THE HISTORIC ORIGINS OF DENOMINATIONAL NEUTRALITY

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INTRODUCTION

The Supreme Court's recent decision in *Catholic Charities Bureau v. Wisconsin Labor & Industry Review Commission* reiterated a long-held principle: "the government may not 'officially prefe[r]' one religious denomination over another."[1] The Court has rooted that principle in the Establishment Clause, but also acknowledged that it "is inextricably connected with the continuing vitality of the Free Exercise Clause," because "the 'fullest realization of true religious liberty requires that government' refrain from 'favoritism among sects.'"[2] But the Court has said little about the origins of this requirement of denominational neutrality.

This Essay examines a key set of sources that illuminate the Founding generation's development and understanding of denominational neutrality: state constitutions adopted from the onset of the Revolution until shortly after the ratification of the First Amendment. State constitutions "are the most appropriate analogue to the Bill of Rights because they served the same purpose: to establish limits to the power of government in a written declaration of fundamental liberties."[3] Furthermore, they were often written by the same state legislatures which ratified the Bill of Rights, and can thus provide unique

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1 Cath. Charities Bureau v. Wis. Lab. & Indus. Rev. Comm'n, 145 S. Ct. 1583, 1591 (2025) (alteration in original) (quoting Larson v. Valente, 456 U.S. 228, 244 (1982)).

2 *Id.* (quoting *Larson*, 456 U.S. at 245–46) (internal quotation marks omitted).

3 John K. Wilson, *Religion Under the State Constitutions, 1776-1800*, 32 J. CHURCH & STATE 753, 753 (1990).

insight into the ratifiers' views of free exercise and establishment.[4] And by tracking the evolution of those provisions from 1776 to 1793, we gain insight into the evolution of those principles throughout the Founding era.

By examining the state constitutions adopted between 1776 and 1793, it becomes clear that the Founding generation did embrace a principle of denominational neutrality, and that this principle grew from both free exercise and establishment concerns. Many of the very states that passed constitutional provisions barring denominational preference, however, also restricted full civil rights and the ability to hold office to Christians, and often specifically to Protestants. This suggests that initially, the framers of state constitutions understood denominational neutrality as a prohibition on the establishment of any particular sect within the Christian tradition, not as a bar on governmental preference of one religion over another. In other words, they viewed a general establishment of Protestantism over Catholicism, or of Christianity over Judaism, as consistent with their prohibitions on denominational preference.

But several of the states that adopted restrictions favoring some religions removed them in the years immediately following the drafting and ratification of the First Amendment. It may be that states became more truly neutral between denominations because those drafting their constitutions believed the new federal Constitution required it. Or it may be that both federal and state constitutions reflected shifting views among the people. What is clear is that 1789 marked a watershed moment in which the nation moved toward a more fulsome concept of denominational neutrality.

I. THE EARLY STATES' ADOPTION OF DENOMINATIONAL NEUTRALITY

At the beginning of the revolution and continuing into the early years of the Republic, the states adopted new constitutions and declarations of rights, several of which included express prohibitions on legal preferences among sects, denominations, and modes of worship. Some of those prohibitions were expressly grounded in nonestablishment, such as Delaware's,[5] Massachusetts's,[6] New Jersey's,[7]

4 *See id.* at 753–54.

5 DEL. CONST. of 1776, art. 29 ("There shall be no establishment of any one religious sect in this state in preference to another . . . .").

6 MASS. CONST. pt. 1, art. III ("[A]nd no subordination of any sect or denomination to another shall ever be established by law.").

7 N.J. CONST. of 1776, art. XIX ("That there shall be no Establishment of any one religious Sect in this Province in Preference to another . . . .").

New Hampshire's,[8] North Carolina's,[9] and New York's.[10] But other states included prohibitions on denominational preferences in their free exercise provisions. For example, New York's 1777 Constitution provided "that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind."[11] In 1790, South Carolina echoed New York's language.[12] And between 1790 and 1792, Delaware, Kentucky, and Pennsylvania adopted provisions that forbade government preferences between religious denominations *and* modes of worship—thus enacting a form of denominational neutrality in both establishment and free exercise contexts.[13]

Across nearly every state constitution, the Founding generation also affirmed a universal right to worship according to the dictates of one's own conscience.[14] As Vincent Phillip Muñoz has explained,

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8 N.H. CONST. pt. I, art. 6 ("[N]o subordination of any one sect or denomination to another, shall ever be established by law.").

9 N.C. CONST. of 1776, Declaration of Rights, art. XXXIV ("That there shall be no establishment of any one religious church or denomination in this State, in preference to any other . . . .").

