

# Symposium

## The Maryland Constitutional Law Schmooze

### FOREWORD: OUR PARADOXICAL RELIGION CLAUSES

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The Establishment Clause may violate the Establishment Clause. The First Amendment declares, “Congress shall make no law respecting an establishment of religion.”<sup>1</sup> Little disagreement exists that statutes declaring “Baal is God” or asserting that people will suffer eternal damnation for eating peppermint ice cream are inconsistent with this provision, even if no one is forced to worship Baal or constrained from having peppermint ice cream. Under any reasonable interpretation of the First Amendment, government may not take sides in religious controversies or enshrine religious dogma as law. The Establishment Clause does exactly that. That provision takes one side in the religious controversy over the role of religion in a constitutional community. Some religions insist that God commands a sharp separation between church and state. Others insist that the state should promote the one true religion. The First Amendment plainly establishes the first dogma as the fundamental law of the land. Thus, the First Amendment paradoxically establishes a religious tenet in its effort to avoid establishment of religion.

The First Amendment paradox cannot be resolved by arguing that a ban on establishments would hardly work to forbid every law that coincides with some religious belief. Laws banning murder are constitutional, even though most religions also contain sharp strictures prohibiting homicide. Government decisions that use secular means to promote secular ends cannot be impeached merely because a religious believer might have religious reasons for supporting that policy. As the Supreme Court famously (or infamously) pronounced in *Lemon v. Kurtzman*,<sup>2</sup> government actions satisfy Establishment

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1. U.S. CONST. amend. I.
2. 403 U.S. 602 (1971).

Clause standards only if they “have a secular legislative purpose,” their “principal or primary effect . . . neither advances nor inhibits religion,” and they do “not foster an excessive government entanglement with religion.”<sup>3</sup> The Establishment Clause problem occurs because the history of the clause casts doubt on whether that provision had the constitutionally required “secular . . . purpose.” One prominent scholar insists that “the separation of church and state stands . . . as a political and religious development that manifests and reinforces Christian domination in American society.”<sup>4</sup> Certainly a good case can be made that the First Amendment litigation throughout American history fosters “an excessive government entanglement with religion.”<sup>5</sup>

The separation of church and state raised paradoxes from the beginning of American history. Roger Williams, often considered the person most responsible for the separation of church and state in America,<sup>6</sup> advanced only religious reasons when justifying free exercise rights and bans on establishment. The Preface to his *The Bloody Tenent of Persecution for Cause of Conscience* declared,

[T]he blood of so many hundred thousand souls of Protestants and papists, spilled in the wars of present and former ages for their respective consciences, is not required nor accepted by Jesus Christ the Prince of Peace.

. . . [P]regnant scriptures and arguments are throughout the work proposed against the doctrine of persecution for cause of conscience.

. . . .

. . . [A]ll civil states, with their officers of justice, in their respective constitutions and administrations, are proved essentially civil, and therefore not judges, governors, or defenders of the spiritual, or Christian, state and worship.

. . . [I]t is the will and command of God that, since the coming of his Son the Lord Jesus, a permission of the most paganish, Jewish, Turkish, or anti-Christian consciences and worships be granted to all men in all nations and countries, and they are only to be fought against with that sword which

3. *Id.* at 612–13 (internal quotation marks omitted).

4. STEPHEN M. FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE 5 (1997).

5. *Lemon*, 403 U.S. at 613 (internal quotation marks omitted).

6. For a brief discussion of Williams's influence on Establishment Clause theory, see Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1854–57 (2009).

is only, in soul matters, able to conquer, to wit, the sword of God's Spirit, the word of God.

. . . .

. . . God requires not a uniformity of religion to be enacted and enforced in any civil state; which enforced uniformity, sooner or later, is the greatest occasion of civil war, ravishing of conscience, persecution of Christ Jesus in his servants, and of the hypocrisy and destruction of millions of souls.

. . . .

. . . [A]n enforced uniformity of religion throughout a nation or civil state confounds the civil and religious, denies the principles of Christianity and civility, and that Jesus Christ is come in the flesh.

. . . .

. . . [T]rue civility and Christianity may both flourish in a state or kingdom, notwithstanding the permission of divers and contrary consciences, either of Jew or Gentile.<sup>7</sup>

James Madison was as concerned with promoting Christianity when he penned the *Memorial and Remonstrance Against Religious Assessments*,<sup>8</sup> a vitally important text for interpreting the First Amendment.<sup>9</sup> Madison in the *Memorial and Remonstrance* insisted on state neutrality between religions and between religion and non-religion. Following Williams, this neutrality had a decidedly non-neutral ambition. Both Madison and Williams agreed that establishment would subvert Christianity, properly understood and practiced. Madison wrote the following:

[W]e hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable

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7. ROGER WILLIAMS, *THE BLOODY TENENT OF PERSECUTION FOR CAUSE OF CONSCIENCE* 3–4 (Richard Groves ed., Mercer Univ. Press 2001) (1644).

8. JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), in *WRITINGS* 29 (Jack N. Rakove ed., 1999).

9. See, e.g., *Flast v. Cohen*, 392 U.S. 83, 103–04 (1968) (looking to the *Memorial and Remonstrance* as evidence that the Establishment Clause was designed as to guard against the "specific evil[ ]" of using tax dollars to promote one religion or religion in general); LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE* 227–28 (Univ. of N.C. Press 1994) (1986) (relying upon the *Memorial and Remonstrance* to refute an argument that the Establishment Clause may properly be disincorporated from the Fourteenth Amendment).

right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe.<sup>10</sup>

The foundation of religious freedom, this passage makes clear, “is the duty of every man to render to the Creator . . . only as he believes it to be acceptable to him.” Government should not compel persons to practice or contribute to religion, because such practices were inconsistent with Madison’s Christian understanding of the human good. Madison insisted that religious service was a duty owed to God, not the state:

Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to man, must an account of it be rendered.<sup>11</sup>

Coercion made religious leaders lazy and corrupt, by substituting state power for the power of the Lord’s word. The proposed assessment for religious teaching that inspired the *Remonstrance*, Madison claimed,

implies either that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: the second an unhallowed perversion of the means of salvation.<sup>12</sup>

Worse, he continued, religious establishments would weaken Christianity:

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10. MADISON, *supra* note 8, at 30.

11. *Id.* at 31.

12. *Id.* at 32.

[T]he policy of the Bill is adverse to the diffusion of the light of Christianity. The first wish of those who enjoy this precious gift ought to be that it may be imparted to the whole race of mankind. Compare the number of those who have as yet received it with the number still remaining under the dominion of false Religions; and how small is the former! Does the policy of the Bill tend to lessen the disproportion? No; it at once discourages those who are strangers to the light of revelation from coming into the Region of it; and countenances by example the nations who continue in darkness, in shutting out those who might convey it to them. Instead of Levelling as far as possible, every obstacle to the victorious progress of Truth, the Bill with an ignoble and unchristian timidity would circumscribe it with a wall of defence against the encroachments of error.<sup>13</sup>

These passages suggest that both the *Bloudy Tenent of Persecution* and the *Memorial and Remonstrance Against Religious Assessment* violate the Establishment Clause they inspired, at least if the *Lemon* test is in force. Both had a religious purpose and both insist that the likely impact of disestablishment will be to promote Christianity.<sup>14</sup>

The 2009 Maryland Constitutional Law Schmooze<sup>15</sup> on the Constitution and Religion is devoted to this and related constitutional paradoxes inherent in the effort to separate church and state. The papers by David Gray,<sup>16</sup> Lief Carter,<sup>17</sup> and David Bogen and Leslie Goldstein<sup>18</sup> highlight some paradoxes that result when constitutionalism is opposed to religion. The papers by Beau Breslin,<sup>19</sup> Samuel Levine,<sup>20</sup> and Henry Chambers<sup>21</sup> highlight other paradoxes that result when one thinks of a constitution as in some sense religious or informed by principles of religious interpretation. The papers by Marci

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13. *Id.* at 34–35.

14. *See supra* text accompanying notes 2–5.

15. For details on the nature of a Constitutionalism Schmooze, see Mark A. Graber, *Foreword: From the Countermajoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power*, 65 MD. L. REV. 1, 4 (2006).

16. David Gray, *Constitutional Faith and Dynamic Stability: Thoughts on Religion, Constitutions, and Transitions to Democracy*, 69 MD. L. REV. 26 (2009).

17. Lief H. Carter, *Like a Hole in the Head*, 69 MD. L. REV. 39 (2009).

18. David Bogen & Leslie F. Goldstein, *Culture, Religion, and Indigenous People*, 69 MD. L. REV. 48 (2009).

19. Beau Breslin, *Is There a Paradox in Amending a Sacred Text?*, 69 MD. L. REV. 66 (2009).

20. Samuel J. Levine, Miranda, Dickerson, and *Jewish Legal Theory: The Constitutional Rule in a Comparative Analytical Framework*, 69 MD. L. REV. 78 (2009).

21. Henry L. Chambers, Jr., *Biblical Interpretation, Constitutional Interpretation, and Ignoring Text*, 69 MD. L. REV. 92 (2009).

