WHAT IS AN ESTABLISHMENT OF RELIGION? AND WHAT DOES DISESTABLISHMENT REQUIRE?

AGREEING TO DISAGREE: HOW THE ESTABLISHMENT CLAUSE PROTECTS RELIGIOUS DIVERSITY AND FREEDOM OF CONSCIENCE. Nathan S. Chapman and Michael W. McConnell.* New York: Oxford University Press. 2023. Pp. viii + 226. $24.95 (Hardcover).

Vincent Phillip Muñoz[1]

Strange as it may seem, as of this writing (Summer of 2023), it is not exactly clear what the Establishment Clause prohibits. In *Kennedy v. Bremerton School District* (2022), the Supreme Court announced that the "*Lemon*" and "endorsement" tests had been "abandoned," meaning, presumably, that the federal judiciary should no longer utilize these "wall of separation" doctrines.[2] But it did not clarify the rule or test judges should use in future Establishment Clause cases. Instead, the Court resolved the question of whether a public school's football coach could pray on the field after games using the Free Exercise and Free Speech Clauses.[3]

* Nathan S. Chapman: Pope F. Brock Associate Professor of Professional Responsibility at the University of Georgia School of Law, and a McDonald Distinguished Fellow of Law and Religion at the Emory Center for Law and Religion; Michael W. McConnell: Richard and Frances Mallery Professor and Director of the Constitutional Law Center at Stanford Law School, and a Senior Fellow at the Hoover Institution.

1. Vincent Phillip Muñoz is the Tocqueville Professor of Political Science and Concurrent Professor of Law at the University of Notre Dame and a Distinguished Fellow of the Civitas Institute at the University of Texas at Austin. The author would like to thank the following individuals for their comments on drafts of this article: Francis Beckwith, Rebecca Devine, Donald Drakeman, Matthew Franck, David Forte, Richard Garnett, Zane Mabry, Mary Frances Myler, Kate Hardiman Rhodes, and Bernadette Shaughnessy.

2. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022).

3. *Id*.

Given the unsettled state of Establishment Clause jurisprudence, Nathan Chapman and Michael McConnell's new book, *Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience*, is especially well-timed. And its argument is especially well-suited to the current moment. *Agreeing to Disagree* explores the Establishment Clause's meaning in light of history and tradition, the current Supreme Court majority's preferred mode of engagement.[4] In their own way, moreover, Chapman and McConnell appeal to diversity and inclusion—two of the reigning ideals of elite opinion. The book's breadth, levelheadedness, and accessibility is commendable, and the prominence of its authors—Chapman is the Pope F. Brock Associate Professor of Professional Responsibility at the University of Georgia School of Law and McConnell is the Richard and Frances Mallery Professor and Director of the Constitutional Law Center at Stanford Law School and perhaps the nation's most distinguished church-state legal scholar—ensure the book's influence. Some originalists, however, will have reservations about the book's methodology, and some of the authors' historical claims extend beyond the available evidence. Nonetheless, *Agreeing to Disagree* is likely to become a particularly important guide as the Court develops its next phase of Establishment Clause jurisprudence.

WHAT, IF ANYTHING, DOES THE ESTABLISHMENT CLAUSE NOW PROHIBIT?

In *Kennedy v. Bremerton School District*, originalist Justices achieved a long-sought goal: overturning the *Lemon* test and its progeny.[5] In *Lemon v. Kurtzman* (1971), the Court bundled its leading "wall of separation" Establishment Clause precedents into a new three-pronged test. To be constitutional, a statute had to: (1) "have a secular legislative purpose," (2) neither advance

4. "In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by "reference to historical practices and understandings." *Kennedy*, 142 S. Ct. at 2428; *see also* Town of Greece, NY v. Galloway, 572 U. S. 565, 576 (2014); American Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019).

5. On *Lemon's* seeming ability to escape a judicial burial, Justice Scalia quipped, "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District." Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist. 508 U.S. 384, 298 (1993) (Scalia, J., concurring in the judgment).

nor inhibit religion as its "principal or primary effect," and (3) "not foster an excessive government entanglement with religion."[6] After Justice Sandra Day O'Connor took her seat on the bench, she offered a clarification in *Lynch v. Donnelly* (1984), shaping *Lemon* into her "endorsement test."[7] O'Connor's approach, notorious for its vagueness, had the Court ask whether a state action could be reasonably viewed as endorsing religion and thus sending the message to some that they are outsiders or less than full members of the political community.[8]

For years, conservative Justices lacked the votes to overturn *Lemon* or the endorsement test, which left them plenty of space to fire off critical concurring and dissenting opinions. Then-Associate Justice William Rehnquist launched a significant attack in his dissenting opinion in *Wallace v. Jaffree* (1985). Citing Justice Hugo Black's use of Jefferson's "wall of separation" metaphor in *Everson v. Board of Education* (1947), Rehnquist opined:

> It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years.[9]

Rejecting the idea that the authors of the First Amendment intended to impose "neutrality on the part of government between religion and irreligion,"[10] Rehnquist proposed to replace the *Lemon* and endorsement tests with the more accommodating rule of state non-preferentialism among religious sects.[11]

6. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

7. Lynch v. Donnelly, 465 U.S. 668, 687 (1984).

8. Cnty. of Allegheny v. Am. C.L. Union, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring in part and concurring in the judgment). *But see id.* at 655 (Kennedy, J., concurring in the judgment in part and dissenting in part); FRANCIS J. BECKWITH, TAKING RITES SERIOUSLY: LAW, POLITICS, AND THE REASONABLENESS OF FAITH 161–63 (2015).

9. Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J. dissenting).

10. *Id.* at 98 (Rehnquist, J. dissenting).

11. *Id.* at 106 ("the Establishment Clause of the First Amendment had acquired a well-accepted meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations").

Rehnquist's non-preferentialism never quite caught on[12] and, at least among the Court's conservative originalists, it was soon displaced by Justice Antonin Scalia's fiery and colorful dissenting voice. Similar to Rehnquist, Scalia employed historical practices from the Founding period to argue that neither *Lemon*'s secularity and non-advancement prongs nor O'Connor's non-endorsement standard could be squared with the Founders' church-state practices. In *McCreary County v. American Civil Liberties Union* (2005), a case in which the Court struck down a Ten Commandments monument placed in a Kentucky courthouse, Scalia provided Founding-era examples from all three branches of government to emphasize his point: George Washington added "So help me God" to the form of the presidential oath of office; the Supreme Court under John Marshall opened its sessions with the prayer, "God save the United States and his Honorable Court"; and the first Congress instituted its legislative sessions with a prayer and enacted legislation providing for paid chaplains for the House and Senate.[13] "With all of this reality (and much more) staring it in the face," Scalia asked,

> how can the Court *possibly* assert that "'the First Amendment mandates governmental neutrality between . . . religion and nonreligion,'" and that "[m]anifesting a purpose to favor . . . adherence to religion generally," is unconstitutional? Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society's constant understanding of those words. . . . Nothing stands behind the Court's assertion that governmental affirmation of the society's belief in God is unconstitutional except the Court's own say-so, citing as support only the unsubstantiated say-so of earlier Courts going back no further than the mid-20th century. . . . And it is, moreover, a thoroughly discredited say-so. It is discredited, to begin with, because a majority of the Justices on the current Court (including at least one Member of today's

12. Non-preferentialism, however, was not without its academic champions. See, notably, GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA (1987). Regarding the development of Rehnquist's Establishment Clause jurisprudence after his *Jaffee* dissent, one would want to consider his assumption of the position of Chief Justice in 1986. For a discussion of Rehnquist's jurisprudence focusing on religious freedom, *see* Richard W. Garnett, *Chief Justice Rehnquist, Religious Freedom, and the Constitution*, in THE CONSTITUTIONAL LEGACY OF WILLIAM H. REHNQUIST (Bradford P. Wilson, ed., 2015).

13. McCreary Cnty. v. Am. C.L. Union of Kentucky, 545 U.S. 844, 886 (2005) (Scalia, J. dissenting).

> majority) have, in separate opinions, repudiated the brain-spun "*Lemon* test" that embodies the supposed principle of neutrality between religion and irreligion. . . . And it is discredited because the Court has not had the courage (or the foolhardiness) to apply the neutrality principle consistently.[14]

Despite extensive criticism of *Lemon*'s ahistorical character, Scalia never fully developed a robust historical case documenting what the Establishment Clause *does* prohibit. He said that the "hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty,"[15] but he introduced almost no historical evidence to document the point or to substantiate the claim. In one of his few substantive passages on the Establishment Clause's prohibitions, he wrote:

> Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities. Thus, for example, in the Colony of Virginia, where the Church of England had been established, ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches.
>
> The Establishment Clause was adopted to prohibit such an establishment of religion at the federal level (and to protect state establishments of religion from federal interference).[16]

Scalia never explained how he determined that this particular understanding of a religious establishment was adopted with the

14. *Id*. at 889–90 (quoting majority opinion).

15. Lee v. Weisman, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) (emphasis omitted).

16. *Id*. at 640–41 (citations omitted). Scalia went on to "further acknowledge for the sake of argument," that "by 1790 the term 'establishment' had acquired an additional meaning—'financial support of religion generally, by public taxation'—that reflected the development of 'general or multiple' establishments, not limited to a single church." But that, he said, "would still be an establishment coerced by force of law." *Id*. at 641 (emphasis omitted). He further conceded that the American constitutional system "from the Declaration of Independence and the first inaugural address of Washington . . . down to the present day," has ruled out of order government-sponsored endorsement of religion "where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)." *Id*.

Establishment Clause.[17] He did not cite any historical records from the Founding era or a single scholar to document his construction.[18]

While there is much more to the story of conservative critiques of *Lemon* and the endorsement test, the strengths and weaknesses of Scalia's jurisprudence appear in current conservative Establishment Clause opinions.[19] Conservative justices have been much more thorough in documenting why they think the Court has misinterpreted the historical record than they have been in building a rich, historically sourced construction of what the Establishment Clause actually prohibits.

This lacuna can be seen in *Kennedy v. Bremerton School District*. The *Kennedy* majority made clear that the Establishment Clause must be interpreted by "reference to historical practices and understandings."[20] The Court recognized that government, consistent with a historically sensitive understanding, may not compel religious observances or coerce individuals to engage in formal religious exercises.[21] At the same time, the Court noted that various justices have "disagreed on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause."[22] Then the majority opinion failed to clarify what forms of coercion—or even if a coercion test alone—

17. *See also* Andrew R. Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. L. REV. 727 (2009); RALPH A. ROSSUM, ANTONIN SCALIA'S JURISPRUDENCE: TEXT AND TRADITION 128–40 (2006).

