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Religious Liberty and the American Founding: Natural Rights and the Original Meanings of the First Amendment Religion Clauses.

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Originalism is having a moment at the United States Supreme Court. Even progressive justices declare that the US Constitution's text, as it would have been understood publicly at the time of its adoption, should constrain them as they decide cases. True, disagreement exists on some important questions: Does a constitutional provision contemplate a concrete rule or a broad principle requiring "construction"?[1] Should the drafters' expected applications of the text matter?[2] What is the relevance of tradition in determining constitutional meaning?[3] Should the court overrule existing, non-originalist decisions or adhere to them as a matter of *stare decisis*?[4] The justices (and scholars) differ on all these matters. But nearly everyone agrees that the original meaning of the constitutional text—assuming one can discern it—should make a difference, somehow. "[I]n that sense," as Justice Elena Kagan famously explained, "we are all originalists."[5]

Vincent Phillip Muñoz's erudite and engaging new book, *Religious Liberty and the American Founding: Natural Rights and the Original Meanings of the First Amendment Religion Clauses*, thus comes at an opportune time. Muñoz, the Tocqueville Professor of Political Science and Concurrent Professor of Law at Notre Dame, sets out to uncover the original meaning of the religion clauses of the First Amendment. He has good news and bad news. First, the bad news: "no clear, unambiguous, original public meaning" of the terms, "establishment" and "free exercise" of religion, exists (289). The framers disagreed about what, exactly, those terms signified, and they did not think it necessary or advisable to resolve matters. The text of the

[1] See Keith Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge, MA: Harvard University Press, 1999).

[2] Lawrence B. Solum, "Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record," *Brigham Young University Law Review* 2017, no. 6 (2017): 1621–82, at 1637.

[3] Marc O. DeGirolami, "The Traditions of American Constitutional Law," *Notre Dame Law Review* 95, no. 3 (2020): 1123–82.

[4] See John O. McGinnis and Michael B. Rappaport, "Reconciling Originalism and Precedent," *Northwestern University Law Review* 103, no. 2 (2009): 803–56.

[5] *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing before the Committee on the Judiciary*, 111th Cong. 62 (2010) (statement of Elena Kagan).

religion clauses cannot be used to determine the outcome of many church-and-state disputes.

The good news is that the framers' generation shared a common understanding about religious liberty that informs a reading of the text they adopted. The framers believed that religious liberty was an inalienable, natural right, concerned, at its core, with worship. That common understanding allows for what Muñoz describes as a plausible construction of the original meaning of the religion clauses—an assignment of meaning "consistent with what we can discern about the text's original meaning" (289). Muñoz maintains that a natural-rights construction can help resolve several current controversies, including fights over religious accommodations, church autonomy, government-sponsored prayer and religious displays, and state funding for religious institutions. Muñoz does not advocate any of the solutions, particularly, or even, although he is obviously sympathetic to it, originalism generally. To the extent people care about original meaning, though—and, again, most of the justices say they do, at least in some sense—he hopes to show what the best construction of the original meaning would entail for the religion clauses. (Muñoz accepts for the sake of argument the court's conclusion that the Fourteenth Amendment incorporates the religion clauses, though he acknowledges the tension with applying the establishment clause against the states, and he takes no position on whether the court's conclusion is correct as an original matter.)

Religious Liberty and the American Founding is a pleasure to read. Muñoz writes well and exceptionally clearly, and his book will appeal both to the educated public and to constitutional lawyers and scholars who spend their time immersed in doctrinal debates. He offers a wealth of detail on the drafting and ratification of the religion clauses. And the story he tells is a persuasive one. History is argument without end,[6] but Muñoz's basic point that the framers disagreed on the precise meaning of establishment and free exercise in the First Amendment but understood those terms in light of their background conception of religious liberty seems entirely plausible. Precisely because the framers could not agree on what the natural right of religious liberty itself entailed with respect to specific government policies, though, it is not clear how helpful a natural-rights construction of original meaning can be in resolving specific constitutional disputes.

Muñoz observes—a key insight—that the First Amendment was a political document. Ratification of the constitution had been a close-run thing, with many Anti-Federalists insisting that the charter include a Bill of Rights limiting the powers of the new national government. Fearing calls for a second constitutional convention that would undo their work, the Federalists who controlled the First Congress went along, but their hearts were not in it. As Muñoz explains, Federalists thought a Bill of Rights was a distraction from more important things and "felt no pressing need" to craft definitive language (178). This resulted in "a deeply ironic and still underappreciated situation: the Bill of Rights was drafted by partisans who thought amendments were unnecessary," and occasioned only "relatively sparse debates" with respect to what it all meant (188). For example, with respect to the religion clauses, the congressional record does "not reveal a substantive discussion about what constituted an establishment of religion" (177). Similarly, "[n]o member of Congress articulated what he understood by 'free exercise'" or why the words "rights of conscience" disappeared from the final version of the text (197). The ratification history in the states does not make things more definitive.

The lack of debate did not reflect agreement. Muñoz shows that establishment and free exercise of religion each could mean a variety of things in 1791; people differed on specifics.