Hamilton,<sup>22</sup> Carol Nackenoff,<sup>23</sup> and Frederick Gedicks<sup>24</sup> highlight a third series of paradoxes that result when Americans attempt to combine into a comprehensive scheme the Establishment Clause and the Free Exercise Clause, the Establishment Clause and the Free Speech Clauses, or the Establishment Clause and every other clause in the Bill of Rights. I should cheerfully acknowledge that no paper consciously frames the analysis in terms of the paradoxes discussed above and below. All are well worth reading for their distinctive merits. Still, in the spirit of an introduction and the pseudo-Kantian spirit of the mind imposing order, one might note paradoxical religious clause themes underlying or perhaps haunting all the essays that follow.

## I. THE CONSTITUTION V. RELIGION

The separation of church and state implies that religion and government should and can occupy distinctive spheres of human existence. A pivotal figure in a prominent religious tradition asserted, “[g]ive to Caesar what is Caesar’s, and to God what is God’s.”<sup>25</sup> Determining what “is Caesar’s” and what “is God’s” is, however, controversial. Religious communities have very different understandings of what constitutes religious practice and what constitutes religion. Government in attempting to separate church and state must inevitably take sides in debates over what constitutes religion and the precise boundaries between state and church.

David Gray directly tackles the central Madisonian paradox, the question whether disestablishment is best conceptualized as an attempt to establish a certain kind of religious practice. He begins by observing that “religious and political authority have a tense relationship,”<sup>26</sup> and asserting his belief that religion “tops the charts as a source for abusive paradigms.”<sup>27</sup> Gray disputes, however, the notion that a state should seek somehow to cabin religion to a purely private sphere.<sup>28</sup> The pervasiveness of religion and religious believers is a fact of social life. Constitutional regimes order environments in which

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22. Marci A. Hamilton, *The Rules Against Scandal and What They Mean for the First Amendment’s Religion Clauses*, 69 MD. L. REV. 115 (2009).

23. Carol Nackenoff, *The Dueling First Amendments: Government as Funder, as Speaker, and the Establishment Clause*, 69 MD. L. REV. 132 (2009).

24. Frederick Mark Gedicks, *Atmospheric Harms in Constitutional Law*, 69 MD. L. REV. 149 (2009).

25. *Matthew* 22:21.

26. Gray, *supra* note 16, at 26.

27. *Id.* at 35; accord Carter, *supra* note 17, at 42 (“[R]eligion as a particular way of knowing and acting is inherently prone to violence.”).

28. Gray, *supra* note 16, at 28.

many people identify with various religious sects. “Constitutions,” Gray notes, “are bounded by context and it is hard to identify a cultural artifact more ubiquitous than religion.”<sup>29</sup> Rather than separate religion from government, constitutional designers must foster the sort of religious life conducive to democratic practices.<sup>30</sup>

Crucial to this endeavor is the integration of religion into what Robert Dahl calls a “modern dynamic pluralist society.”<sup>31</sup> Such a regime, Dahl declares, is characterized by “high average levels of wealth,” “great occupational diversity,” “economic growth,” and “numerous relatively autonomous groups and organizations.”<sup>32</sup> Gray similarly insists that “a robust multiplicity and variety of segmentary oppositional relationships allows societies to achieve and maintain stability.”<sup>33</sup> To this end, both constitutions in general and constitutional protections for religious life in particular “should encourage a flourishing diversity of religions as a mainstay of civil society.”<sup>34</sup> To begin with, as Madison noted in Federalist No. 10, the more factions (including, presumably, religious factions), the less likely any single faction will establish a tyranny.<sup>35</sup> More to the point, Gray sees religion as a vital tool for breaking down other social divisions. The rich and the poor rub elbows in the pews, as do the farmer and the cowboy, and, increasingly, people of different races and ethnicities. Gray notes how “most religions invite membership from a broad spectrum of individuals across other exclusive communities, thereby providing an important source for cross-secting association.”<sup>36</sup>

Gray’s intriguing bottom line is that Religion Clauses in constitutions are better conceptualized as establishing a certain religious environment than promoting neutrality between religions or between religion and non-religion. He favors constitutional practices that prevent “a single religion [from] achiev[ing] dominance as the definitive marker of national identity.”<sup>37</sup> So understood, Gray’s ideal Establishment Clause is decidedly non-neutral. He speaks of “religion properly channeled,”<sup>38</sup> a phrase that clearly implies a major constitutional role in the construction of the religious life in a constitutional community.

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29. *Id.* at 27 (footnote call number omitted).

30. *See id.* at 28.

31. ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 251 (1989).

32. *Id.*

33. Gray, *supra* note 16, at 30.

34. *Id.* at 28.

35. THE FEDERALIST NO. 10 (James Madison); Gray, *supra* note 16, at 33.

36. Gray, *supra* note 16, at 37.

37. *Id.* at 29.

38. *Id.* at 37.