18. The term construction refers to the act of importing meaning into a constitutional provision by consulting external sources, as opposed to purely interpreting its text. A term of art within originalist scholarship, it helps isolate and explain how one is importing meaning and allows for critical evaluation of the sources used to do so. For more on the interpretation-construction distinction in originalism, *see* Vincent Phillip Muñoz & Kate Hardiman Rhodes, *Constructing the Establishment Clause*, 54 LOY. U. CHI. L.J. 387 (2023); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65 (2011); Amy Coney Barrett, *The Interpretation/Construction Distinction in Constitutional Law: Annual Meeting of the AALS Section on Constitutional Law: Introduction*, 27 CONST. COMMENT. 1 (2010); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION (2001).

19. Justice Clarence Thomas's jurisprudence is perhaps an exception in this regard. In a number of opinions, Justice Thomas has outlined and presented some historical evidence to document that the original understanding of the Establishment Clause pertains to federalism. *See* Town of Greece, NY v. Galloway, 572 U. S. 565, 603 (2014) (Thomas, J., dissenting); *see also* Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of its Incorporation*, 8 J. CONST. L. 585, 586 (2006).

20. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) (quoting Town of Greece, NY v. Galloway, 572 U. S. 565, 576 (2014)).

21. *Id*. at 2429.

22. *Id*.

constitute a prohibited establishment of religion. The *Kennedy* majority found no need to clarify the issue because any possible state coercion in the case at hand "did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion."[23]

In future cases, we can expect the Court to further develop, in light of "historical practices and understandings," what constitutes unconstitutional Establishment Clause coercion and whether coercion alone is the proper no-establishment standard. Indeed, Justice Gorsuch, the author of *Kennedy*'s majority opinion, has already taken steps in that direction. In a concurring opinion in *Shurtleff v. Boston* (2022), which was handed down a few weeks before *Kennedy*, Justice Gorsuch outlined what might develop into the conservative approach to the Establishment Clause. After reviewing all the faults of *Lemon*, he noted that "our constitutional history contains some helpful hallmarks that localities and lower courts can rely on" and that "founding-era establishments often bore certain other telling traits."[24] He listed six such traits, remarking that "most of these . . . reflect forms of coercion":

> First, the government exerted control over the doctrine and personnel of the established church. Second, the government mandated attendance in the established church and punished people for failing to participate. Third, the government punished dissenting churches and individuals for their religious exercise. Fourth, the government restricted political participation by dissenters. Fifth, the government provided financial support for the established church, often in a way that preferred the established denomination over other churches. And sixth, the government used the established church to carry out certain civil functions, often by giving the established church a monopoly over a specific function.[25]

Gorsuch cited Michael McConnell's 2003 *William and Mary Law Review* article, "Establishment and Disestablishment at the Founding, Part I: Establishment of Religion."[26] Had it already

23. *Id*.

24. Shurtleff v. Boston, 142 S. Ct. 1583, 1609 (Gorsuch, J., concurring). Gorsuch provided a much more thorough case in his *Shurtleff* concurrence as to why *Lemon* ought to be abandoned than he later did in his *Kennedy* majority opinion.

25. *Id*. at 1609.

26. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105 (2003).

been published, he also might have cited Chapman and McConnell's new book, which, drawing from McConnell's earlier article, presents the same six hallmarks of establishment. Given the Court's current composition, the future of the Court's Establishment Clause jurisprudence may already have been written, and it can be found in Chapman and McConnell's *Agreeing to Disagree*.

CHAPMAN AND MCCONNELL'S ESTABLISHMENT CLAUSE

As noted, Chapman and McConnell propose to adjudicate Establishment Clause issues in light of the clause's "historically informed purposes" (p. 93). The history from which they derive those purposes includes the various elements of religious establishments in English and colonial American history, the drafting of the First Amendment, and, most importantly, the process of religious disestablishment in the states from the Founding until the disestablishment of religion in Massachusetts in 1833. I address their historical claims below, but let us first turn to one of the authors' most important conclusions.

MISCHIEF AND PURPOSES

A helpful way to analyze laws, including constitutional provisions, is to identify the mischief the law seeks to remedy, the purpose or end it aims to foster, and the corresponding test, doctrine, or rule that interpreters employ to execute the law.[27] Identifying these components zeroes in on some of the most important elements of any given interpretation of a legal text. It also facilitates comparison of different interpretations of the same legal text.

Chapman and McConnell articulate with admirable clarity their understanding of the Establishment Clause's mischief. "The true evil of religious establishment contemplated at the adoption of the First Amendment," Chapman and McConnell write, "was the use of government power to foster or compel uniformity of religious thought and practice." Though details differed by jurisdiction, they continue, "establishments all relied on an array of legal devices designed to bring about religious uniformity and discourage religious dissent" (p. 10).

27. For an extraordinarily helpful recent account of the "mischief rule," see Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967 (2021).

As Table 1 shows, the mischief rule framework reveals Chapman and McConnell's originality. They fuse a more typically liberal commitment to individual autonomy with a new emphasis on the mischief of coerced religious uniformity to propose a novel account of the Establishment Clause. And they package their approach in the more traditionally conservative method of history and tradition.

Table 1: Establishment Clause Mischiefs and Purposes[28]

	Mischief	**Purpose**
Chapman & McConnell	Government sponsored religious uniformity	Enlarging the scope of religious choice
Rutledge *(Everson)*	Intrusion of religion into civil governance and the intermixing and overlapping of the spheres of religious and civil authority	Civic peace (ending the struggle of sect against sect) and religious freedom through the independence of churches from the state
Brennan *(Schempp)*	Official interdependence with religious institutions that tends to foster or discourage religious worship or belief	Securing autonomy in matters of religious belief and practice
Burger *(Walz, Lemon)*	Political division along religious lines that results from government sponsorship, financial support, and active involvement in religion	Protection of the integrity of the democratic political process from political division along religious lines and protection against the corresponding political confusion, obfuscations, and diversions that such divisions cause

28. Table 1 draws on Muñoz & Hardiman Rhodes, *Constructing the Establishment Clause*, *supra* note 18.

	Mischief	**Purpose**
O'Connor *(Lynch, County of Allegheny)*	Exclusion that results from state authorities making adherence to a religion relevant to a person's standing in the political community	Promoting an inclusive political community that holds all citizens with equal regard in matters of religion
Rehnquist *(Jaffree)*	Official establishment of a religion and governmental preference of some sects over others	Evenhanded treatment of all religious sects
Scalia *(Lee, McCreary County)*	Legal coercion of religion (e.g., church attendance, religious civil privileges and disabilities, exclusive taxation to finance religion)	To secure religious freedom while also allowing individuals and groups to "acknowledge and beseech the blessing of God" collectively and publicly, and to allow the state to foster the moral character of citizens through noncoercive support and nonsectarian endorsements of religion
Thomas *(Newdow, Galloway)*	Potential national power that might be exercised to interfere with state church-state arrangements	Protecting state authority over state-level church-state arrangements, including protecting then-existing state establishments
Breyer *(Zelamn, Van Orden, Carson)*	Religiously based strife, conflict, and discord	Fostering civic harmony by preventing religiously based strife, conflict, and social division
Sotomayor *(Trinity Lutheran, Kennedy)*	State entanglement with religion, direct and indirect coercion of religion, taxpayer funding of religion, religion-based division	Securing autonomy in matters of religious belief and practice and maintaining a secular government
Kagan *(Galloway)*	State favoritism and state-sponsored sectarianism	Fostering a religiously inclusive political community

Chapman and McConnell's focus on the mischief of state-sponsored religious uniformity does not directly match any leading Establishment Clause construction offered by a Supreme Court Justice.[29] They share Justice O'Connor's concern with religious exclusion, but they do not adopt her endorsement test as the means by which to prevent religious exclusion. Similar to Justice Rehnquist, they take a more accommodating approach to government favoritism of religion over non-religion. We might classify their approach as moderately conservative, sitting to the right of O'Connor and close to Rehnquist. Compared to those on the Court now, their Establishment Clause mischief resembles the mischief advanced by Justice Kagan in *Town of Greece v. Galloway*.[30]

With their Establishment Clause mischief, Chapman and McConnell most clearly break with separationists such as Justices Rutledge and Sotomayor, who hold that the Establishment Clause was adopted to prevent the intrusion of religious authority into the sphere of political authority—in the words of Justice Sotomayor, to ensure "the government's ability to remain secular."[31] Chapman and McConnell's Establishment Clause is neither jurisdictional in character nor devoted to secularism,[32] and thus they do not frame their analysis around competing spheres of authority or against the intrusion of religious authority into the public square. Chapman and McConnell also reject Chief Justice Burger's and Justice Breyer's concerns with religious division and religiously based strife and social conflict.[33] They eschew the theme of religious division as such.[34] They also do not adopt

29. Though Justice Gorsuch cites McConnell's earlier scholarship in his *Shurtleff* concurrence, he does not articulate an underlying Establishment Clause mischief or purpose.

30. *See* Muñoz & Hardiman Rhodes, *supra* note 18, at 440–42.

31. Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449, 495 (Sotomayor, J., dissenting); *see also* Everson v. Board of Education, 330 U.S. 1, 28–63 (1947) (Rutledge, J., dissenting); for a discussion of Rutledge's and Sotomayor's Establishment Clause mischiefs, see Muñoz & Hardiman Rhodes, *supra* note 18.

32. For a helpful discussion of jurisdictional versus substantive approaches to the Establishment Clause, see Steven Smith, *The Jurisdictional Establishment Clause: A Reappraisal*, 81 NOTRE DAME L. REV. 1874–91 (2006). *Compare* VINCENT PHILLIP MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING 271–83 (2022) [hereinafter, MUÑOZ, RELIGIOUS LIBERTY] (for a different approach to the jurisdictional aspects of the Establishment Clause).

33. *See* Muñoz & Hardiman Rhodes, *supra* note 18.

34. For a critical analysis of division rationale in Establishment Clause jurisprudence, see Richard Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667 (2006).

Justice Scalia's near-exclusive focus on coercion as the Establishment Clause's principal evil, though coercion, as we shall discuss below, occupies an important place in their jurisprudence.

