Establishing an Agreement to Disagree about Church and State*

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A review of Nathan Chapman & Michael McConnell, Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience (Oxford University Press 2023)

This is a remarkably timely book. The Supreme Court has signaled its willingness to do a complete renovation of its church–state jurisprudence, or what we might call a remodel of the house that *Everson* built.[1] Yet while a majority of Justices seems prepared, to varying extents, to "dismantle [*Everson*'s] wall of separation between church and state,"[2] in Justice Sonia Sotomayor's unenthusiastic words, they are much more likely to agree on the outcome of the cases than the constitutional reasoning. In the *American Legion v. American Humanist Association* case involving the display of a cross on public land,[3] for example, there were seven separate opinions, with Justice Samuel Alito's opinion of the Court only speaking for a majority of the Justices part of the time.

There is little doubt that a full-scale renovation is underway, but, as with most construction projects, tearing down the old structures—such as the wall of separation metaphor and the much-derided *Lemon* test—has proceeded much more quickly than has the installation of something new and improved. At some point, the Court will need to settle on a constitutional design that

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* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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[1] Everson v. Board of Education, 330 U.S. 1 (1947).

[2] Carson v. Makin, 596 U.S. __ (2022) (Sotomayor, J., dissenting).

[3] American Legion v. American Humanist Association, 588 U.S. __ (2019).

appeals to a consistent majority of the Justices and that will be fit for the critical purpose of "say[ing] what the law is,"[4] as Chief Justice John Marshall enjoined 220 years ago. That design—the detailed plans for a full-scale renovation of Establishment Clause jurisprudence—is what Nathan Chapman and Michael McConnell have offered in this fascinating, thought-provoking, and crisply written volume.[5]

Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience includes all of the key components of the Court's prior encounters with the Establishment Clause: religious history from the 16th through the 19th centuries; the views of James Madison, Thomas Jefferson, and other famous Founders; a new test to replace the unlamented *Lemon* test ("When a court describes its own doctrine as a Catch-22, you know there is a problem"[6]); and a guide to deciding the most common church–state cases. The design also includes a plan for how the Clause should get along with its next-door neighbor, the Free Exercise Clause. It even offers the Justices a memorable catch-phrase—"Agreeing to Disagree"—to replace "Wall of Separation" in the hearts and minds of both constitutional experts and the American public.

The book's basic theme for understanding the religion clauses is based on the authors' belief about what represents the "simplest and most sensible" interpretation, which is that the two clauses are "mutually reinforcing." The Free Exercise Clause "protects the right to practice religion according to conscience and conviction," while the Establishment Clause "prevents the government from coercing or using governmental power to induce religious beliefs and practices."[7] The Establishment Clause is thus not properly understood as a "thumb on the scale for secularism in public matters," but rather as "a constitutional commitment for Americans to agree to disagree about matters of religion—to refrain from using the power of government to coerce or induce uniformity of belief, *whether that belief is . . . secular or religious*."[8] The italicized language is a very significant interpretive move by Chapman and McConnell, and one that is likely to be controversial. It turns a provision that explicitly refers to religion ("Congress shall make no law respecting an

[4] Marbury v. Madison, 5 U.S. 137 (1803).

[5] NATHAN S. CHAPMAN & MICHAEL W. MCCONNELL, AGREEING TO DISAGREE: HOW THE ESTABLISHMENT CLAUSE PROTECTS RELIGIOUS DIVERSITY AND FREEDOM OF CONSCIENCE (2023).

[6] *Id.* at 91.

[7] *Id.* at 3.

[8] *Id.* at 6 (emphasis added).

establishment of religion") into a broader "principle [that] warns against using the power of the state to enforce conformity."[9]

The book is divided into two parts: "History" and "Modern Controversies." The four-chapter history portion starts with the founding, then recounts the framing of the First Amendment, followed by a discussion of disestablishment in the states, and concludes with the application of the Establishment Clause to the states. Part II devotes a chapter to each of the most controversial issues in Establishment Clause jurisprudence: government accommodation of religious exercise, including exemptions; religious schools; school prayer and Bible reading; the public display of religious symbols; and church autonomy. Part II's substantive issues are bookended by a chapter on the many failings of the Court's *Lemon* test, and a conclusion urging the Court to see the Clause as a commitment to neutrality and a model for how that neutrality principle could help us become less polarized on other controversial issues.