10 N.Y. CONST. of 1777, art. XXXV (incorporating the prior law of the colony, but providing "[t]hat all such parts of the said common law, and all such of the said statutes and acts aforesaid, or parts thereof, as may be construed to establish or maintain any particular denomination of Christians or their ministers . . . be, and they hereby are, abrogated and rejected").

11 *Id.* art. XXXVIII.

12 *See* S.C. CONST. of 1790, art. VIII, § 1.

13 *See* DEL. CONST. of 1792, art. I, § 1 (stating that there shall be no "preference given by law to any religious societies, denominations, or modes of worship"); KY. CONST. of 1792, art. XII, § 3 ("[N]o preference shall ever be given by law, to any religious societies or modes of worship."); PA. CONST. of 1790, art. IX, § III ("[N]o preference shall ever be given, by law, to any religious establishments or modes of worship.").

14 DEL. DECLARATION OF RIGHTS of 1776, § 2 ("[A]ll men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings . . . ."); DEL. CONST. of 1792, pmbl. ("[A]ll men have, by nature, the rights of worshipping and serving their Creator according to the dictates of their consciences . . . ."); GA. CONST. of 1777, art. LVI ("All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State . . . ."); KY. CONST. of 1792, art. XII, § 3 ("[A]ll men have a natural and indefeasible right to worship Almighyty [sic] GOD, according to the dictates of their own consciences . . . ."); MASS. CONST. pt. 1, art. II ("[N]o subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments, provided he doth not disturb the public peace or obstruct others in their religious worship."); N.H. CONST. pt. I, art. 5 ("Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping God, in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession, sentiments or persuasion; provided he doth not disturb the public peace, or disturb others, in their religious worship."); N.J. CONST. of 1776, art. 18

"[t]he language of the founding-era declarations of rights and constitutions unequivocally reveals that the founders understood that all individuals possessed the right to worship according to conscience."[15] That right applied to all, regardless of what faith tradition or denomination they followed. The free exercise right's universal application was itself a way in which the early states established nonpreferentialism.

Because the early states developed the principle of denominational neutrality through both free exercise and non-establishment provisions, and because their guarantees of free exercise were themselves a powerful form of denominational neutrality, the Court has been mistaken to ground the principle of denominational neutrality almost exclusively in the Establishment Clause. That mistake may have downstream consequences, given the doctrinal differences in the way the Court applies the two religion clauses.

II. THE INCONSISTENCY OF EARLY DENOMINATIONAL NEUTRALITY

The Founding generation's initial conception of denominational neutrality was not nearly as protective as modern doctrine. Even as states prohibited legal preference among denominations, many of them restricted equal protection of the laws[16] and full political participation[17] to Christians, and often specifically to Protestants.

("[N]o Person shall ever within this Colony be deprived of the inestimable Privilege of worshipping Almighty God in a Manner agreeable to the Dictates of his own Conscience . . . ."); N.Y. CONST. of 1777, art. XXXVIII ("[T]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind . . . ."); N.C. CONST. of 1776, Declaration of Rights, art. XIX ("[A]ll men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences."); PA. CONST. of 1776, Declaration of Rights, art. II ("[A]ll men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding . . . ."); PA. CONST. of 1790, art. IX, § III ("[A]ll men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences . . . ."); VT. CONST. of 1777, ch. I, § III ("[A]ll men have a natural and unalienable right to worship Almighty God, according to the dictates of their own consciences and understanding, regulated by the word of God . . . ."); VA. BILL OF RIGHTS of 1776, art. 16 ("[A]ll men are equally entitled to the free exercise of religion, according to the dictates of conscience . . . ."). Maryland alone limited "protection in their religious liberty" to those "professing the Christian religion," but in the same article stated that "no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice." MD. CONST. of 1776, Declaration of Rights, art. XXXIII.

15 Vincent Phillip Muñoz, *Church and State in the Founding-Era State Constitutions*, 4 AM. POL. THOUGHT 1, 31 (2015).

16 DEL. DECLARATION OF RIGHTS of 1776, § 3 ("[A]ll persons professing the Christian religion ought forever to enjoy equal rights and privileges in this state, unless, under

Furthermore, some states even purported to adopt denominational neutrality while compelling public support for Protestant ministers. Massachusetts, while prohibiting "subordination of any sect or denomination to another," [18] also mandated the "support and maintenance of public protestant teachers of piety, religion and morality" and compulsory church attendance.[19] While individuals could designate that their taxes be applied to their own denomination,[20] the provision established government preference and support of Protestantism. New Hampshire likewise mandated an assessment "for the support and maintenance of public protestant teachers of piety, religion, and morality," with a provision that "no person of any one particular religious sect or denomination, shall ever be compelled to pay towards the support of the teacher or teachers of another persuasion, sect or denomination."[21] It would seem that states that adopted provisions requiring denominational neutrality while also enacting provisions that elevated Protestantism or Christianity over other faiths viewed denominational neutrality only as preventing the state from establishing any one sect of Protestantism as the state religion, while