Turning to Chapman and McConnell's Establishment Clause purpose brings something of a surprise. They adopt the same purpose as William Brennan, one of the Court's most influential progressives.[35] Similar to Justice Brennan, Chapman and McConnell offer a positive-rights vision of the Constitution affirmatively securing individual choice and institutional autonomy in religious matters. Protecting religious freedom, accordingly, is not only about preventing harms that state action might inflict, but also, at times, requiring affirmative government action to secure religious autonomy for individuals and institutions that might not otherwise be able to exercise such choices.[36] Chapman and McConnell's approach to religious liberty, like Justice Brennan's, fits comfortably within the post-New Deal consensus that accepts a more active, managerial role for the judiciary.[37] Their Establishment Clause purpose, notably, is fully compatible with McConnell's (and Brennan's) exemption-granting construction of the Free Exercise Clause.[38] Yet Chapman and McConnell also break from the purposes of other influential liberal separationists. They do not see the Establishment Clause's end in terms of civil peace (Rutledge, Sotomayor), democracy (Burger), or civic harmony (Breyer). As I discuss below, they blend the typically liberal goal of individual autonomy with a more typically conservative method of history-based analysis to produce (for the most part) relatively conservative jurisprudential results.

35. *See* Muñoz & Hardiman Rhodes, *supra* note 18.

36. *See* pp. 80, 98, 116, advancing exceptions to general rules (such as religious waivers for military service) and military chaplains, an accommodation "where the government so controls a particular institutional or physical environment that its affirmative assistance is needed to enable people trapped in that environment to practice their faith" (p. 98).

37. For a discussion of "managerial" approach to church-state jurisprudence, see MUÑOZ, RELIGIOUS LIBERTY, *supra* note 32, at 293–95.

38. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990).

TESTS AND SUBSTANTIVE RESULTS

The mischief(s) that a law seeks to remedy and the end(s) that a law seeks to foster generate a doctrine(s) used by judges and other interpreters to apply the law in concrete cases.[39] Justice Rutledge, for example, held that in order to remedy the mischief of religious intrusion into civil governance and the intermixing and overlapping of the spheres of religious and civil authority, the Establishment Clause prohibits all official relationships between religious and state authority and all forms of tax support of religion. This separation seeks to foster civil peace by ending the struggle of sect against sect and helps to secure religious freedom through the independence of churches from the state.[40] Justice O'Connor understood the Establishment Clause as a remedy for exclusion—particularly, the exclusion resulting from state authorities making religious adherence relevant to a person's standing in a political community (mischief). She thus found that the Establishment Clause prohibits state endorsement of religion (doctrine) so as to promote an inclusive political community that regards all citizens equally in matters of religion (purpose).[41]

Doctrines can be narrow or broad, precise or less precise, singular or multiple. Narrow doctrines are rule-like, e.g., religious groups may not receive taxpayer funds, whereas broader doctrines are generally formulated as standards, e.g., government may not endorse religion. A coherent doctrine supplies the means to remedy the posited mischief and achieve the posited end. Table 2 presents the doctrines of a number of Supreme Court Justices who have authored significant Establishment Clause opinions.

39. *See* Muñoz & Hardiman Rhodes, *supra* note 18, at 399–404.

40. *See id*.

41. Justice Scalia's Establishment Clause, to present a third example, held that to prohibit the coercion of religion (mischief) the Establishment Clause prohibits legal fines and penalties on religious practice, compelled financial support of clergy, and sectarian endorsements of religion by state actors (doctrines), so as to secure religious freedom (purpose).

Table 2: Establishment Clause Doctrines or Tests[42]

Chapman & McConnell	Context sensitive legal judgment in light of six historical elements of disestablishment: • Autonomy of churches with respect to their doctrine, liturgy, and personnel • Repeal of compulsory religious attendance • Abolition of religious taxes • Free Exercise and/or liberty of conscience • Stripping the formerly established church of any exclusive public prerogatives or functions • Denominational equality
Rutledge *(Everson)*	• No official relationship between religious and civil authority • No tax support of religion
Brennan *(Schempp)*	National and state governments may not take action that: • Serves the essentially religious activities of religious institutions • Employs the organs of government for essentially religious purposes • Uses essentially religious means to serve governmental ends where secular means would suffice
Burger *(Walz, Lemon)*	National and state government action: • Must have a secular purpose • May neither advance nor inhibit religion • Must not cause an excessive entanglement between government and religion
O'Connor *(Lynch, County of Allegheny)*	National and state government action must not: • Communicate a message of endorsement • Cause an excessive institutional entanglement between government and religion
Rehnquist *(Jaffree)*	• No official national church • No governmental preference of one sect over others

42. Table 2 draws on Muñoz & Hardiman Rhodes, *supra* note 18.

Scalia *(Lee, McCreary County)*	• No legal coercion of orthodox religious belief or practice • No legally compelled, exclusive financial support of clergy • No sectarian endorsements of religion by state actors
Thomas *(Newdow, Galloway)*	Congress lacks power to make any law respecting state establishments
Breyer *(Zelamn, Van Orden, Carson)*	Judges must apply "legal judgment" to determine whether a challenged state action causes "religiously based social conflict"
Sotomayor *(Trinity Lutheran, Kennedy)*	• No endorsement • No coercion (direct or indirect) • No advancement of religion
Kagan *(Galloway)*	• No religious preference • State action must have a secular purpose • State action must neither advance nor inhibit religion

As displayed in Table 2, Chapman and McConnell do not offer one doctrine or test that they then employ to resolve Establishment Clause controversies. Following the Court's practice as it abandoned the *Lemon* test,[43] they instead utilize "context-sensitive doctrines that reflect a more accurate understanding [than *Lemon*] of the history of religious disestablishment" (p. 91). Adopting multiple doctrines, they say, "better reflects not only the original understanding of the Clause but also the full panoply of concerns originally animating disestablishment, including, importantly, equal religious liberty."

While they don't quite put it this way, Chapman and McConnell adopt a version of Justice Breyer's advocacy for "legal judgment."[44] They examine particular cases in light of their

43. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2092–94 (2019) (Kavanaugh, J., concurring).

44. *See* Van Orden v. Perry, 545 U.S. 677 (Breyer, J., concurring in the judgment) ("I see no test-related substitute for the exercise of legal judgment"). *See also* Muñoz & Hardiman

posited Establishment Clause mischief and then use one of their disestablishment elements to achieve the Establishment Clause's purpose. Whereas Breyer's legal judgment assumed the mischief of religiously based division and the purpose of civic harmony, Chapman and McConnell's legal judgments attend to the harm of government-sponsored religious uniformity, which impedes the overarching purpose of enlarging the scope of individual religious choice. Far more than Breyer, moreover, Chapman and McConnell strive to offer judgments informed by the history and traditions that led to religious disestablishment in America.

As I discuss below, in the first part of *Agreeing to Disagree,* Chapman and McConnell uncover the six elements associated with historical religious establishments invoked by Justice Gorsuch in *Shurtleff*. More importantly for their case analysis, however, are six corresponding "essential legal elements of disestablishment," which they derive from early American state-level constitutional and political developments. These disestablishment elements serve as Chapman and McConnell's replacement for the *Lemon* test. They rely on their disestablishment list (rather than their establishment elements) to work through how they believe various church-state issues should be resolved. The lists of both their establishment and disestablishment elements are as follows (pp. 18, 57):[45]

Establishment Elements

- Government control over doctrine, governance, and personnel of the church
- Compulsory church attendance
- Financial support
- Prohibitions on worship in dissenting churches
- Use of church institutions for public functions
- Restriction of political participation to members of the established church

Rhodes, *supra* note 18.

45. I present the disestablishment elements in a slightly different order than presented by Chapman and McConnell. I have done this to match them up with their corresponding establishment element. Chapman and McConnell present their list roughly in the order of adoption. I have not in any way altered the substance of their lists.

Disestablishment Elements

- Autonomy of churches with respect to their doctrine, liturgy, and personnel
- Repeal of compulsory religious attendance
- Abolition of religious taxes
- Free Exercise and/or liberty of conscience
- Stripping the formerly established church of any exclusive public prerogatives or functions
- Denominational equality

Chapman and McConnell provide sensible, often-compelling arguments about how they derive their constitutional conclusions from their disestablishment elements. Unfortunately, they do not share the methodology that accounts for which disestablishment element is to be used for a given category of cases. They employ "context sensitive doctrines," but do not elucidate what contextual elements should determine which doctrine should be utilized. This results in their decision-making seeming ad hoc and results driven.

Take Chapman and McConnell's treatment of government chaplains, which occurs in their chapter on accommodation of religious exercises. Government-selected chaplains funded with tax dollars are as old as the republic itself. As commander-in-chief of the Continental Army, George Washington requested that the Continental Congress fund military chaplains.[46] The First Congress—the same Congress that drafted the Establishment Clause—also made provisions for military chaplains and appointed legislative chaplains for the House and Senate (pp. 98–99). Chapman and McConnell write, "this kind of accommodation might appear to violate ordinary church-state separation in ways that would never be tolerable in ordinary circumstances" (p. 99). Indeed, it would seem to potentially violate three of their establishment elements: government control over church personnel, financial support, and the use of church institutions for public functions. But Congress, they report, judged that the "denial of the chance to worship to thousands of military

46. *See* VINCENT PHILLIP MUÑOZ, GOD AND THE FOUNDERS: MADISON, WASHINGTON, AND JEFFERSON 51–52 (2009) [hereinafter, MUÑOZ, GOD AND THE FOUNDERS].

personnel, would be a more serious affront to First Amendment values" than not providing chaplains out of Establishment Clause concerns. The Supreme Court would eventually find legislative chaplains constitutional in *Marsh v. Chambers*,[47] a judgment Chapman and McConnell appear to favor, as at the end of their chapter they conclude that "[e]fforts to invalidate religious accommodations in the name of the Establishment Clause have been almost uniformly rejected, and this has been a good thing for religious freedom and diversity" (p. 116).

At no point do they rigorously analyze chaplains or religious accommodations in light of their six establishment elements. They focus, instead, only on the disestablishment element of denominational neutrality, which they identify as a "core principle." Denominational neutrality, they explain, requires that accommodations be extended to all religions even if, in practice, such accommodations tend to benefit only a few or one religion (p. 108). But why denominational neutrality alone ought to be the "core principle" that governs state-sponsored religious chaplaincies—and not, say, abolition of religious taxes—is never explained.

When it comes to prayer in public schools, denominational neutrality quietly disappears. In this context, Chapman and McConnell utilize "the basic tenet of disestablishment" that "the government may not compel the performance of religious duties, such as the attendance of worship services" (pp. 144–45). In what will likely surprise many conservatives, Chapman and McConnell emphatically endorse the constitutional prohibition of school-led prayers in public schools. They call the Court's early 1960s decisions that eliminated the practices "the Court's finest hour," when it did "the right thing . . . in the face of public opposition and long-standing practice." The Court's holdings against school prayer, they say, were "firmly grounded in the history and rationale of disestablishment: 'Government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying any program of governmentally sponsored religious activity.'"[48]

47. Marsh v. Chambers, 463 U.S. 783 (1983).

48. P. 147, quoting Engel v. Vitale, 370 U.S. 421, 430 (1962).

Because they never explain why denominational neutrality is the "core principle" in religious accommodation cases and why non-coercion is the "basic tenet" in school prayer cases, Chapman and McConnell's "context sensitive" legal judgment can come across as arbitrary. If prayer in public school was conceptualized as a religious accommodation and the school prayer cases examined primarily through "denominational neutrality"—or even Chapman and McConnell's overarching Establishment Clause purpose of enlarging the scope of individual religious choice—different results might be reached.