If government does not promote pluralism in the alleged private sphere, Gray realizes, societies will soon be characterized by the homogeneity in the public sphere that threatens democratic order. Madison would have understood the sense in which Gray's view of a constitution regards constitutional neutrality between religions as a means for establishing particular forms of religious life.

Lief Carter's paper also grapples with the central Madisonian paradox. He begins by defending a sharp conceptual distinction between church and state, boldly asserting that "[u]nless . . . we seriously distort the definitions of 'religion' and 'constitutional democracy,' . . . effort[s] at reconciliation cannot meet basic tests of internal coherence, evidentiary credibility, and normative persuasiveness."<sup>39</sup> Constitutional democracy is committed to skepticism, to science, and to the give and take of electoral politics. Religion is committed to faith, to absolutism, and to utopian visions.<sup>40</sup> Not surprisingly, given this contrast, Carter initially concludes that "religion should have no place 'in,' as opposed to 'distinct from,' constitutional democracies."<sup>41</sup> The purpose of religion clauses is to cabin religious believers into a narrowly constructed private sphere.

The problem of religion and politics soon becomes more complex and more interesting. Carter in the second part of his paper suggests that "all claims to have reached universal and objective certainties are philosophically untenable."<sup>42</sup> This fundamental opposition is between democracy and all "isms" that inform devotees that they can know with absolute confidence the difference between good and evil. We need to "deliberately move away from truth-based habits of thinking, be they sectarian or secular, and toward open and skeptical ways of thinking," Carter writes.<sup>43</sup> Religion, from this perspective, is only one species of antidemocratic thought. In fact, religion may also play appropriate democratic functions. The United States contains a significant religious left, which, if not as publicly active in politics as the religious right, is composed of people who see their religious identity as consistent with a commitment to the skepticism Carter favors.<sup>44</sup> In short, religious believers and secular thinkers are on both sides of the divide Carter sees as structuring democratic engagements

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39. Carter, *supra* note 17, at 39.

40. *See id.* at 40.

41. *Id.* at 42.

42. *Id.* at 43.

43. *Id.*

44. *See generally* STEVEN H. SHRIFFIN, *THE RELIGIOUS LEFT AND CHURCH-STATE RELATIONS* (2009).



with religion. Democratic thinking, the approach to the First Amendment Carter develops in the last pages of his essay, fosters “good” as opposed to “bad” religious values.<sup>45</sup> This, of course, is decidedly non-neutral. One suspects Carter would not object that seriously to Madison’s version of Christianity. Madison may have believed with certainty that Christian doctrines were true, but he was as certain that believers could spread the faith only by persuading others.

David Bogen and Leslie Goldstein raise a related paradox when they point out that “[w]ith some indigenous Americans, the lines between culture, religion, and even government blur—challenging the Supreme Court’s assumptions about the Constitution.”<sup>46</sup> Neutral Religion Clauses quite obviously depend on a neutral definition of religion. Government can be neutral between Catholicism, Lutheranism, Judaism, Islam, and other related practices only if these “isms” have some common trait. The American constitutional tradition regards faith as the appropriate marker. The Supreme Court in numerous cases has urged that “[t]he freedom to hold religious beliefs and opinions is absolute.”<sup>47</sup> Bogen and Goldstein similarly maintain “[t]he essence of religion is belief.”<sup>48</sup> A strong case can be made, however, that this is a distinctively Christian notion of religion, and perhaps a notion of religion that characterizes particular Christian sects. A Christian may be defined as someone who accepts the ministry of Jesus Christ,<sup>49</sup> but a Jew is defined as someone with a Jewish mother. No belief is involved. Native American practice is also not neatly captured by Christian conceptions of religion. Bogen and Goldstein quote Justice Brennan’s dissent in *Lyng v. Northwest Indian Cemetery Protective Ass’n*, “Native American [ ] religion is not a discrete sphere of activity separate from all others, and any attempt to isolate the religious aspects of Indian life ‘is in reality an exercise which forces Indian concepts into non-Indian categories.’”<sup>50</sup> If this is correct, then the Supreme Court by defining religion as faith privileges some religious communities over others. The constitutional ban on religious establishments requires a definition of religion, but any definition of religion establishes the religious understanding of a particular community.

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45. Carter, *supra* note 17, at 45–46.

46. Bogen & Goldstein, *supra* note 18, at 48.

47. *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) (plurality opinion); *see also Reynolds v. United States*, 98 U.S. 145, 164 (1879) (“Congress was deprived of all legislative power over mere opinion, but was left free to reach actions . . .”).

48. Bogen & Goldstein, *supra* note 18, at 49.

49. *See Chambers*, *supra* note 21, at 96–97.

50. Bogen & Goldstein, *supra* note 18, at 56–57 (quoting *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 459 (1988) (Brennan, J., dissenting)).