[6] This phrase is typically attributed to Dutch historian Pieter Geyl. See Allison Orr Larsen, "Factual Precedents," *University of Pennsylvania Law Review* 162, no. 1 (2013): 59–116, at 106n264.

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The religion clauses thus do not admit of a single, original understanding. Nonetheless, he argues, one can plausibly "construct" the original meaning of the religion clauses by focusing on the shared principle the framers sought to advance. (Muñoz adopts current academic argot in referring to what he is doing as "construction" rather than "interpretation" (12), but scholars of contracts and legislation will recognize the method as old-fashioned purposive interpretation, which reads a legal text to effectuate the purposes revealed by the text's language, structure, and evident goals.)[7] The religion clauses must be read in light of the framers' shared commitment to religious liberty, which they understood as a natural, inalienable, individual right focused on worship.

Muñoz shows that the framers derived this right from an "'overlapping consensus'" of "reason and revelation" (17). For example, James Madison's famous Memorial and Remonstrance, written during the Virginia assessment controversy in the mid-1780s, employs both Enlightenment and Evangelical arguments for religious liberty. And the framers agreed that, at its core, the right protected individuals from government interference with the worship of God as one's conscience dictated. Government could not legitimately compel worship "as such" (67). Religious liberty was not absolute, of course. Like other natural rights, it had natural limits. The framers understood the government had authority to restrain religious liberty to protect the natural rights of others—and the legitimate interests of the collective society.

Where to draw the line in specific cases was a matter of debate. Although the framers agreed on the core principle of religious liberty, Muñoz writes, "they disagreed about the proper separation of church and state" (14). Consider the Virginia assessment controversy. Muñoz shows that both Patrick Henry, who supported tax assessments to pay ministers, and Thomas Jefferson, who opposed them, agreed that religious liberty was a natural right. They differed on whether the state could legitimately compel citizens to pay taxes to support clergy, even on a non-preferential basis. For Henry and other "[n]arrow republicans" (117), Virginia could fund ministers to promote public morality—an obviously legitimate collective interest. Jefferson and other "[e]xpansive liberals" (117) disagreed. The expansive liberals prevailed in Virginia, but that does not mean that the issue was settled more generally. Massachusetts continued to have a non-preferential establishment for decades.

Notwithstanding disagreements such as these, Muñoz maintains that a natural-rights construction, focused on the core of worship as such, can resolve current church-state controversies. The results will please conservatives some of the time and progressives some of the time—but neither group all of the time. For example, "[t]he natural rights construction would allow the state to fund religion," including private religious education, "as a means to foster legitimate state ends" (276), for example, instruction in non-religious subjects. Similarly, the state could display religious symbols to honor the heritage of the community or to "foster moral behavior in general" (279). Neither policy would infringe on the core right to worship—assuming, of course, that the policies were not just pretexts for compelling or forbidding religious observance. Conservatives would approve these outcomes; progressives would decry them.

On the other hand, the natural-rights construction would forbid government sponsored prayers, including legislative prayers that long have been an American tradition and that the court approved in *Town of Greece v. Galloway*.[8] (Generally, Muñoz has a dim view of tradition as a factor in constitutional interpretation.) And, with respect to what is perhaps the most neuralgic issue in current free exercise law, Muñoz argues that the natural-rights construction would reject a presumptive right to exemptions from laws that burden

[7] For the classic treatment, see Lon L. Fuller, "The Case of the Speluncean Explorers," *Harvard Law Review* 62, no. 4 (1949): 616–45.

[8] 572 U.S. 565 (2014).

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religious observance. Provided it does not exercise jurisdiction over religious observance as such, the state would have authority to adopt laws that impose incidental burdens on believers' practices. This goes for individuals and institutions alike: the natural-rights construction would not support what is commonly referred to as the church-autonomy doctrine. Progressives would cheer these outcomes; conservatives would condemn them.

These are all plausible results under Muñoz's version of the natural-rights construction. He forthrightly concedes, though, that his analysis is not the only possible one, and that one might accept the natural-rights construction and nonetheless reach opposite results in some of these cases. That is not a surprise, given the fact that the framers themselves could not agree on what the natural right of religious liberty required in specific instances. As Muñoz writes, "[t]he Founders debated these matters as vigorously as we debate them today, perhaps even more so" (115). In fact, in an important respect, the situation in the United States today exactly resembles that of the framers' era. Like the framers, Americans today agree that religious liberty covers the right to worship; no one seriously debates that. It is the other questions that cause problems. If the framers could not achieve consensus, why should we expect to do so?

Of course, it is unrealistic to expect a legal theory to offer definitive answers to all questions. Understanding how the framers approached the problems of church-and-state is valuable in itself—and, as I have said, nearly everyone agrees today that the original meaning of constitutional provisions matters in some way. *Religious Liberty and the American Founding* is learned and lucid, a great achievement that will quickly become part of the religion clauses canon. Still, in terms of settling the increasingly polarized debates about church and state in the United States, the natural-rights construction seems unlikely to offer all that originalists might desire. History is argument without end. So is constitutional law.

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