An alternative account of the school prayer cases might proceed as follows. Given that not all parents could (then or now) afford to send their children to private religious schools,[49] religious choice would be augmented if students were guided in prayer at school, especially given that students could opt out from participating, as was the practice in the actual cases the Court heard. The option to pray or not to pray clearly offers more choice than having no option to pray. School-led prayers, moreover, might expose students to different religious traditions from their own, thus facilitating diversity in choice. Furthermore, with the rise of the "nones" today,[50] prayer in public schools might expose some students to prayer for the very first time, thus significantly increasing their ability to direct their own religious choices.[51]

If viewed through the lens of denominational neutrality, the constitutionality of school prayer could be secured through the content of the prayers themselves or, perhaps, through a rotational system. Indeed, the "Regent's Prayer"—"Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our

49. Chapman and McConnell, it might be noted, emphasize this point in their discussion (p. 145).

50. On the rise of the "nones," see DAVID E. CAMPBELL, GEOFFREY C. LAYMAN & JOHN C. GREEN, SECULAR SURGE: A NEW FAULT LINE IN AMERICAN POLITICS (2021).

51. Also consider that at the time of original cases in the 1960s, in-person school attendance was often legally mandatory. "A compulsory state educational system so structures a child's life," Justice Stewart wrote in dissent in *Abington School District v. Schempp* (1963), "that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage." "A refusal to permit religious exercises," Stewart continued, "thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at the least, as government support of the beliefs of those who think that religious exercises should be conducted only in private." Abington School District v. Schempp, 374 U.S. 203, 313 (1963) (Stewart, J., dissenting).

Country"—struck down in *Engel v. Vitale* (1962),[52] might be a model of the type of prayer that could meet Chapman and McConnell's "denominational neutrality" standard.

Chapman and McConnell may not be wrong to analyze the issue of school prayer through the lens of coercion, but they give no account as to why the coercion tenet of disestablishment—and not some other element such as denominational neutrality—ought to govern school prayer cases.[53] Given their overarching Establishment Clause purpose of facilitating religious choice, moreover, denominational neutrality might be a better means to achieve their own stated end. Even if this is not the case, it would have been helpful if Chapman and McConnell explained why they evaluated chaplains through the lens of neutrality but school prayer though coercion. More generally, clarification as to why and when which disestablishment element ought to be employed would have made their decision-making seem less arbitrary.

That unfortunate impression is reinforced when Chapman and McConnell discuss state aid to private religious schools. Here, coercion recedes while enlarging the scope of individual religious choice (p. 128) and maintaining state neutrality remain in the forefront. Religious choice, they say, is furthered through state funding of religious schools. The demand of neutrality, they suggest, may even require government financing of religious schools, as the Supreme Court recognized in *Espinoza v. Montana Department of Revenue* (2020)[54] and *Carson v. Makin* (2022)[55] (pp. 140–143).

Again, we can ask why different disestablishment elements should not be factored in or be treated preeminently. Why doesn't the disestablishment principle of "abolition of religious taxes" govern? Given that historical establishments included tax support for religious clergy and religious buildings—not to mention the use of church institutions for public functions—might not a

52. 370 U.S. 421 (1962).

53. I leave aside the question as to whether the school prayer practices in question in cases such as *Engel* (1962), *Schempp* (1963), *Lee v. Weisman* (1992), and Santa Fe Independent School District v. Doe, 530 US 290 (2000), were, in fact, coercive. Chapman and McConnell say that it "seems obviously correct" that the Court's finding in *Engel* and *Schempp* that "indirect coercive pressure" on reluctant students is plain (p. 145). For a competing view, to which Chapman and McConnell fail to respond, see Justice Scalia's dissent in *Lee v. Weisman*.

54. Espinoza v. Montana Department of Revenue, 140 S. Ct. 2246 (2020).

55. Carson v. Makin, 142 S. Ct. 1987 (2022).

modern establishment equivalent be tax support for sectarian religious education? Perhaps such concerns ought not be considered or are tainted given their anti-Catholic judicial origins,[56] but Chapman and McConnell do not sufficiently explain why these disestablishment elements do not play a role in their analysis.

To be clear, my concern is not with the substantive results Chapman and McConnell advocate. In my own writings on the Establishment Clause, I reach similar results as they do on school prayer and state aid to private religious schools (but not on government chaplains).[57] I also do not question their reasoning from a given tenet of disestablishment to the constitutional conclusions they reach.[58] Indeed, their sensible legal reasoning and clear explanations as to how their approaches are similar to and different from leading Supreme Court opinions are both engaging and usually persuasive. I should note that throughout the second half of the book, the authors do not just offer their own Establishment Clause conclusions; they discuss the various twists and turns in the Court's jurisprudence in an insightful, accessible, and nuanced way. Their three-stage account of the Court's changing doctrines of aid to religious schools—rejecting the no-aid absolutism of *Everson* (1947), *Lemon* (1971), and *Nyquist* (1973)[59] in favor of the "permissible neutrality" of *Zelman* (2002)[60] and then mandating neutrality starting in *Trinity*

56. Chapman and McConnell helpfully contextualize the Court's mid-twentieth century anti-Catholicism, documenting how it was part of a larger intellectual current. They cite the following passage from no less a figure than John Dewey to help make their case:

> The Roman Catholic hierarchy . . . has attempted for many years to gain public fiscal aid and its program has been advanced through active lobbying for school lunches, health programs and school transportation facilities for Catholic schools. . . . It is essential that this basic issue be seen for what it is, namely, as the encouragement of a powerful reactionary world organization in the most vital realm of democratic life with the resulting promulgation of principles inimical to democracy.

P. 132, quoting John Dewey, 15 *The Later Works*, 1925–53, at 284–85 (Jo Ann Boydston ed., 1989).

57. *See* MUÑOZ, RELIGIOUS LIBERTY, *supra* note 32, at 271–85.

58. I say this with one reservation. Chapman and McConnell contend the prayer practices at issue in *Engel* and *Schempp* were "obviously" coercive. I think that conclusion is questionable. Chapman and McConnell's case would have been stronger had they responded to Justice Scalia's criticisms of their adopted point in his dissenting opinion in *Lee v. Weisman*.

59. Committee for Public Education v. Nyquist, 413 U.S. 756 (1973).

60. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

Lutheran (2017), *Espinoza* (2020), and *Carson* (2022)—helpfully parses decades of complicated jurisprudence (pp. 128–43). Their deft analysis often makes sense of a jumble of Supreme Court opinions, and, where that is impossible, they explain with admirable clarity how Court precedents have shifted over time.

Yet Chapman and McConnell do not offer an overarching account of which of their tenets of disestablishment should be used for what cases or in what priority they should be applied. Given the number of disestablishment elements they set forth, judges who adopt their approach could probably reach whatever results they want. Rather than constraining judicial decision-making within a straighter, narrower course, Chapman and McConnell's numerous disestablishment elements provide multitudinous paths to varied conclusions. Their case analyses, as noted, come across as somewhat ad hoc, reminiscent of Justice O'Connor's and Justice Breyer's no-establishmed jurisprudence. One knew that O'Connor would utilize her endorsement test and Breyer would exercise his "legal judgment" in light of his perception of "divisiveness," but it was impossible to know beforehand whether a given state action actually endorsed religion sufficiently or caused too much division to be found unconstitutional. "Legal judgment," even when exercised by scholars as sensible and reasonable as Chapman and McConnell, seems more prudential and political than legal.

CHAPMAN & MCCONNELL'S HISTORICAL ESTABLISHMENT CLAUSE

I thus far have examined *Agreeing to Disagree* as if its history is accurate. According to Chapman and McConnell, the Establishment Clause was drafted to remedy the mischief of government-sponsored religious uniformity and designed with the purpose of enlarging the scope of religious choice. Their history underlying those conclusions is disputable. Chapman and McConnell presume shared intentions and understandings among the Founders without sufficient evidence to substantiate their conclusions. And they overlook evidence complicating their historical narrative. This is not to say that Chapman and McConnell's history is necessarily incorrect; their version of the Establishment Clause has some historical support. But the historical record, at least in my view, is more obscure and less definitive than their confident conclusions suggest.

ENGLISH AND COLONIAL AMERICAN ESTABLISHMENTS

Chapman and McConnell present their history in the first part of the book. Chapter 1 quickly traverses sixteenth- to eighteenth-century English and American colonial history to offer a snapshot of the six elements (discussed above) that they view as comprising religious establishments at the time of the American Founding. Chapter 2 reviews the drafting of the Establishment Clause in the First Congress. Chapter 3 develops the six disestablishment elements (also discussed above) by reviewing the debates over disestablishment that occurred in various states. Chapter 4 makes the important argument that the Establishment Clause can be intelligibly incorporated to apply against the states via the Fourteenth Amendment.

Their history begins with a bold assertion. On the book's first page, Chapman and McConnell contend that when the words, "Congress shall make no law respecting an establishment of religion" were added to the Constitution "every American lawyer and probably every citizen knew what they meant" (p. 1). They repeat the point on the first page of Chapter 1, this time writing, "virtually every American knew from experience what those words [respecting an establishment of religion] meant" (p. 9).

Others have made a similar claim. Regarding the congressional debates during the drafting of the First Amendment, Justice Wiley Rutledge in *Everson* contended that the "sparse discussion" reflected "the fact that the essential issues had been settled" and that "the matter had become so well understood as to have been taken for granted in all but formal phrasing."[61] Years later, legal scholar Gerard Bradley agreed with Justice Rutledge on the Founders' common understanding but disagreed strenuously about the content of that common understanding. Whereas Rutledge said the state-level debates in 1780s Virginia decisively determined that the prohibition on religious establishments required the privatization of religion and forbade "any appropriation, larger or small, from public funds to

61. Everson v. Board of Education, 330 U.S. at 42 (Rutledge, J., dissenting). Other scholars have also made similar claims suggesting that a broad consensus as to the meaning of an establishment of religion accounts for the absence of clarification or debate during the drafting debates. *See*, *e.g.*, BRADLEY, *supra* note 12, at 19. *See also* THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1987) (using evidence from published sermons to argue that people of the time believed "respecting an establishment" meant establishing a specific denomination).

aid or support any and all religious exercises," Bradley said that "everyone [in the First Congress] knew it meant no sect preference and agreed that this was the appropriate federal norm."[62]

Given this striking disagreement, one might wonder whether the drafters and ratifiers of the First Amendment really possessed a shared understanding as to what constituted an establishment of religion. More recent scholarship has raised serious doubts as to whether they did. Donald Drakeman, who has written the very best book focused exclusively on the history and meaning of the Establishment Clause, finds that at the time of the adoption of the First Amendment, the word "establishment" "was susceptible of being used in various ways,"[63] "that New Englanders simply did not share one definition of establishment, irrespective of whether they were for or against whatever one was,"[64] and that "there was no reason that people needed to have a common understanding of the word 'establishment' to vote for (or against) the First Amendment, and the best description of all of the available evidence is that they did not."[65] Chapman and McConnell seem to have overlooked Drakeman's work.