The first part of the book analyzes the history of the meaning of a religious establishment in some detail.[10] The authors do not commit themselves to any of the current approaches to constitutional originalism, or, in fact, to any particular methodology for deciding which aspects of the historical record are the most relevant for interpreting the Constitution. Instead, relying again on what they consider to be the most sensible approach, they simply state that "starting with the original meaning of a constitutional provision always makes good sense,"[11] citing the champion of the living constitution, Justice William J. Brennan, Jr. Their historical analysis begins with an impressively clear, even bold, claim: when the words of the Establishment Clause became part of the Constitution, "virtually every American knew from experience what those words meant."[12] The quintessential example of what everyone thought was an establishment of religion was the Church of England, which "was established by law in the mother country."[13]

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[9] *Id.* at 95. In the conclusion, they modify this interpretive approach to say that, although the Establishment Clause itself is "solely about religion . . . establishments can come in many different flavors," including "secular and ideological as well as religious." *Id.* at 190.

[10] Much of this portion of the book is based on Judge McConnell's well-known and widely cited article, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105 (2003), to which "readers seeking more copious citations of authority" should go for additional information. CHAPMAN & MCCONNELL, *supra* note 5, at 194, n.1. What would have been Part II's focus on disestablishment, which McConnell left unfinished when he was appointed to the Tenth Circuit, is added in this book.

[11] CHAPMAN & MCCONNELL, *supra* note 5, at 5.

[12] *Id.* at 9.

[13] *Id.*

So far, so good: there is little doubt that the founding generation understood the Church of England as an establishment of religion. The authors highlight the Supremacy Act, which gave the King "full power and authority" to establish doctrines and "repress . . . heresies";[14] the statutory Thirty-nine Articles of Faith establishing the doctrine of the church and the Book of Common Prayer, which set out the rites and ceremonies;[15] and the various Acts of Uniformity, which provided civil or criminal penalties for those departing from the church's rites and doctrines. Such an interpretation would track James Madison's statement to the First Congress when it was debating a proposed amendment reading, "no religion shall be established by law,"[16] and explained that some state conventions wanted to make sure that "Congress should not establish a religion, and enforce the legal observation of it by law."[17] Lest there be any concern that this provision could be misinterpreted and thought to apply to the states, Madison suggested adding "national" before "religion."[18] The newspapers printed these statements, along with the comments from others in the First Congress, who, in proposing language changes, said their versions were intended to accomplish the same goal.[19]

The prohibition of an American version of the Church of England would thus seem to be the original meaning of the Establishment Clause, as understood by the First Congress and the newspaper-reading public. Nevertheless, Chapman and McConnell do not end the historical analysis with the conclusion that the Clause was meant to ban a congressionally established "Church of the United States." Instead, they use a much broader definition of "establishment" for most of the book. They do not explain why they need to use a broader definition than the original one, except briefly to note that the Clause, in its 18th-century congressional context, "refers to legal arrangements that have gone the way of the dodo."[20] And so, their conclusion about prohibiting the American equivalent of the Thirty-nine Articles and the

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[14] *The Act of Supremacy*, in DOCUMENTS OF THE ENGLISH REFORMATION 98 (Gerald Bray ed., 3d ed. 2019).

[15] CHAPMAN & MCCONNELL, *supra* note 5, at 12.

[16] *House and Senate Debates Concerning the First Amendment*, in CHURCH AND STATE IN AMERICAN HISTORY: KEY DOCUMENTS, DECISIONS, AND COMMENTARY FROM FIVE CENTURIES 86–87 (John F. Wilson & Donald L. Drakeman eds., 4th ed. 2020).

[17] *Id.* at 87.

[18] *Id.*

[19] *See* DONALD L. DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT 203–16 (2009).

[20] CHAPMAN & MCCONNELL, *supra* note 5, at 5. If the efforts of Colossal Biosciences are successful, this memorable turn of the phrase may become extinct. *See* William Sullivan, *This Company Wants to Bring the Dodo Back from Extinction*, SMITHSONIAN MAG., Feb. 2, 2023.

Supremacy and Uniformity Acts is introduced with the phrase, "whatever else the [the Clause] might mean."[21] Much of the rest of the historical analysis, and of the book itself, is devoted to that "whatever else."

