed with the sense behind the saying, "When a man stops believing in God he doesn't believe in nothing, he believes anything."[136] "How could society fail to perish," Tocqueville thus

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132. *See* Pope Paul VI, *supra* note 28; *see also* MURRAY, *supra* note 28.

133. *See, e.g.*, RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (1984).

134. TOCQUEVILLE, *supra* note 11, I.ii.9, at 275.

135. *Id*. at 282.

136. Although this saying is often attributed to G.K. Chesterton, it is probably apocryphal.

worried, "if, while the political bond is relaxed, the moral bond were not tightened." Tocqueville thought religion an essential element to shoring up that morality: "[W]hat makes a people master of itself if it has not submitted to God?"[137]

Tocqueville praised America because it had mediated this tension. One important part of the solution was to foster respect for religion, and especially for sects and denominations that inculcate the basic lessons of equality, dignity, and morality that a liberal and democratic republic needs. In this regard, Tocqueville observed, America was fortunate to have been "peopled by men who, after having escaped the authority of the pope, did not submit to any religious supremacy," and "therefore brought to the New World a Christianity that I cannot depict better than to call it democratic and republican."[138] Such denominations reinforced lessons of morality and equality by "intermingl[ing] all classes of society at the foot of the same altar, as they are intermingled in the eyes of God."[139] (Since Epps is quick to cite the civil rights movement as moral authority, he should consider how it would have fared if it had not been staffed largely with believers who held that racial equality was a necessary corollary of human equality before a common Lord.)

The other part of the solution is to strike a compromise as to how religion can influence political life—to make it "less powerful" temporally, but with "influence . . . more lasting" in its rightful sphere.[140] On one hand, anti-establishment laws, free-exercise guarantees, and a broad political consensus for toleration should all keep religion from taking an official role in political life. On the other hand, religion should elevate political life through the backdoor, by "direct[ing] mores, and [by] regulating the family . . . to regulate the state."[141] This compromise protects religion from becoming bogged

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See Letter from Dale Ahlquist to Richard John Neuhaus (Dec. 31, 2005) (available at http://www.firstthings.com/onthesquare/?p135&pageid=25).

137. TOCQUEVILLE, *supra* note 11, at 282.

138. *Id*. at 275.

139. *Id*. at 276. Tocqueville speaks in this passage specifically of Catholicism, but he does so both to illustrate how Catholicism could be reconciled with democracy when shorn of its temporal pretensions, and to highlight the religious teachings that reinforce respect for democracy.

140. *Id*. at 286.

141. *Id*. at 278.

down in temporal politics and corruption. Conversely, it also protects politics: While it prevents politics from becoming bogged down in debates over "the worship one must render to the Creator," it lets the state and different sects shore up the community's views on "the duties of men toward one another" and "the same morality in the name of God."[142]

If this analysis of the democratic citizen's soul is sensible, it would be unfortunate to use anti-establishment guarantees to limit religion's role in American public life. Of course, there may be ways to preserve the goods of America's religious tradition while avoiding many of the bads that most concern Professor Epps. But this is a far more delicate business than he lets on. I am not at all convinced that the wall of separation of which he is so fond does the job.

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142. *Id.*