Instead, they presume that an original public meaning of "religious establishment" existed and that it can be ascertained through an overview of the laws that erected establishments in England and colonial America. Chapter 1 offers a quick and informative history that chronicles a number of legal acts related to establishment. The 1534 Act of Supremacy made the king the supreme head of the Church of England, giving him "authority, to reform and redress all errors, heresies, and abuses."[66] Parliament later enacted the "Thirty-nine Articles of Faith," which legally set forth the doctrinal tenets of the church, including the use of the Book of Common Prayer, which determined the liturgy for

62. *Everson*, 330 U.S. at 39–41 (Rutledge, J., dissenting); BRADLEY, *supra* note 12, at 19.

63. DONALD L. DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT 225 (2009).

64. *Id*. at 227.

65. *Id*. at 228; *see also*, Joel Alicea & Donald L. Drakeman, *The Limits of the New Originalism*, 15 U. PA. J. CONST. L. 1161, 1169, 1218 (2013) (explaining that the objective evidence for the original meaning of "establishment" "points in two opposite directions" and "[t]here is no particular reason . . . to choose one meaning of establishment over the other").

66. P. 12, quoting Supremacy Act 1534, 26 Hen. 8 c. 1 (Eng.), *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY (Carl Stephenson & Frederick Marcham eds., Harper & Row rev. ed. 1937).

religious worship (pp. 12–13). The Acts of Uniformity of 1549, 1559, and 1662 required all ministers to conform to these requirements, thus establishing a "universal agreement in the public worship of God," to quote from the preamble of the 1662 version.[67] The Toleration Act of 1688 suspended the penalties for violation of the Uniformity Acts for some Protestants, but not for all. The Test and Corporation Acts limited the possession of certain civil, military, ecclesiastical, and academic offices to participating members of the church. The "Penal Acts" suppressed certain religious rites; the Act Against Papists and the Conventicle Act prohibited unlicensed religious meetings (pp. 13–14).

Chapman and McConnell explain that the establishment situation in colonial America was more varied, assuming two principal forms. An exclusive, oligarchic Anglican establishment was legislated in the southern states, while a more localized, republican Puritan establishment took hold in New England, with the exception of Rhode Island. From this English and colonial American history, Chapman and McConnell draw their six aforementioned elements of an establishment.

THE DRAFTING OF THE ESTABLISHMENT CLAUSE

Chapman and McConnell, wisely, do not attempt to show that these six elements informed the drafting of the Establishment Clause. Justices and scholars often speak of an unstated agreement animating the Establishment Clause's adoption because of the thinness of the relevant historical records. We only have summaries of the House debates in the First Congress; the corresponding Senate record is even more sparse, containing only the votes on the various motions presented.[68] Yet, despite the thinness of the records, we can learn something about the concerns of those who drafted the Establishment Clause.

In Chapter 2, Chapman and McConnell present a serviceable summary of the drafting records' key moments, with a few references to scholars who have plumbed the debates more

67. P. 13, quoting Acts of Uniformity 1662, 14 Car. 2 c. 4 (Eng.), *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY, *supra* note 66, at 543–46.

68. For a discussion of the available records surrounding the adoption of the Establishment Clause, *see* MUÑOZ, RELIGIOUS LIBERTY, *supra* note 32, at 125–82. *See also* Stephanie H. Barclay, et al, *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 ARIZ. L. REV. 505 (2019).

deeply. While every book on the historical meaning of the Establishment Clause must cover this material, Chapman and McConnell do not make much of it. They seem to presume that the six historical elements they uncover in their English and colonial American history functioned as the Framers' common understanding of an "establishment." It is not an unreasonable presumption, but it is a presumption nonetheless.[69] And the presumption is not confirmed by the available drafting records, which do not yield a clear meaning of the Framers' understanding of a religious establishment.

To see how the drafters might have adopted language that did not have a clear or commonly understood meaning requires a consideration of the political context that led to the adoption of the Bill of Rights. One has to recall that most of the men who drafted the Bill of Rights did not think that it was necessary at all. During the ratification debates, Anti-Federalists had criticized the Constitution for its lack of a declaration of rights. Federalists had responded that the limited, delegated character of the new national government's powers made a declaration of rights unnecessary. To achieve ratification, however, Federalists agreed to adopt amendments after the Constitution had been ratified.

After ratification, the Federalists swept the inaugural elections for the first federal Congress.[70] Given their overwhelming victory, most Federalists' concern for amendments evaporated, but Madison insisted that they be adopted. His primary motivation in securing amendments was not so much to remedy perceived deficiencies in the Constitution but rather to defeat the Constitution's critics. By giving the Anti-Federalists amendments (but not the substantive changes they actually wanted), Madison made it impossible for the Anti-Federalists to press for a second constitutional convention, which is what they most wanted and which would have exposed the Constitution to a wholesale revision.[71]

69. The precise location where Chapman and McConnell presume a shared understanding among the Framers is the first sentence of their second chapter, which begins: "The members of the First Congress debated the terms of the First Amendment against the backdrop of a well-known political, legal, and religious landscape of religious establishment" (p. 33).

70. According to THORNTON ANDERSON, CREATING THE CONSTITUTION: THE CONVENTION OF 1787 AND THE FIRST CONGRESS, 176 (1993), Anti-Federalists occupied only ten seats in the House and two seats in the Senate in the First Federal Congress. *See* MUÑOZ, GOD AND THE FOUNDERS *supra* note 46, at 143 n.46.

71. *See* ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION (1997).

This political context, which Chapman and McConnell mostly overlook (pp. 34–35), explains the somewhat slapdash character of the drafting debates. The drafting of the First Amendment Religion Clauses was not a grand seminar where leading American statesmen hashed out the true principles of religious freedom. It certainly did not involve a pitched battle between strict-separationists and those advocating for a more accommodating position such as non-preferentialism among sects, as was portrayed by then-Associate Justice Rehnquist in *Wallace v. Jaffree* (1985) and Justice David Souter in *Lee v. Weisman* (1992).[72] The actual drafting record reveals repeated frustrations by those Federalists who thought they were wasting time because amendments were not necessary, pleading by James Madison that something should be adopted, and concern by a few New England Congressman that, if an amendment was adopted, the language used should not interfere with then-existing state-level government support of religion.

The most substantive comment on the purposes of what became the Religion Clauses was offered by James Madison on August 15, 1789.[73] Madison had introduced several amendments for consideration by the House of Representatives in early June. They were sent to a committee for further consideration, primarily because several House members thought amendments were not necessary and the Congress had more important work to do. The committee had modified Madison's original proposal as follows (words added by the committee are in italics):

> ~~The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national~~ *no* religion *shall* be established *by law*, nor shall the full and equal rights of conscience ~~be in any manner, or on any pretext,~~ infringed.[74]

In the subsequent discussion of it, Madison is recorded as saying that,

72. Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting); *see also* Lee v. Weisman, 505 U.S. 577, 609 (1992) (Souter, J., concurring).

73. For my more detailed account of the drafting of the Establishment Clause, *see* Chapter 5 of MUÑOZ, RELIGIOUS LIBERTY, *supra* note 32, at 125–82. *See also*, Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2 UTAH L. REV. 489 (2011).

74. 1 *ANNALS OF CONG.* 757 (1789). For a more detailed discussion of the drafting record, see MUÑOZ, RELIGIOUS LIBERTY, *supra* note 32, at 143–73.

> he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. [75]

Chapman and McConnell sensibly deduce that the proposed language was directed against the legal enforcement of religion by law and against compulsory worship (p. 37). Madison's language might be read to suggest that the text that would become the Free Exercise Clause relates to compelled worship and the text that would become the Establishment Clause relates to the legal enforcement of religion. But here we should recall that the records are not a verbatim recording of specific comments but rather summaries by a clerk. And even if the records do accurately capture Madison's sentiments, a prohibition on enforcing "the legal observation" of religion does not exactly convey a precise legal rule.

At this point in the drafting record, the House appears to turn toward protecting federalism in church-state matters. Benjamin Huntington from Connecticut expressed concern that the proposed language might lead federal courts to find Connecticut's system of tax support for religion unconstitutional. He appears to be concerned that the committee's elimination of the word "national" might lead to the misinterpretation that the text applied to state governments as well as the national government. Madison immediately responded that they could reinsert the word "national," which addressed Huntington's concern. Madison then again connects establishments to compulsion. The record presents Madison's remarks as follows: "He [Madison] believed that the people feared one sect might obtain a pre-eminence, or two combined together, and establish a religion, to which they would compel others to conform."[76] Samuel Livermore from New Hampshire then introduced a decisive motion. His statement is recorded as follows:

> Mr. LIVERMORE (N.H.) was not satisfied with the amendment; but he did not wish them to dwell long on the subject. He thought it would be better if it were altered, and

75. 1 *ANNALS OF CONG.* 758 (1789).

76. 1 ANNALS OF CONG. 758–59 (1789). For competing scholarly interpretations of Madison's comment, *see*, MUÑOZ, RELIGIOUS LIBERTY, *supra* note 32, at 155 n.75; Steven K. Green, *Federalism and the Establishment Clause: A Reassessment*, 38 CREIGHTON L. REV. 761, 790 (2004–2005); Esbeck, *supra* note 73, at 545; ELLIS M. WEST, THE RELIGION CLAUSES OF THE FIRST AMENDMENT: GUARANTEES OF STATES' RIGHTS? 96 (2011).