After their initial historical investigation, the authors then make a definitional leap of faith. An establishment is not just what Madison had said it was in the First Congress: a national church that requires everyone to abide by religious rites and theological doctrines set out in federal statutes. Instead, "An establishment is the promotion and inculcation of a common set of beliefs through governmental authority."[22] To move toward that unusually comprehensive definition, they begin by arguing that there were establishments in both Puritan New England and Anglican Virginia held together by "a complex web of statutes and executive pronouncements."[23] Since the Anglican Church in Virginia was actually part of the church that was "by law established" in England under the narrow definition, the definitional expansion needs to rest heavily on Puritan New England. The authors then break the establishmentarian web into six categories: "(1) control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on [other] worship; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church."[24] The authors do a good job of showing that these kinds of laws existed in numerous colonies, but they do not address the key question of whether "virtually every American" at the time of the Constitution's framing understood those elements to be "an establishment of religion."[25]

Since the question of what exactly is a forbidden establishment has been the single most difficult and divisive element of religion clause jurisprudence, it is important to try to follow this line of historical reasoning. Although the authors say that there were religious establishments in colonial New England, they admit that "these colonies could not easily establish their religion by law" because the "Puritans were at religious odds with the authorities in London."[26] Accordingly, if the Church of England and Madison's definition both revolved around a national church that was formally established by statutory

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[21] CHAPMAN & MCCONNELL, *supra* note 5, at 14.
[22] *Id.* at 18.
[23] *Id.* at 12.
[24] *Id.* at 12, 18.
[25] *Id.* at 9.
[26] *Id.* at 18.

law, how could the New England Way become an "establishment of religion" as everyone in America understood that term (to use the authors' definitional gold standard)?

As it turns out, some very important public figures said that the New Englanders' church–state arrangement—which featured town-based religious taxes, among other things—was *not* an establishment. In 1796, Connecticut Judge Zephaniah Swift said that any establishment in his state ended with the 1784 revision of laws, which ended the "civil endorsement" of the Savoy Confession of Faith.[27] Chief Justice Jeremiah Smith of the New Hampshire Supreme Court said the Granite State did not have an establishment of religion because "a religious establishment is where the State prescribes a formulary of faith and worship for the rule of all the subjects."[28] In Massachusetts, there was a debate in the newspapers between Baptist leader Isaac Backus and "Hieronymus" over this definitional point. Backus had condemned religious taxes as establishment of religion, which was simply wrong, asserted Hieronymus, who explained that a "religious establishment by law is the establishment of a particular mode of worshipping God, with rites and ceremonies peculiar to such a mode, from which the people are not suffered to vary."[29]

If, as Chapman and McConnell argue, everyone in the founding era knew what "an establishment of religion" meant, it would be hard for the definition to expand beyond a formal, statutorily created Church of America. Indeed, Hieronymous (probably Massachusetts Attorney General Robert Treat Paine[30]) and two state supreme courts not only defined it that way, but rejected the notion that the New England states had religious establishments even though they had several of the elements of the authors' six part definition.[31]

Instead of wrestling further with founding-era counter-examples, the authors turn to the process of disestablishment in the states between the Revolution and the 1830s, much of which focused on the question of religious taxes. They continue to use their enlarged definition of establishment, arguing

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[27] 2 WILLIAM G. MCLOUGHLIN, NEW ENGLAND DISSENT, 1630–1833: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE 923–24 (1971).

[28] *Id.* at 864. *See* Muzzy v. Wilkins, 1 Smith's (N.H.) 1 (1803).

[29] 1 MCLOUGHLIN, *supra* note 27, at 614.

[30] *See* THOMAS J. CURRY, THE FIRST FREEDOM: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 172 (1986).

[31] For more on these methodological issues, especially relating to the Establishment Clause, see DONALD L. DRAKEMAN, THE HOLLOW CORE OF CONSTITUTIONAL THEORY: WHY WE NEED THE FRAMERS (2020).

that "state disestablishment provisions clarify the sort of laws the Establishment Clause prohibited the federal government from enacting."[32] They do not explain why those subsequent state-level provisions should be read back several decades into the First Amendment. Moreover, they actually seem perplexed that the only state whose Constitution expressly stated that it had an established church, South Carolina, had "state-specified articles of faith, but no financial support."[33] Yet, again, that South Carolina approach tracks the language usage in the New Hampshire and Connecticut supreme courts, which declared that no establishment existed, despite the presence of religious taxes, because there were no statutorily set articles of faith.