This problem may be less acute with respect to Native Americans because Congress is not limited by the First Amendment when governing indigenous people, but other religious communities who reject the belief/action distinction may regard the ban on religious establishments as establishing a particularly Christian notion of religion. Consider Bogen and Goldstein's brief observation that "[a]lthough many religious groups proselytize, courts usually use freedom of speech analysis to judge the constitutionality of regulation."<sup>51</sup> Different religions have different attitudes towards proselytizing. Many Christian sects believe adherents have a religious obligation to proselytize. Most Jewish groups believe that religious believers should not proselytize. A Constitution that treats proselytizing as something beyond the Religion Clauses in effect privileges the ways that certain religious communities obtain members. More generally, a Constitution that relies on a distinction between the religious and secular is likely to privilege what the dominant religion regards as the line between religious and secular. As Stephen Feldman notes, "the principle of separation of church and state" in the United States "increases the likelihood that Christian-oriented governmental action will be labeled or coded as secular and therefore legitimated."<sup>52</sup>

## II. THE CONSTITUTION AS RELIGION

Treating the Constitution as religion or as a text that might be informed by religious perspectives raises a related set of paradoxes. The common view that the Constitution ought to be venerated<sup>53</sup> suggests that the First Amendment grants the civic religion of constitutionalism a spiritual monopoly by prohibiting the establishment of other faiths. The relevant analogy is the Biblical command, "You shall have no other gods before me."<sup>54</sup> Moreover, a Constitution that is sacred text confronts a problem as to the meaning of sacred. If, as noted in Part I of this Essay, the concept of religion is contested, then the concept of "sacred" is also likely to be contested. The sense in which the Constitution is regarded as sacred, therefore, is likely to privilege the concepts of some religious communities at the expense of others.

Beau Breslin tackles the numerous problems that result when the Constitution of the United States is treated as or analogized to sacred text. His essay highlights the tensions between the American under-

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51. *Id.* at 49.

52. FELDMAN, *supra* note 4, at 279.

53. *See generally* Breslin, *supra* note 19.

54. *Exodus* 20:3.

standing that the Constitution is sacred and Article V, which sets out the rules for amending the Constitution. Breslin first notes that “[t]o suggest that the Constitution is worthy of reverence is to suggest that it merits special, heightened, even religious, status.”<sup>55</sup> Already, the reader is walking a dangerous path. Breslin points out that “[t]he definition of reverence is tied up with the principle of faith, a largely unconfirmed . . . belief in the greatness of an object, text, person, or idea.”<sup>56</sup> When Breslin’s essay is read in conjunction with Carter’s insistence that religion is characterized by powerful commitments to unconfirmed beliefs,<sup>57</sup> then American constitutionalism is best understood as a religious alternative to Christianity or Judaism, rather than a distinctive form of social organization. The two-hundred-year effort to make the Constitution a venerated document, from this perspective, violates the Establishment Clause.

Related problems result when Breslin considers the sense in which religious texts can be amended. “If the Constitution is so worthy of reverence,” he ponders, “should it also be alterable?”<sup>58</sup> We cannot avoid this problem by noting most sacred religious texts have been amended in practice, even as contemporary believers insist they are reading the precise words delivered by the divinity during the moment of revelation.<sup>59</sup> Perhaps, as Breslin suggests, only the “broad contours and . . . central messages” of the Constitution “may be sacred,” permitting “the individual words, phrases, and clauses” to be “revis[ed] or modif[ied].”<sup>60</sup> One might argue, however, that the same distinction between the essential and ephemeral marks most religious traditions. Moreover, the notion that a sacred text cannot be amended may not characterize all religious faiths. Consider Noam Zohar’s claim that “halakhic Midrash is functionally equivalent to constitutional amendment.”<sup>61</sup> The claim that a sacred Constitution cannot be amended from this perspective establishes a certain Christian perspective on “sacred” as the fundamental law of the land.

The implicit conversation between Samuel Levine and Henry Chambers casts additional light on the establishment problems that result from treating constitutions in manners analogous to sacred texts. Each believes that insights from their religious tradition might

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55. Breslin, *supra* note 19, at 69.

56. *Id.* at 71.

57. See *supra* text accompanying notes 39–41.

58. Breslin, *supra* note 19, at 71.

59. *Id.* at 73–76.

60. *Id.* at 76.