> made to read in this manner, that Congress shall make no laws touching religion, or infringing the rights of conscience.[77]

Beginning with the word "Congress" clarified that the amendment would apply to the national government alone. Livermore's proposal also tracked what Federalists had argued all along, that the national government possessed no delegated authority over religion. The House quickly adopted Livermore's proposed language. After Livermore successfully turned the focus of the Establishment Clause toward federalism, no substantive debate is recorded in the House of Representatives.[78]

Two more important textual revisions were subsequently made, however. Five days after Livermore's text had been adopted, it was changed as follows, "Congress shall make no law~~s touching~~ *establishing* religion. . . ." Available records do not provide specific comments clarifying why the House replaced "no laws touching religion" with "no law establishing religion."[79] A month later, the final House-Senate Conference Committee amended the House text, adding the words "respecting an." The phrase "respecting an establishment," has no antecedent. The phrase does not appear in any pre-1789 state-level declaration of rights or constitution. The words would seem to have a jurisdictional connotation, as that is how "respecting" is used elsewhere in the Constitution,[80] but we lack records from the final House-Senate Conference Committee that confirm this or any other interpretation of "respecting an."

77. 1 *ANNALS OF CONG.* 759 (1789). New Hampshire had proposed, "Congress shall make no laws touching religion, or to infringe the rights of conscience." Livermore replaced "to infringe" with "infringing."

78. For an extended discussion of Livermore's intervention and its meaning, *see* MUÑOZ, RELIGIOUS LIBERTY, *supra* note 32, at 155–58.

79. In MUÑOZ, RELIGIOUS LIBERTY, *supra* note 32, at 158–60, I speculate that some members of Congress might have become aware that "no laws touching religion" would have imposed a new, substantive restriction on Congress's power prohibiting it—for example, from drafting legislation exempting Quakers and other religious conscientious objectors from mandatory military service—but we just don't know for certain why the change was made. Between the adoption of Livermore's language on August 15, 1789, and the change to "no law establishing religion" on August 20, 1789, the House debated the propriety of adopting text (in the context of what became the Second Amendment) exempting those religiously scrupulous from bearing arms.

80. Article IV, § 3: "The Congress shall have power to make all needful rules and regulations respecting the territory or other property belonging to the United States," communicates that Congress has no power to make laws concerning the subject matter of religious establishments because that subject matter belongs to the states. For an elaboration of a jurisdictional interpretation of "respecting an," see MUÑOZ, RELIGIOUS LIBERTY, *supra* note 32, at 167–74.

In summary, we know from the drafting records that:

(a) the Framers deliberately directed the text of the Establishment Congress against the Federal Congress after concerns regarding federalism were articulated;

(b) they specifically chose to employ the term "establishment" when the House substituted it for "religion";

(c) Madison seems to have associated religious establishments with the legal compulsion of religion;

(d) the Framers deliberately added the words "respecting an."

According to Chapman and McConnell, "most scholars" conclude that the original Establishment Clause "broadly prevents any establishment of religion at the federal level" and "protects state establishments from federal interference" (p. 40). They do not draw attention to what also seems to be true: the First Congress's drafting record does not disclose with any precision the original public meaning of what constitutes a law "respecting an establishment of religion," even if it does reveal that the Framers deliberately chose those words.

It is plausible—perhaps more than plausible—that the Framers generally agreed with Madison and thought that religious establishments involved the legal coercion of religion. It is also possible that the Framers all understood an "establishment of religion" to consist in the six elements listed by Chapman and McConnell. The drafting record itself, however, is too thin to definitively determine what constitutes an establishment of religion.

The drafting record, moreover, does not support Chapman and McConnell's assertion that, "the true evil of religious establishment contemplated at the adoption of the First Amendment was the use of government power to foster or compel uniformity of religious thought and practice." Madison did speak of the evil of religious compulsion, but it is not clear that he was especially concerned with *uniformity*. Madison's recorded comment that he was opposed to compelling men to worship God "in any manner contrary to their conscience" equally applies to state compulsion of one religion or state compulsion of a multiplicity of religions. Madison's concern about religious compulsion, in other words, was primarily directed at the impropriety of state religious coercion as such, not merely the coercion of a single religion. Legal coercion of religion was

Madison's mischief, not coercion of religious uniformity.[81] Equally, if not more importantly, Madison did not drive the final stages of Establishment Clause's drafting. Samuel Livermore and other New England Congressmen did, and they were primarily concerned with affirming federalism and protecting their own states' church-state arrangements from federal interference. The Establishment Clause, as I believe the record makes clear, was not adopted to remedy the mischief of compelled religious uniformity.[82]

81. As I have argued elsewhere, Madison's principle of religious liberty pertains to the state's absence of jurisdiction over religious exercises as such. *See* Vincent Phillip Muñoz, *Response to Jonathan Ashbach*, 85 REV. POL. 349–51 (2023); *see also* Vincent Phillip Muñoz, *James Madison's Political Science of Religious Liberty*, AM. POL. THOUGHT, Fall 2021, at 552–576; Vincent Phillip Muñoz, *Two Concepts of Religious Liberty: The Natural Rights and Moral Autonomy Approaches to the Free Exercise of Religion*, AM. POL. SCI. REV., May 2016, at 369–81; Vincent Phillip Muñoz, *James Madison's Principle of Religious Liberty*, AM. POL. SCI. REV., Feb. 2003, at 17–32.

82. One could try to connect the articulated concerns about federalism with compelled uniformity, but at best it would be a stretch. The argument would go something like this: During the ratification debates, some Anti-Federalists expressed fear that the strength of the new national government would lead to "consolidation" and, in particular, the compelled uniformity in religious belief through an exclusive national establishment of a single sect or denomination. *See*, *e.g.*, *Letters of Agrippa XII*, MASS. GAZETTE, January 11, 1788, *reprinted in* 4 COMPLETE ANTI-FEDERALIST 94 (Herbert J. Storing, ed., 1981); MUÑOZ, RELIGIOUS LIBERTY, *supra* note 32, at 130–34. That fear was channeled by Benjamin Huntington and a few other influential Congressmen who sought to ensure that an adopted amendment would not interfere with state-level church-state arrangements. In this way, the Framers' commitment to federalism reflects an underlying concern with compelled uniformity of religious thought and practice.

Let me be clear that Chapman and McConnell do not make the argument just outlined, perhaps because it does not really work. To interpret the concern with federalism as more deeply reflecting a concern with compelled religious uniformity is not true to the position of those who sought to protect federalism. Those who argued for federalism in church-state matters were not opposed to compelled religious uniformity at the state level. They only were against compelled uniformity throughout the entire nation. Akhil Amar summarizes their position as follows:

> The possibility of national control over a powerful intermediate association [churches] self-consciously trying to influence citizens' worldviews, shape their behavior, and cultivate their habits obviously struck fear in the hearts of Anti-Federalists. Yet local control over such intermediate organizations seemed far less threatening, less distant, less aristocratic, less monopolistic—just as local banks were far less threatening than a national one, and local militias far less dangerous than a national standing army. Given the religious diversity of the continent—with Congregationalists dominating New England, Anglicans down south, Quakers in Pennsylvania, Catholics huddling together in Maryland, Baptists seeking refuge in Rhode Island, and so on—a single national religious regime would have been horribly oppressive to many men and women of faith; local control, by contrast, would allow dissenters in any place to vote with their feet and find a community with the right religious tone.

AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 45 (1998).

A review of the Establishment Clause drafting records does not substantiate—and, if anything, undercuts—two of Chapman and McConnell's more significant historical claims in the first part of *Agreeing to Disagree*: that virtually everyone knew what constituted an establishment of religion at the time of ratification and that the "the true evil" contemplated at the adoption of the First Amendment was "the use of government power to foster or compel uniformity of religious thought and practice" (p. 10).

THE PROCESS OF DISESTABLISHMENT IN THE STATES

Fortunately, these evidentiary shortcomings ultimately do not matter for Chapman and McConnell's larger argument. Neither their review of English and colonial American history nor their account of the drafting record are essential to the Establishment Clause construction they present in the second half of their book. To provide the text's operative legal meanings, they turn to the debates over disestablishment in the states, which is the subject of Chapter 3. These state debates, Chapman and McConnell claim, "offer the best evidence of what the Founding era meant by 'establishment of religion'" (p. 42).

Chapman and McConnell's turn to the states makes good sense, as the most important church-state matters primarily were state matters at the time of the Founding. The period between 1776 and 1786, moreover, was a remarkable time of constitution writing. Eleven states drafted constitutions, and several states also drafted declarations of rights. Though they did not necessarily set forth legally enforceable provisions, these declarations of rights offer an authoritative source for the Founders' political thinking, including their natural rights philosophy of religious freedom.[83] Importantly, Chapman and McConnell do not limit their state investigations to Virginia, thus avoiding a repetition of the *Everson* Court's unfortunately truncated version of Founding-era church-state relations.

When they turn to the Founding-era states, however, Chapman and McConnell make a subtle methodological move that some originalists might have trouble accepting. They derive a list of six disestablishment elements from the process of state

83. *See* Vincent Phillip Muñoz, *Church and State in the Founding-Era State Constitutions*, AM. POL. THOUGHT, Winter 2015, at 3–7 [hereinafter, Muñoz, *Church and State*].

disestablishment of religion that extends from 1776 until 1833, the year that Massachusetts disassembled its system of state financing of religion.[84] They then use their disestablishment list to determine the Establishment Clause's meaning.

Chapman and McConnell's two lists, to repeat, are as follows:

Establishment Elements

- Government control over doctrine, governance, and personnel of the church
- Compulsory church attendance
- Financial support
- Prohibitions on worship in dissenting churches
- Use of church institutions for public functions
- Restriction of political participation to members of the established church

Disestablishment Elements

- Autonomy of churches with respect to their doctrine, liturgy, and personnel
- Repeal of compulsory religious attendance
- Abolition of religious taxes
- Free Exercise and/or liberty of conscience
- Stripping the formerly established church of any exclusive public prerogatives or functions
- Denominational equality

In some cases, the disestablishment element serves as a direct remedy for its equivalent establishment element. Repealing compulsory religious attendance laws negates laws that compel church attendance. In other cases, however, the disestablishment element shades or modifies the establishment element. In these instances, the meaning of Chapman and McConnell's disestablishment Establishment Clause is provided primarily by post-ratification political history. Chapman and McConnell, in other words, do not use post-adoption history merely to clarify the original (if not fully appreciated) meaning embedded in the text at the moment of adoption. They use post-adoption history to create the Establishment Clause's meaning.

84. They note that by the mid-nineteenth century, many Americans also perceived that laws prohibiting blasphemy and enforcing sabbath observance had been components of a religious establishment (pp. 18–19).