Setting aside, for now, the interpretive choice to adopt this "living" definition of "establishment," Chapman and McConnell do an excellent job of summarizing the multiple political players and the range of legislative moving parts involved in the state-level battles that the Rev. Lyman Beecher described in Connecticut in 1820 as "the last struggle of the separation of Church and State."[34] In particular, they show the error of the Supreme Court's *Everson*-inspired fixation on the church–state exploits of Madison and Jefferson in Virginia. "We must," they conclude, "look . . . to the debates in all [the] states, and not just that in Virginia, for an understanding of the arguments for and against compulsory support for religion."[35] Especially valuable is their argument that opposition to religious taxes was not rooted in a secularist impulse. Rather, "popular opposition was concentrated among the most intensely evangelical" Baptists and other Protestants whose "opposition was largely theological in nature."[36] For these ardent believers, "the support of religion is a duty to God alone, for which believers are not answerable to the state."[37]

The authors are so convincing on the theological roots of this separationist movement that it seems that what they call disestablishment—or at least the elimination of religious taxes—could actually be considered an unconstitutional establishment of evangelical Baptist theology. The Establishment Clause, in their view, was meant to ensure that Americans would "refrain from using the power of government to coerce or induce uniformity of belief."[38] Those who believe that government needs to support religion to promote civic

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[32] CHAPMAN & MCCONNELL, *supra* note 5, at 73.

[33] *Id.* at 66.

[34] Wilson & Drakeman eds., *supra* note 16, at xiv (quoting Beecher).

[35] CHAPMAN & MCCONNELL, *supra* note 5, at 68.

[36] *Id.*

[37] *Id.* at 69.

[38] *Id.* at 6.

virtue, or to usher in the millennium, or for any other reason, have been required to abide by a competing theological viewpoint that has become constitutionalized because the Baptists experienced exponential growth in membership—and, therefore, political power—throughout the 19th century.[39] A national establishment of Baptist theology—now *that* would have been an interesting discussion, but unfortunately the authors did not choose to go that direction. (Maybe they could have at least revised the title to "Establishing an Agreement to Disagree.")

As an admirer of Professor Chapman's previous work, I expected a chapter discussing how the federal government thought about the Establishment Clause in the 19th century, especially in the context of the many millions of dollars appropriated by Congress to fund missionary churches, schools, and church personnel to "civilize" Native Americans. In his recent article on the topic, Chapman points out that "the government's funding of missions to the Native nations is most closely analogous to two practices that generated disestablishment objections . . . within the early republic,"[40] and they happened at about the same time. "Why didn't anyone contest them?" he has asked.[41] That is a good question. One possible answer is that the then-accepted definition of "establishment"—along with its original meaning—was simply not as broad as the one advanced in *Agreeing to Disagree*.

Rather than analyzing the Civilization Program and how it might cause a revision to how we see the 19th-century understanding of "establishment,"[42] the authors move to the incorporation doctrine—that is, the 20th-century idea that the 19th century's Due Process Clause in the Fourteenth Amendment made the 18th-century Establishment Clause directly applicable to the actions of state and local governments. This short chapter identifies various challenges to the incorporation doctrine. But it ultimately makes a pragmatic decision to move on since "no justice of the Supreme Court now questions the applicability of the personal rights of the Bill of Rights to the states," and at least the aspect of the Establishment Clause that "disabled Congress from

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[39] *See* EDWIN SCOTT GAUSTAD & PHILIP L. BARLOW, NEW HISTORICAL ATLAS OF RELIGION IN AMERICA (2000).

[40] Nathan S. Chapman, *Forgotten Federal-Missionary Partnerships: New Light on the Establishment Clause*, 96 NOTRE DAME L. REV. 677, 723 (2020).

[41] *Id.* at 724.

[42] The authors briefly mention the Civilization Program in the chapter on education, where they cite numerous examples of federal and state government support for religious education in the 19th century. *See* CHAPMAN & MCCONNELL, *supra* note 5, at 120–21.