61. Noam J. Zohar, *Midrash: Amendment Through the Molding of Meaning*, in *RESPONDING TO IMPERFECTION* 307, 307 (Sanford Levinson ed., 1995).

inform how crucial constitutional provisions should be interpreted. Levine “considers ways in which Jewish legal theory might elucidate the nature of the ‘constitutional rule’ delineated in *Miranda* [*v. Arizona*].”<sup>62</sup> Chambers tells a more Christian story of constitutional interpretation.<sup>63</sup> He analogizes the relationship between the Constitution of 1787 and the Constitution of 1868 to the relationship between what Christians refer to as the Old and New Testaments.<sup>64</sup> His essay “considers how a particular vision of Christian biblical interpretation can inform constitutional interpretation.”<sup>65</sup>

Levine suggests how a Jewish perspective might inform debates over whether *Miranda* warnings are inherent in the Constitution or merely judicial guidelines for ensuring that confessions meet constitutional standards.<sup>66</sup> This issue lay at the heart of the Supreme Court’s opinion in *Dickerson v. United States*.<sup>67</sup> If the Supreme Court in *Miranda* was elaborating on the meaning of the Fifth Amendment’s ban on self-incrimination, then Congress had no power to legislate alternative rules for determining when confessions were voluntary.<sup>68</sup> If, however, *Miranda* warnings are merely devices for promoting compliance with constitutional rules, then Congress had far greater authority to provide different standards for determining what confessions could be introduced during criminal trials.<sup>69</sup>

Levine points out that similar problems occur in Judaism when determining whether a law is “d’oraita,” “based in the biblical text and its interpretation,” or “d’rabbanan,” mere rabbinic legislation.<sup>70</sup> The distinction matters for the same reason the difference between constitutional interpretation and prophylactic rules matter. “[B]iblical laws are of Divine origin and command, and thus are inherently justified as a manifestation of Divine will,”<sup>71</sup> Levine writes. By comparison, he notes, “[r]abbinic legislation . . . serves the express prophylactic purpose of safeguarding compliance with biblical laws.”<sup>72</sup> Hence, the authority of interpretations, whether constitutional or biblical, is greater

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62. Levine, *supra* note 20, at 79.

63. See generally Chambers, *supra* note 21.

64. *Id.* at 93.

65. *Id.* at 92.

66. See generally Levine, *supra* note 20.

67. 530 U.S. 428 (2000).

68. See *id.* at 437.

69. See *id.*

70. Levine, *supra* note 20, at 85.

71. *Id.* at 86.

72. *Id.*

than the authority of legislation, whether secular or religious, that merely seeks to promote obligations.

After a learned exegesis on Jewish rules for working on Sabbath, Levine concludes that *Miranda* is best treated as a distinctive form of interpretation.<sup>73</sup> From the perspective of Jewish practice, *Miranda* is “d’oraita” because the rules are derived from an interpretation of the Fifth Amendment, but an instance where an interpretation is “derived through a process that more closely resembles judicial legislation.”<sup>74</sup>

Chambers takes as his texts possible differences between the Constitution drafted in Philadelphia in 1787 and the post-Civil War Constitution. His paper provides a fascinating analogy between the Old and New Constitutions and the Old and New Testaments. “If the Civil War can be likened to Christ’s coming,” he writes, then “the Reconstruction Amendments . . . can be analogized to Christ’s ministry and teaching.”<sup>75</sup> When contradictions exist between the Old and New Testaments, Christians are governed by the New Testament. Chambers writes, “[t]o the extent that the New Testament breaks with Old Testament teaching and interpretation, the parts of and practices in the Old Testament that are fundamentally inconsistent with Christ’s teaching can be ignored.”<sup>76</sup> He then reinterprets the Civil War as a Christ story that warrants an analogous ordering of “sacred” constitutional texts. “The Reconstruction Amendments can be considered a partial fulfillment of the equality principles presented in the Declaration of Independence and the pre-Civil War Constitution,” Chambers writes, “or a complete break from the past.”<sup>77</sup>

Possible paradoxes may result when Christians consider Levine’s method of constitutional interpretation and when Jews attempt to see the Constitution through Chambers’s interpretation of American history. Religious methods of interpretation are likely to be deeply entwined with religious world views. Chambers’s claim that the United States has experienced two dramatic moments of constitutional transformation reflects a Christian sensibility that human beings have experienced two dramatic moments of revelation. Levine’s emphasis on rabbinic interpretation bespeaks of a tradition in which the proper interpretation of constitutional and religious scripture unfolds over time. One cannot use Jewish or Christian methods for interpreting

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73. *Id.* at 88.

74. *Id.*

75. Chambers, *supra* note 21, at 106.

76. *Id.* at 98.

77. *Id.* at 107.

the Constitution, these observations suggest, without privileging Jewish or Christian world views in violation of the Establishment Clause.