Take the establishment element of "financial support" and the corresponding disestablishment element of "abolition of religious taxes." At the time of the Founding, the Founders disagreed about the propriety of taxpayer support of religion. Chapman and McConnell summarize the crux of the debate as follows:

> All agreed that the state has no business enforcing religious obligations, and all agreed that the state may tax for the support of the common good, but the two sides disagreed over whether taxes for the support of religious institutions fell in the former or the latter category (p. 70).[85]

When the Establishment Clause was adopted, the two sides disagreed whether tax support of religion should be prohibited and whether such support was properly classified as part of a religious establishment.[86] This is one of the reasons why the Framers sought to keep church-state matters at the state level and reaffirmed federalism when they adopted the Establishment Clause.[87] But because Connecticut, New Hampshire, and Massachusetts stopped assessing religious taxes in the early nineteenth century, Chapman and McConnell declare that religious taxation violates the Establishment Clause. As they themselves recognize, however, that view was not the universally accepted view in 1791. By deriving the meaning of the Establishment Clause from post-ratification politics, Chapman and McConnell effectively declare the anti-tax side the winner of the Founding-era debate and then graft that partisan view onto the Establishment Clause.

To grasp what was understood to constitute a religious establishment *when the Establishment Clause was adopted* would require a more exacting review of the Founding-era constitutions than Chapman and McConnell provide. I have attempted to provide that analysis elsewhere, but let me quickly highlight what it yields with a revealing example.[88] The North Carolina 1776

85. For an elaboration of the differences between what I term "narrow republicans" and "expansive liberals," see Chapter 4 of MUÑOZ, RELIGIOUS LIBERTY, *supra* note 32, at 88–115.

86. *See*, *e.g.*, Barnes v. The Inhabitants of the First Par. in Falmouth, 6 Mass. 401 (1810) (opinion of Parsons, C.J.).

87. For an elaboration of this argument, see MUÑOZ, RELIGIOUS LIBERTY, *supra* note 32, at 88–115.

88. *See* MUÑOZ, RELIGIOUS LIBERTY, *supra* note 32, at 23–67. 88–115; *see also* Muñoz, *Church and State*, *supra* note 83, at 1–38.

Constitution and the South Carolina 1778 Constitution used similar language to prohibit compelled financial support of religion.[89] Article 34 of the North Carolina Constitution also declared that "there shall be no establishment of any one religious church or denomination in this State, in preference to any other." The 1778 South Carolina Constitution, however, officially declared "the Christian Protestant religion" as "the established religion of this State."[90] It is plausible that in North Carolina, taxpayer funding of religion was prohibited to comply with the state's no-establishment provision. It is also plausible that North Carolina's state constitution included both a no taxpayer-funding-of-religion and a no-establishment provision because taxpayer funding was *not* considered an aspect of establishment.[91] (If it was so understood, the constitutional provisions would have been redundant.) Whatever the case was in North Carolina, in South Carolina religious establishments clearly were *not* associated with taxpayer funding of religion. The 1778 South Carolina Constitution both established a religion and prohibited taxpayer funding of it. It may be true, as Chapman and McConnell suggest, that taxpayer funding of religion was generally associated with religious establishments by 1833. But the evidence from the Founding-era North Carolina and South Carolina state constitutions does not evince a uniform understanding of the relationship between religious taxes and religious establishments. A more exhaustive account of the Founding-era state constitutions, which need not be repeated here, confirms the point more generally. When the First Amendment was adopted, some states considered religious establishments and taxpayer support of religion as distinct and unrelated categories.[92] As I have

89. North Carolina's 1776 Constitution read in part: ". . . nor [shall any person] 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; . . ." N.C. CONST. of 1776, art. XXXIV. South Carolina's 1778 Constitution provided: "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." S.C. CONST. of 1778, art. XXXVIII, para. 7.

90. S.C. CONST. of 1778, art. XXXVIII.

91. This is the surplusage canon: "If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." ANTONIN SCALIA & BRIAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174–80 (2011).

92. For further elaboration of this point, including evidence from other founding-era states, *see* Muñoz, *Church and State*, *supra* note 83, at 33–35; MUÑOZ, RELIGIOUS

concluded elsewhere, in the Founding-era state charters adopted immediately prior to the adoption of the Establishment Clause, "the term 'establishment' seems not to have been used in state charters to refer to constitutional rules pertaining to taxpayer funding of religion."[93] Chapman and McConnell elide the complications and disagreements that attend this Founding-era history by relying on the post-Founding-era settlement against religious taxation.

Chapman and McConnell make the same move in their transformation of the establishment element of "restriction of political participation to members of the established church" into the disestablishment element of "denominational neutrality." At the time of the adoption of the Establishment Clause, the equality in civil and political rights that denominational neutrality requires was not universally understood to be an aspect of non-establishment or religious freedom, though it may have become so a while after the Bill of Rights was adopted.[94] Again, a revealing example can illustrate the point. Article XIX of the 1776 New Jersey Constitution provided that "there shall be no establishment of any one religious sect . . . in preference to another." The same article then specified that "no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles" and, moreover, that only persons "professing a belief in the faith of any Protestant sect . . . shall be capable of being elected into any office of profit or trust. . . ." In Founding-era New Jersey, non-establishment did not mean denominational equality, religious neutrality, or non-discrimination in civil and political rights. Among the Founding-era states, New Jersey was not alone. The 1776 Delaware Constitution prohibited religious establishments,[95] but limited political office-holding to those willing to make a profession of "faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost."[96] It may be true, as Chapman and McConnell report, that at some point in time after the adoption of the Bill of Rights, denominational equality and the elimination of religious tests for office came to be associated with

LIBERTY, *supra* note 32, at 90–99.

93. MUÑOZ, RELIGIOUS LIBERTY, *supra* note 32, at 98.

94. *Id.* at 103–14.

95. DEL. CONST. of 1776, art. XXIX.

96. DEL. CONST. of 1776, art. XXII.

disestablishment. But the state constitutions immediately prior to the adoption of the Establishment Clause do not evince that understanding.

Chapman and McConnell's method of relying on post-ratification political history has the advantage of reaching relatively clear conclusions about what came to be accepted by many as a religious establishment, conclusions that many today likely would share. (Who now would advocate for the constitutionality of religious tests for office?) But their subtle move of deriving constitutional meaning from how disestablishment came to be understood by 1833 displaces the meaning of establishment at the time of the adoption of the Establishment Clause.[97]

This view depends, in large part, on one understanding of the proper use of history in constitutional jurisprudence. Some originalists may find Chapman and McConnell's reliance on post-adoption history to determine constitutional meaning to violate the Fixation Thesis, which holds that the meaning of a constitutional text is fixed when it is framed and ratified.[98] Along with the "Constraint Principle," which holds that the original meaning of the constitutional text should constrain constitutional practice, some originalists contend that the Fixation Thesis comprises one of the core ideas of originalist constitutional theory.[99]

97. A related but different issue, which I do not develop here, relates to how Chapman and McConnell's disestablishment elements may depart substantively from their establishment element counterparts. "Autonomy of churches with respect to their doctrine, liturgy, and personnel," may be related to, but is not necessarily the corresponding rule for, "government control over doctrine, governance, and personnel of the church." Government chaplains, for example, would seem to be incompatible with the establishment element of government control of church personnel but perhaps compatible with the disestablishment element of church autonomy. Church autonomy transforms a negative restriction against certain categories of state action into a positive right for non-state actions from application of particular laws. For Chapman and McConnell's discussions of the constitutional propriety of government chaplains, see pp. 98–99. For a discussion of the basic "negative" structure of constitutional rights, see Matthew D. Adler, *Rights against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1 (1998).

98. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015). For a discussion cautioning against "giving postenactment history more weight that it can rightly bear," see Justice Thomas's majority opinion in *New York State Rifle & Pistol Assn., Inc. v. Bruen*. 142 S. Ct. 2111, 2136–38 (2022).

99. Solum, *supra* note 98, at 1.

Chapman and McConnell's looseness with the Fixation Thesis is ironic, given their contention that the original meaning of "establishment" was clear at the time of the First Amendment's adoption. There would seem to be no need to rely on post-adoption history if the meaning of the text at the time of its adoption were clear. As Justice Thomas wrote in his majority opinion in *New York State Rifle & Pistol Association v. Bruen* (2022), "to the extent later history contradicts what the text says, the text controls. . . . Thus 'post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text.'"[100] Theories that use post-ratification history to establish constitutional meaning, moreover, presume that the text under consideration is indeterminate.[101] But Chapman and McConnell contend that the original meaning of "establishment" was clear at the moment of its adoption. They set forth that meaning and then proceed, at least to some degree, to ignore it in favor of an alternative meaning developed decades after the Establishment Clause was adopted. Even though, as Justice Amy Coney Barrett has noted, "scholars have proposed competing and potentially conflicting frameworks" regarding the "manner and circumstances in which post-ratification practice may bear on the original meaning of the Constitution,"[102] some originalists will find it hard to follow Chapman and McConnell's interpretive two-step of identifying the original meaning of an establishment and then displacing it with an alternative meaning of disestablishment.[103]

100. *Bruen*, 142 S. Ct. at 2137 (emphasis in original) (quoting Heller v. District of Columbia, 670 F. 3d 1244, 1274 n.6 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)). *See also* Espinoza v. Montana Dept. of Revenue, 140 S. Ct. 2246, 2258–59 (2020) ("we see no inconsistency in recognizing that such [post-ratification] evidence may reinforce an early practice but cannot create one") (cited by *Bruen* majority at 142 S. Ct. 2137).

101. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 13 (2019) ("The first premise of liquidation is an indeterminacy in the meaning of the Constitution.").

102. *Bruen*, 142 S. Ct. at 2162–63. Justice Barrett cites articles by Caleb Nelson, Michael McConnell, and William Baude; *see* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003); Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B. U. L. REV. 1745 (2015); William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 49–51 (2019).

103. The background of incorporation of the Establishment Clause via the Fourteenth Amendment informs this discussion but does not fundamentally affect the analysis. Most Establishment Clause scholars, including Chapman and McConnell, presume that the Fourteenth Amendment incorporates the Establishment Clause's original meaning to apply against the states (p. 77). They do not presume the Fourteenth Amendment

A POSSIBLE ORIGINALIST ESTABLISHMENT CLAUSE

For those who strictly adhere to the Fixation Thesis and those who believe that the Establishment Clause ought to be interpreted consistent with what can be known about the public meaning of "establishment" at the time of the adoption of the First Amendment, *Agreeing to Disagree* still can provide the basis of an originalist construction, though it would look somewhat different than Chapman and McConnell's disestablishment establishment clause. This originalist construction might start with their six elements of an historical establishment—the same six elements Justice Gorsuch highlighted in his *Shurtleff* concurrence—and sort them between the Establishment Clause and Free Exercise Clause. Compulsory church attendance and prohibitions of worship seem to fall squarely within the protections of the Free Exercise Clause.[104] Assuming this to be true, the originalism puzzle then consists of conceptualizing the other four elements into an account of religious establishment that coheres with the available historical evidence, within the constraints of the Fixation Thesis.