'establish[ing] a religion, and enforc[ing] the legal observation of it by law' . . . is easily understood as a personal rights provision."[43]

The brief incorporation discussion highlights a recurring problem with trying to remodel *Everson*'s house of mirrors. The authors are stuck with 80 years of church–state jurisprudence in which "Congress" no longer means Congress, but anything that is somehow connected to a federal, state, or local government, including instrumental music played by a high school band.[44] "Law" no longer means law, but practically anything that any of those loosely defined governmental entities ever do. And an "establishment of religion" seems to mean anything that might be considered religious by some people, including displaying a holiday creche that has not been adequately camouflaged by elves, reindeer, and Frosty the Secular Snowman.[45] As a result, any and all church–state disputes arising anywhere in America must be resolved by the federal judiciary. This book seeks to give the Justices a sound principle by which to adjudicate those cases, and the authors' interpretive elasticity serves their core purpose of identifying an agreeing-to-disagree principle underlying what they consider to be a desirable constitutional ban on using "the power of government to coerce or induce uniformity of belief, whether . . . secular or religious."[46]

Once Chapman and McConnell complete their historically-informed argument for the agreeing-to-disagree standard, they largely leave the 18th century behind. Historical examples only occasionally arise in the remaining chapters on specific Establishment Clause issues. Those chapters focus instead on Supreme Court doctrine. The authors' basis for applying their agreeing-to-disagree interpretation primarily involves an appeal to what they believe is a simple and sensible approach. Inasmuch as virtually every possible interpretation of the Establishment Clause can claim to be informed by one aspect of American history or another, the extent to which readers—including sitting Supreme Court Justices—agree with the authors' conclusions will therefore most likely be determined primarily by whether they share Chapman's and McConnell's views of what church–state policy makes the most sense rather than by any particular 18th-century-based argument.

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[43] *Id.* at 79–80 (quoting James Madison).

[44] *See* Nurre v. Whitehead, 580 F.3d 1087 (9th Cir. 2009). *See also* Nurre v. Whitehead, 559 U.S. 1025 (2010) (Alito, J., dissenting from denial of certiorari).

[45] See the various cases discussed in CHAPMAN & MCCONNELL, *supra* note 5, at 157–72.

[46] *Id.* at 6.

Part II of the book begins with a dismissal of *Lemon*'s three-part Catch-22 requiring that laws "(1) must have a secular purpose, (2) must have a 'primary effect' that 'neither advances nor inhibits religion,' and (3) may not foster an 'excessive entanglement' between government and religion."[47] Arguing that it was "plagued by conceptual ambiguity, overemphasized separationism at the expense of religious freedom, and was a mismatch with the historical understanding of disestablishment," the authors reject the test, and they express considerable unhappiness with the fact that the Court has quietly retreated from the test rather than explicitly overruling it.[48] The problem with this approach is that "lower courts are instructed to follow Supreme Court holdings until expressly overruled."[49] This is a valuable and important reminder—especially from Professor McConnell, a highly respected former federal appellate judge—of the need for Supreme Court Justices to set out an Establishment Clause doctrine that can provide lower court judges with the tools they need to decide concrete cases in a coherent and consistent manner.

The authors then take on one of today's most controversial issues: religious exemptions from otherwise applicable legal requirements. The controversy arises not only from "the increasingly sharp divide between secular and religious elements of our culture," but also because some proposed exemptions "have involved religiously motivated resistance to triumphs of the cultural left with respect to hot-button issues like abortion, same-sex marriage, and transgender rights."[50] Chapman and McConnell offer a number of reasons why exemptions make good political sense and conclude that these kinds of "accommodations often are a win-win solution for the problem of ineradicable conscientious differences."[51] They note that the legislative and executive branches have frequently granted religious exemptions throughout American history, while state and federal courts have been inconsistent as to whether the Free Exercise Clause requires them.

Since this book specifically addresses the Establishment Clause, the authors focus their attention on arguments that these kinds of religious accommodations violate the Establishment Clause. After considering the various costs and benefits of such policies, the authors conclude that the nation's "tradition of generous religious accommodations" should be upheld, even if the

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[47] *Id.* at 88 (quoting Lemon v. Kurtzman, 403 U.S. 602 (1971)).
[48] *Id.*
[49] *Id.* at 92.
[50] *Id.* at 94.
[51] *Id.*

costs to others are substantial[52] because they are "a good thing for religious freedom and diversity."[53] They base this conclusion primarily on "long-standing practice and precedent,"[54] while noting that "courts are understandably [wary when] an accommodation might have the effect of pressuring people to change (or pretend to change) their religion . . . to claim an exemption."[55]