### III. THE ESTABLISHMENT CLAUSE V. THE REST OF THE CONSTITUTION

Different paradoxes and dilemmas occur when Americans attempt to integrate the Establishment Clause with the rest of the Constitution. The complex relationship between the Establishment and Free Exercise Clauses is well known. When considering whether religious believers should enjoy exemptions from otherwise general laws, government officials may have the unhappy option of violating the Establishment Clause by providing special benefits to religion or the Free Exercise Clause by burdening religious faith.<sup>78</sup> The religion and speech provisions of the First Amendment have similarly not achieved harmonic convergence. The Constitution permits government to speak on non-religious affairs, but not on religious matters, a distinction that raises previous questions about whether any definition of religion necessarily establishes a particular religious conception of religion. Finally, the Religion Clauses may not sit well with the constitutional order. Constitutional law has traditionally assessed harms differently when analyzing claimed Establishment Clause violations than when analyzing other purported constitutional wrongs. Again, government seems to be in the position of having to act in a manner that simultaneously preserves and violates the constitutional ban on establishments.

Marci Hamilton highlights a less recognized dilemma inherent in the choice between whether to emphasize establishment or free exercise values.<sup>79</sup> Many Americans, concerned with religious minorities, insist on strong constitutional protections for religious believers they believe are vulnerable to majoritarian tyranny. Hamilton maintains such judicial protections may be unnecessary. “‘Minority’ and even hated religions have done quite well in the legislative process,” she points out, “from widespread peyote exemptions for Native American Church members . . . to child medical neglect exemptions for Christian Scientists and other faith-healing religions.”<sup>80</sup> Hamilton then reminds readers that tyranny may take place in small religious groups as well as large democratic legislatures. Doctrines that insulate religious

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78. See *Sherbert v. Verner*, 374 U.S. 398, 413, 416 (1963) (Stewart, J., concurring in the result) (finding the case to present a “double-barreled dilemma” that requires the Court to “face up to the . . . conflict between the Free Exercise Clause of the Constitution and the Establishment Clause as interpreted by the Court”).

79. See generally Hamilton, *supra* note 22.

80. *Id.* at 117.

figures from public scrutiny, she details, help keep abusive practices from the public eye.<sup>81</sup>

A central lesson the Hamilton paper teaches is that no approach to the Religion Clauses will leave all minorities protected from abusive practices. Hamilton notes “the very real potential that constitutional doctrine,” which emphasizes the free exercise side of the free exercise/establishment divide, “might work hand in glove with hiding and perpetuating abuse of the vulnerable.”<sup>82</sup> A state that does not interfere in religious affairs may both enable religious communities to appoint adherents to leadership positions and hide child molestation from prosecutors. Most religious groups have strong norms against airing dirty laundry in public.<sup>83</sup> These norms will gain constitutional status should courts find that the Free Exercise Clause generally forbids government from violating the “autonomy” of religious organizations.<sup>84</sup> One consequence of such efforts not to foster an excessive entanglement of church and state, Hamilton concludes, is “ensur[ing] that the vulnerable . . . may not receive the protection they need . . . guarantee[ing] not only that the organization’s reputation is not defiled but also that a cycle of abuse or mistreatment is fueled.”<sup>85</sup> The main lesson her paper teaches seems to be that some entanglement is necessary. Which entanglements are necessary may well depend on contested beliefs about which religious minorities are in most need of protection from which institutions.

Similar problems result when the Religion Clauses of the First Amendment come into contact with the Speech Clauses. In sharp contrast to the Religion Clauses, which place both free exercise and establishment restrictions on government power, the Speech Clauses have only a free exercise component. Government may freely participate in the marketplace of ideas, subject only to the restriction that government speech not completely displace the marketplace of ideas. Given the omnipresence of government funding, state officials are quite clearly influencing the marketplace of ideas when government uses funds to promote its message. Mere influence is presently constitutionally uncontroversial. Nevertheless, as Carol Nackenoff points out, the difference between a secular and religious message is hard to

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81. *See id.* at 118.

82. *Id.* at 121.

83. *See id.* at 122–26 (detailing the “scandal rule” at play in religious institutions).

84. *See id.* at 127–29 (describing the theory of religious “autonomy” that religious institutions exploit as a defensive legal tactic).