Perhaps the most obvious and relevant historical starting place is the 1778 South Carolina Constitution. As the only American constitution that textually declared an official religious establishment, it seems to provide unique insight into what at least some Framers thought constituted a religious establishment.[105] In the 1778 South Carolina Constitution, one finds constitutionally

incorporates an alternative meaning of establishment developed after the adoption of the Bill of Rights. If the Fourteenth Amendment incorporated a non-Founding-era meaning of establishment, an originalist would have to hold that the Establishment Clause's prohibition against Congress is substantively different than the Establishment Clause's prohibition against the states. Chapman and McConnell do not entertain such a view.

Their chapter on incorporation, rather, focuses on the propriety of incorporating the Establishment Clause via the Privileges and Immunities Clause instead of the Due Process Clause (pp. 75–84). A potential difficulty with that argument, which I merely mention here, is that the American tradition of understanding religious liberty to be a natural right belonging to all individuals rests uneasily with identifying the "privilege and immunity" of non-establishment as belonging only to citizens. Limitations on state action pertaining to religious establishments would seem to be equally applicable to citizens and non-citizens. This fact makes the text of the Privileges and Immunities Clause, which pertains only to citizens, problematic as the vehicle of incorporation of the Establishment Clause.

104. *See generally* chapter six in MUÑOZ, RELIGIOUS LIBERTY, *supra* note 32, at 183–213. For a discussion on ratification-era state constitutional provisions regarding compulsory church attendance, *see* Muñoz, *Church and State*, *supra* note 83, at 17–20.

105. The 1778 South Carolina Constitution provided: "The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State." S.C. CONST. of 1778, art. XXXVIII.

legislated relationships of privilege and control that map onto at least two of Chapman and McConnell's remaining four establishment elements.[106]

Article XXXVIII of the South Carolina 1778 Constitution legislated specific articles of faith to be accepted by each established church:

> 1st. That there is one eternal God, and a future state of rewards and punishments.
>
> 2d. That God is publicly to be worshipped.
>
> 3d. That the Christian religion is the true religion.
>
> 4th. That the holy scriptures of the Old and New Testaments are of divine inspiration, and are the rule of faith and practice.
>
> 5th That it is lawful and the duty of every man being thereunto called by those that govern, to bear witness to the truth.[107]

The same article also regulated how clergy were to be selected (democratically) and prescribed an oath-of-office-esque profession that all established ministers were required to declare.[108] Through specific acts of incorporation, moreover, the state regulated the amount and kind of income each established church could receive. The one and only constitutionally proclaimed religious establishment in America legislated Chapman and McConnell's first establishment element, government control over doctrine, governance, and personnel of the church.

106. The following discussion of the 1778 South Carolina Constitution is based upon my presentation of the same material in MUÑOZ, RELIGIOUS LIBERTY, *supra* note 32, at 242–250, 272–73.

107. S.C. CONST. of 1778, art. XXXVIII.

108. *Id*. Article XXXVIII provided:

> no person shall officiate as minister of any established church who shall not . . . have made and subscribed to the following declaration, over and above the aforesaid five articles, viz: "That he is determined by God's grace out of the holy scriptures, to instruct the people committed to his charge, and to teach nothing as required of necessity to eternal salvation but that which he shall be persuaded may be concluded and proved from the scripture; that he will use both public and private admonitions, as well to the sick as to the whole within his cure, as need shall require and occasion shall be given, and that he will be diligent in prayers, and in reading of the same; that he will be diligent to frame and fashion his own self and his family according to the doctrine of Christ, and to make both himself and them, as much as in him lieth, wholesome examples and patterns to the flock of Christ; that he will maintain and set forwards, as much as he can, quietness, peace, and love among all people, and especially among those that are or shall be committed to his charge."

South Carolina's establishment also extended specific privileges to established churches. From these privileges, we can specify the meaning of Chapman and McConnell's establishment element of "financial support" of religion. South Carolina effectively delegated its taxing power to churches. Legally established churches could utilize the state's coercive power to collect "pew assessments" and other financial obligations imposed on their members. And such assessments were not necessarily voluntarily agreed to by church members. South Carolina historian James Underwood explains:

> Even though the government did not impose the tax directly itself, it, in essence, delegated taxing authority to the incorporated, established churches when it permitted [in the particular act of incorporation], and made enforceable at law, assessments going beyond the terms of the pewholder agreement with the church.[109]

South Carolina's practice helps to clarify the specific type of financial support to religion associated with Founding-era religious establishments. Prohibiting an establishment did not mean, as Justice Rutledge claimed in *Everson v. Board of Education* (1947), "comprehensively forbidding every form of public aid or support for religion."[110] As already noted and as Chapman and McConnell helpfully discuss, many Americans at the time of the Founding thought tax support of religion legitimate insofar as the purpose and scope of such support was to foster the self-governing moral character necessary for republican government (pp. 69–74).[111] South Carolina's Founding-era establishment did something different. It delegated the state's taxing authority to churches. In New England states, which did not have specific constitutional language providing for an establishment, the state collected and distributed solely to churches specific religious taxes for the support of ministers and church facilities.[112] The delegation of state coercive power to

109. JAMES LOWELL UNDERWOOD, 3 THE CONSTITUTION OF SOUTH CAROLINA: CHURCH AND STATE, MORALITY, AND FREE EXPRESSION 70 (1992); *cf.* ELLIS M. WEST, THE FREE EXERCISE OF RELIGION IN AMERICA: ITS ORIGINAL CONSTITUTIONAL MEANING 202–03 (2019).

110. *Everson*, 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting).

111. *See also* Chapter Four in MUÑOZ, RELIGIOUS LIBERTY, *supra* note 32, at 88–124; Vincent Phillip Muñoz, *George Washington on Religious Liberty*, REV. POL., Winter 2003, at 10–33; Nathan S. Chapman, *Forgotten Federal-Missionary Partnerships: New Light on the Establishment Clause*, 96 NOTRE DAME L. REV. 677 (2020).

112. The 1780 Massachusetts Constitution did not establish an official religion, but it

churches and the exercise of the state's coercive power on behalf of churches alone are the types of financial-support practices that would fall under Chapman and McConnell's element of "financial support" (pp. 21–22).

The two remaining establishment elements from Chapman and McConnell's establishment list—use of church institutions for public functions and restriction on political participation to members of the established church—fall within the broader categories of government control of and exclusive privileges for churches, at least in some circumstances. We can conceptualize Chapman and McConnell's elements of historical establishments into what elsewhere I have labeled "state establishments" and "church establishments":[113]

- "State establishments": Government itself exercising the functions of an institutional church, including the regulation of internal church matters such as the content of doctrine and the selection of ministers;
- "Church establishments": Delegation of government's coercive authority to churches, especially in matters of taxation and financial contribution.

Consistent with the elements of historical establishments uncovered by Chapman and McConnell, we can construct the First Amendment's prohibition of laws "respecting an establishment of religion" as prohibiting both "state" and "church" establishments. I have presented a version of this Establishment Clause elsewhere, so there is no use for further

did grant the legislature the "power to . . . authorize and require, the several towns, parishes, precincts, and other bodies-politic or religious societies to make suitable provision, at their own expense, for the institution of the public worship of God and for the support and maintenance of public Protestant teachers of piety, religion, and morality in all cases where such provision shall not be made voluntarily." Additionally, the legislature could require subjects to attend specific religious services, and the "towns, parishes, precincts, and other bodies-politic, or religious societies" were given "the exclusive right" to elect public teachers of the Protestant religion. To top it off, "all moneys paid by the subject to the support of public worship . . . shall, if he require it, be uniformly applied to the support of the public teacher or teachers of his own religious sect or denomination, provided there be any on whose instructions he attends; otherwise it may be paid toward the support of the teacher or teachers of the parish or precinct in which the said moneys are raised." MASS. CONST. of 1780, art. III. This, according to John Adams, was "a most mild and equitable establishment." *See* MUÑOZ, RELIGIOUS LIBERTY, *supra* note 32, at 245 n.64 (quoting John Witte, Jr., *"A Most Mild and Equitable Establishment of Religion": John Adams and the Massachusetts Experiment*, 41 J. CHURCH & STATE 214 (1999)).

113. MUÑOZ, RELIGIOUS LIBERTY, *supra* note 32, at 246–48.

elaboration here.[114] Similar to the version put forth by Chapman and McConnell, my version would find state-orchestrated prayer in public school unconstitutional and find government support of religion for civic purposes constitutional. Unlike Chapman and McConnell's version, it would find government religious chaplains to be unconstitutional.[115]

Besides fidelity to the Fixation Thesis, the most significant difference between the two constructions lies in the conceptions of why the Establishment Clause came into being and what work it is conceived to do. In my recent book,[116] I have tried to present a construction of "establishment" consistent with the Founders' underlying natural rights political philosophy. It emphasizes jurisdictional boundaries that follow from the Founders' understanding of religious liberty as an inalienable natural right and the First Amendment's categorical prohibition that "Congress shall make *no* law . . ." Chapman and McConnell's establishment clause is much more attuned to contemporary concerns and more elegantly fits within our intellectual zeitgeist. Autonomy in the sense of self-determination—"living your best life" as my students like to say—is understood by many today to be constitutive of political liberty. Chapman and McConnell's embrace of autonomy as the underlying purpose of the Establishment Clause, moreover, includes embracing religious diversity, religious inclusion, and denominational equality. Perhaps as closely as one can in the context of church-state relations, they align the Establishment Clause with today's holy grail of diversity, equity, and inclusion. And they accomplish all this while still advancing outcomes that would be called conservative by most, with the noted exception of prayer in public schools.

Agreeing to Disagree elegantly blends the progressive value of autonomy with mostly conservative results. It invokes history and also speaks to the present moment. Chapman and McConnell may not get all of their history exactly right, and they may not comply with the rules of academic originalism, but they offer an

114. *Id*.

115. Chapman and McConnell's position on the constitutionality of government chaplains is a bit uncertain. They nod approvingly of government accommodations of religious exercises "even when the accommodations specifically target religion" (p. 116), but they also seem to have reservations about the constitutionality of legislative chaplains (p. 99).

116. *See* MUÑOZ, RELIGIOUS LIBERTY, *supra* note 32.

Establishment Clause that is broadly acceptable—including, I suspect, to six or seven members of the current Supreme Court. As I have tried to briefly sketch, they also provide the foundations for an Establishment Clause construction, slightly different from their own, which better coheres with recent originalist constitutional theory and the Fixation Thesis. Whatever path the Court next takes, *Agreeing to Disagree* will almost certainly have a sizeable influence on the Court's development of its next Establishment Clause doctrine.