Readers who share the authors' view that religious freedom and diversity are good things are likely to agree. Others will not necessarily be convinced that Chapman and McConnell have made a powerful enough constitutional argument to change their minds. To convince skeptics, they would need to expand the reasoning behind their claim that when "the anti-establishment principle warns against using the power of the state to enforce conformity,"[56] it should encompass all types of secular laws that religious believers find objectionable. As the authors point out, these cases seemed easier when they considered accommodations for "Native American religious practitioners, Jewish sabbatarians[, and] Amish farmers."[57] Recent "conspicuous" claims by "religious traditionalists who seek to avoid compulsory support for abortion, contraception[, and] same-sex marriage"[58] have been opposed by those embracing these "progressive causes,"[59] who do not necessarily agree that promoting religious freedom and diversity is a more important (or constitutionally required) goal than pursuing the legislative policies involved in those causes.

It would have been interesting if the authors had followed their agreeing-to-disagree thesis to what might be its logical conclusion on the subject of accommodations. They say that the "anti-establishment principle warns against using the power of the state to enforce conformity," especially in cases of "ineradicable conscientious differences,"[60] and that even atheism should be treated as a religion in the context of accommodations.[61] In that case, it would seem that if conservatives legislate against abortion, contraception, and same-sex marriage, it would be consistent with the anti-establishment principle to

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[52] *Id.* at 111.
[53] *Id.* at 116.
[54] *Id.*
[55] *Id.* at 107.
[56] *Id.* at 95.
[57] *Id.* at 109.
[58] *Id.*
[59] *Id.*
[60] *Id.* at 95.
[61] *Id.* at 107.

provide exemptions for progressives even if they are not adherents of any particular religion.

The authors next address the Court's legion of education-related cases. Their fundamental point is that "when the Supreme Court first brought the Establishment Clause to bear on these issues . . . it interpreted that Clause to stifle religious pluralism and to foster religious uniformity."[62] That was actually the reverse of what the authors see as the First Amendment's "historic purposes," and they are happy to report that, more recently, "the Court has done a U-turn, producing the most extreme doctrinal about-face in all the volumes of U.S. Reports."[63] After long "holding that neutral funding programs" are forbidden if they "support religious activities," the Court has more recently held that "discrimination against an otherwise eligible school on the basis of its religious status is unconstitutional."[64] Today, "neutrality is the reigning principle," which is "truer to the history and theory of disestablishment in America."[65]

What about prayer and Bible reading in the legislatures and public schools? This politically charged question provides the authors with a chance to highlight the role of coercion in at least some Establishment Clause issues. The biggest barrier to embracing this principle comes from language in the *Engel v. Vitale* school prayer case saying that the "Establishment Clause, unlike the Free Exercise Clause, does not depend on any showing of direct government compulsion."[66] The authors list the many ways that statement is wrong, including the fact that it "subordinate[s] the Free Exercise Clause to the Establishment Clause."[67] They are pleased to see that the Court is bringing the idea of coercion back into "Establishment Clause analysis,"[68] although they note that some governmental acts, such as "an official proclamation of religious doctrine by law would *likely* violate the clause,"[69] even in the absence of coercion. (Unfortunately, they do not discuss when a statutory declaration of official religious doctrine would *not* be a violation. Nor do they say whether the national motto, "In God We Trust," might be a statutory declaration of official religious doctrine.) Yet while a no-coercion principle is the authors'

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[62] *Id.* at 118.
[63] *Id.*
[64] *Id.* at 141.
[65] *Id.* at 142.
[66] *Id.* at 147–48 (citing Engel v. Vitale, 370 U.S. 421 (1962)).
[67] *Id.* at 150.
[68] *Id.* at 153.
[69] *Id.* at 149 (emphasis added).

major theme for how courts should decide many questions arising under the Establishment Clause, their recurring minor theme is that the "line will often not be clear."[70] Moreover, since they argue that some actions could be unconstitutional even without an element of coercion, their guidance to the Court also becomes considerably less clear.