85. *Id.* at 120.

discern.<sup>86</sup> Her paper observes how “[t]he government speech doctrine, First Amendment case law on government as funder, and the current reading of the Establishment Clause are combining into a perfect storm” in which constitutional decisions on free speech matters may obliterate the constitutional prohibition on establishment.<sup>87</sup>

Nackenoff points to numerous constitutional doctrines that may enable government to promote sectarian doctrines and organizations inconsistently with basic constitutional norms. The first is standing. A judicial plurality is increasingly prone not to find that plaintiffs have suffered injury when government takes steps that arguably violate the Establishment Clause. In *Hein v. Freedom From Religion Foundation*,<sup>88</sup> the Supreme Court ruled that taxpayers could not challenge Bush Administration decisions to fund various faith-based initiatives.<sup>89</sup> Nackenoff places particular emphasis on Justice Kennedy’s assertion that “[t]he Executive Branch should be free, as a general matter, to discover new ideas, to understand pressing public demands, and to find creative responses to address governmental concerns.”<sup>90</sup> This effort to think of government funding for religion in light of free speech values, Nackenoff fears, could provide the Executive Branch or Congress with “broad opportunities to rewrite the boundaries of church-state relations.”<sup>91</sup> The logic is simple. If we perceive funding for faith-based initiatives as “government speech,” that practice is now judged in light of “precedents involving government as funder.”<sup>92</sup> These precedents suggest that the Constitution requires government to fund religious viewpoints when government creates a public forum, but that government may also choose selectively to fund a particular viewpoint.<sup>93</sup> Combining these two points, Nackenoff suggests the possibility that “government expenditure in furtherance of a religious viewpoint” may be constitutional under Rehnquist/Roberts Court doctrine.<sup>94</sup> Government may not promote religion under the Establishment Clause, her analysis suggests, but presently may promote religious viewpoints under the Free Speech Clause.

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86. See generally Nackenoff, *supra* note 23.

87. *Id.* at 148.

88. 551 U.S. 587 (2007) (plurality opinion).

89. *Id.* at 592–93.

90. Nackenoff, *supra* note 23, at 132 (quoting *Hein*, 551 U.S. at 616 (Kennedy, J., concurring)).

91. *Id.* at 137.

92. *Id.* at 138.

93. *Id.* at 138–40.

94. *Id.* at 140.



The Establishment Clause is not better integrated with the rest of the Constitution than with either the Free Exercise Clause or the Free Speech Clause. Frederick Gedicks points out that contemporary American constitutional law is normally hostile to what he refers to as “atmospheric harms.”<sup>95</sup> Such harms “consist[ ] of the knowledge that one’s essential identity or core beliefs or practices are not approved by the majority, even though they are not prohibited or penalized or even regulated by it.”<sup>96</sup> Persons suffer such ills, for example, when the government permits such human relationships as same sex-marriage that are abominations from the perspective of their religious belief.<sup>97</sup> Gedicks notes that outside the First Amendment, “atmospheric harms generally have not fared well in constitutional litigation.”<sup>98</sup> Jackson, Mississippi, could close all swimming pools in order to prevent integration, because the municipality’s discriminatory purpose did not have a discriminatory impact.<sup>99</sup> Religion is different. “In contrast to the rest of constitutional rights law,” Gedicks points out, “the Establishment Clause is sympathetic to atmospheric claims.”<sup>100</sup> He notes that under *Lemon v. Kurtzman*, “state action lacking a plausible secular purpose violates the Establishment Clause, even when such legislation does not appear to constrain or coerce individual actions.”<sup>101</sup> Justice O’Connor’s “endorsement test”<sup>102</sup> is another example of an Establishment Clause doctrine that has no analogue in the rest of the Constitution.<sup>103</sup> That Jews may perceive a crèche as signifying their outsider status matters to constitutional law,<sup>104</sup> but African-American perceptions that pool closings reflect white supremacy remain constitutionally invisible.

The different treatment of atmospheric harms in constitutional law raises anew the paradox of establishment. On one hand, the ban on government speech that endorses religion implements the constitutional prohibition against establishment. On the other hand, by permitting religious persons, but not persons of color, to object to

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95. See generally Gedicks, *supra* note 24.

96. *Id.* at 151.

97. *Id.* at 150.

98. *Id.* at 155.

99. See *id.* (citing *Palmer v. Thompson*, 403 U.S. 217 (1971)).

100. *Id.* at 157.

101. *Id.*

102. See *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring) (“The . . . more direct infringement is government endorsement or disapproval of religion.”).

103. Gedicks, *supra* note 24, at 158–59.

104. See *Lynch*, 465 U.S. at 688 (“Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community . . .”).

atmospheric harms, the same rules grant religious believers a special status in constitutional law. Governmental officials, the analysis suggests, cannot choose to honor the Establishment Clause, but may only choose which way to violate that provision.

#### IV. AGAINST NEUTRALITY

Government cannot be neutral between religions or between religion and irreligion in some comprehensive sense. The papers for the 2009 Schmooze demonstrate that every theory of the Establishment Clause attempts to promote constitutionally appropriate religious communities, relies on religiously contested notions of religion, and makes choices between the Establishment Clause and other constitutional values. Lacking neutral grounds on which to stand, all Americans can do is defend the contested values they believe will best integrate religious communities in a democratic polity. The following essays provide outstanding defenses of what those values might be.