Chapman and McConnell begin the next discussion about controversies involving the public display of religious symbols with two observations: "almost no one admires" the Court's decisions in this area, and "[n]o one . . . ever claimed at the founding that the display of religious symbols was a form of religious establishment."[71] Then they abandon the agreeing-to-disagree interpretive approach of the preceding chapters in favor of a straightforward admission that "it would have been better if the Court had never entered this minefield."[72] After all, the Founders were not concerned about the issue, there were no challenges to these displays under the Establishment Clause until the 1950s,[73] and the authors' description of one case could easily fit all the others: "most[ly] remembered as a symbol of pointless and expensive culture-war litigation."[74] Ultimately, they conclude, "as a practical matter,"[75] the Court should probably stick with its "irenic, if less principled,"[76] approach in recent cases.

At this point, about 90% of the way through the book, the authors have arrived at a new—and potentially promising—test for whether the Establishment Clause has anything to say about a political dispute. Instead of discarding principle in favor of practicalities, Chapman and McConnell could have emphasized this chapter's theme that the Supreme Court Justices should simply refrain from making culture war disputes into constitutional cases. This test would offer considerably more clarity and consistency than mixing coercion (but only some of the time) and irenic pragmatism (but not all the time). Was a practice known at the time of the First Amendment's ratification? If so, was it challenged on Establishment Clause grounds in the first 150 years the Clause was in effect? Since the authors admit that the Court's

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[70] *Id.* at 156.

[71] *Id.* at 159.

[72] *Id.* at 162.

[73] *Id.* at 158.

[74] *Id.* at 162 (citing Salazar v. Buono, 559 U.S. 700 (2010) (involving a cross in the Mojave Desert)).

[75] *Id.*

[76] *Id.* at 163.

decisions have often been divisive and leave "no one . . . satisfied,"[77] why not just throw these cases out of the Court if the answer to the second question is no?

If we go back and apply this approach to the other issues discussed in the book—cases involving accommodations, aid to religious schools, legislative prayers, school prayers, religious symbols, and so on—most would not present a constitutional issue at all. Virtually all these practices pre-date the First Amendment, and no one challenged them under the Establishment Clause until after the 1940s *Everson* decision. In fact, the Establishment Clause was seen as such a constitutional dead letter until that time that Mr. Everson's lawyer was not even willing to make a First Amendment argument until his arm was twisted by the American Civil Liberties Union.[78] Since then, there has been an outpouring of contentious litigation, and a series of inevitably unpopular Supreme Court decisions.

If Chapman and McConnell's thoughtful analysis of the symbol cases is persuasive, then perhaps the most irenic *and* principled approach to the Establishment Clause would be for the Supreme Court simply to declare virtually all modern Establishment Clause controversies non-justiciable. If the church–state arrangements addressed by the Clause have gone the way of the dodo, perhaps Establishment Clause jurisprudence should follow suit. But, alas, Chapman and McConnell take the interpretive road most traveled by, instead. For the symbol cases, they just point to what seems like a reasonable outcome considering all the facts and circumstances: distinguishing between new displays and ones that already exist.[79] Their hope for that approach is that it "will dry up most litigation."[80]

The authors take yet another approach in the chapter on church autonomy. That chapter only occasionally touches on the Establishment Clause as it argues strongly in favor of autonomy largely on religious liberty and freedom of assembly grounds. They see as potential establishment issues the "two most prominent sources of [government] intrusion" into "internal church governance," which are "employment law and the application of property law to church splits."[81] The critical constitutional principle, according to the authors, is that "disestablishment invariably guaranteed a right of self-

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[77] *Id.* at 158.

[78] DRAKEMAN, *supra* note 19, at 92.

[79] *See American Legion*, 588 U.S. __.

[80] CHAPMAN & MCCONNELL, *supra* note 5, at 172.

[81] *Id.* at 174.

governance to religious institutions."[82] The authors favor the concept of church autonomy, and they seek to make the Establishment Clause the place courts turn to when they consider church property disputes. In doing so, they introduce a new concept: that the Clause prohibits "civil 'entanglement' in religious matters."[83] To avoid such entanglement, the authors argue, courts deciding property cases should follow the "neutral principles doctrine" (essentially asking who holds the deed, what the charter says, and so on)[84] rather than the "deference" approach (which involves judges trying to decide whether any particular church is fundamentally hierarchical or congregational).[85]

Overall, this short chapter reads more like a manifesto than a rigorous account of the complex history of the concept of church autonomy, especially as it relates to the First Amendment. Most of the book addresses a post-*Everson* environment in which the religion clauses, after being silent for 150 years, suddenly emerged to apply to just about every possible dispute about religion. But the federal government was conspicuously active in church autonomy disputes during various parts of the 19th century. It would have been helpful if the authors had taken those activities into account. The Edmunds–Tucker Act of 1887, for example, disincorporated the Mormon Church and confiscated many church properties.[86] Those actions were upheld by the Supreme Court, which noted that the Mormon community's support for polygamy—or what their church called "celestial marriage"[87]—was "contrary to the spirit of Christianity, and of the civilization which Christianity has produced in the Western world."[88] This act of Congress is undoubtedly contrary to what the authors believe are the best "Establishment Clause principles,"[89] but since the Supreme Court found no First Amendment problem, it would have been helpful for the authors to explain why their view of religion clause principles should trump that of the 19th-century Supreme Court.

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[82] *Id.* at 173.

[83] *Id.* at 182.

[84] *Id.*

[85] *Id.* at 183–85.

[86] 48 U.S.C. § 1461.

[87] *See generally* SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA (2002).

[88] Mormon Church v. U.S. 136 U.S. 1, 49 (1890).

[89] *See, e.g.,* CHAPMAN & MCCONNELL, *supra* note 5, at 185 (referring to the "grave violation" of those principles by courts that have adopted the "deference" approach in property disputes).

In the end, are the authors right? Did the Framers mean for us to agree to disagree? The answer is yes, but not quite as Professors Chapman and McConnell propose. The Framers knew that Americans not only disagreed about religion itself, but also about whether state power should support religion (and vice versa).[90] The Framers' agreeing-to-disagree approach was to leave these issues in the hands of the states, which would undoubtedly make different choices based on their own local political realities.[91] With the Establishment Clause, the Framers were essentially saying, we agree that the American people can continue to disagree. Rhode Island can go one direction, and Massachusetts another, and nobody is going to make a federal case out of it. And no one did for 150 years.

Does the Chapman and McConnell version of agreeing to disagree share enough of the same spirit to be the 21st-century equivalent of the Framers' First Amendment choices? That will be up to the reader and, even more importantly, the Justices to decide.

This thought-provoking and potentially very influential volume ends on a remarkably optimistic note, especially for a book overflowing with descriptions of contentious and divisive cases dealing with a perennially controversial topic. After a series of chapters chronicling the Supreme Court's many wrongheaded decisions and dubious doctrines, the authors suggest that "[p]erhaps America's experience with the Establishment Clause can provide a model for handling analogous disputes of other kinds," such as "Marxism, environmentalism[, and] anti-racism."[92] These "other 'isms,'" the authors note, can "resemble religions in their intensity, their seeming imperviousness to evidentiary challenge, and their thirst to enforce their own brand of virtue."[93] Presumably, the authors do not mean the Supreme Court's Establishment Clause jurisprudence to date is such a model, but its potential future decisions, as it follows the authors' guidance as to the Clause's true purpose of

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[90] *See* VINCENT PHILLIP MUÑOZ, RELIGIOUS LIBERTY AND THE AMERICAN FOUNDING: NATURAL RIGHTS AND THE ORIGINAL MEANINGS OF THE FIRST AMENDMENT RELIGION CLAUSES 88–116 (2022).

[91] For a more detailed discussion of what the Framers were doing when they drafted and debated the Establishment Clause, see Donald L. Drakeman, *Which Original Meaning of the Establishment Clause Is the Right One?*, *in* THE CAMBRIDGE COMPANION TO THE FIRST AMENDMENT AND RELIGIOUS LIBERTY 365–95 (Michael D. Breidenbach & Owen Anderson, eds., 2020) and DRAKEMAN, *supra* note 19, at 326–46.

[92] CHAPMAN & MCCONNELL, *supra* note 5, at 190.

[93] *Id.*

preventing the government from using its power to "impose an orthodoxy and suppress disagreement."[94]

In this important book, two outstanding church–state scholars have offered us a blueprint for Establishment Clause jurisprudence that they believe will "help to protect cultural pluralism" by "guarantee[ing] that neither side" in the various culture wars "can use its momentary political power to impose an orthodoxy."[95] Professors Chapman and McConnell have thus set out to show the Court and the country how we can construct an amicable public understanding on contentious issues of religion, politics, and culture. That would certainly be an excellent outcome.

[94] *Id.* at 189.
[95] *Id.* at 189, 191.