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colour of religion, any man disturb the peace, the happiness or safety of society."); MASS. CONST. pt. 1, art. III. ("[E]very denomination of Christians, demeaning themselves peaceably and as good subjects of the commonwealth, shall be equally under the protection of the law; and no subordination of any sect or denomination to another shall ever be established by law."); N.H. CONST. pt. I, art. 6 ("[E]very denomination of christians demeaning themselves quietly, and as good subjects of the state, shall be equally under the protection of the law . . . ."); N.J. CONST. of 1776, art. 19 ("[N]o Protestant Inhabitant of this Colony shall be denied the Enjoyment of any civil Right merely on Account of his religious Principles . . . ."); PA. CONST. of 1776, Declaration of Rights, art. II ("Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship . . . ."); S.C. CONST. of 1778, art. XXXVIII ("[A]ll denominations of Christian Protestants in this State, demeaning themselves peaceably and faithfully, shall enjoy equal religious and civil privileges."); VT. CONST. of 1777, ch. I, § III (limiting civil rights to Protestants).

17 MD. CONST. of 1776, Declaration of Rights, art. XXXV (requiring "a declaration of a belief in the Christian religion"); MASS. CONST. pt. 2, ch. II, § 1, art. II; *id.* pt. 2, ch. II, § 2, art. I; N.H. CONST. pt. II, arts. 14, 29; N.J. CONST. of 1776, art. 19 ("[A]ll Persons, professing a Belief in the Faith of any Protestant Sect, who shall demean themselves peaceably under the Government as hereby established, shall be capable of being elected into any Office of Profit or Trust, or being a Member of either Branch of the Legislature°.°.°.°."); N.C. CONST. of 1776, art. XXXII (excluding from public office individuals who deny "the truth of the Protestant religion"); PA. CONST. of 1776, ch. 2, § 10 (requiring legislators to affirm Christian beliefs); S.C. CONST. of 1778, arts. III, XII, XIII (limiting public office to Protestants); VT. CONST. of 1777, ch. II, § IX (limiting public office to Protestants).

18 MASS. CONST. pt. 1, art. III.

19 *Id.*

20 *See id.*

21 N.H. CONST. pt. I, art. 6.

allowing the state to support Protestantism generally.[22] In other words, they interpreted "denomination" quite literally to mean a particular sect, not to refer to religious traditions generally as courts do today when they speak of denominational neutrality. That conception of neutrality is markedly less protective than the one courts have adopted today, which prohibits favoring broad religious traditions, not just specific sects.

III. PROGRESSION TOWARD TRUE DENOMINATIONAL NEUTRALITY

However, the ratification of the First Amendment seems to have started a movement toward true denominational neutrality. Following the drafting and ratification of the First Amendment, states began to remove or loosen restrictions that had limited full civil protection and political participation based on religion. Five states—Delaware, Kentucky, Pennsylvania, South Carolina, and Vermont—adopted new constitutions between 1789 and 1793, and each of them established fewer privileges for Protestants and other Christians than their prior constitutions had, or, in the case of newly-admitted Kentucky on its first constitution, simply did not enact denominational preferences at all. Vermont, which had limited public office only to Protestants in both its 1777 and 1786 constitutions,[23] established no religious test for public office in its 1793 constitution.[24] Unlike its 1776 predecessor, Delaware's 1792 Constitution did not limit equal rights and privileges to Christians.[25] In 1790, Pennsylvania opened public office to anyone "who acknowledge[d] the being of a God, and a future state of rewards and punishments."[26] While this provision was still restrictive, it was more tolerant than Pennsylvania's 1776 Constitution, which limited public office to Christians.[27] And Kentucky, which ratified its constitution in 1792, expressly guaranteed equal civil rights for all regardless of religion.[28]

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22 *Cf.* Muñoz, *supra* note 15, at 24 ("Three state constitutions (NJ, DE, NC) declared that there was to be no establishment of any one religious sect with the state in preference to any other sect. The wording of these three prohibitions suggests that the ban extended only to the exclusive establishment of any one religious sect and that multiple or general establishments were not prohibited.").

23 *See* VT. CONST. of 1777, ch. II, § IX; VT. CONST. of 1786, ch. II, § XII.

24 *See* VT. CONST. ch. II, § 12.

25 *Compare* DEL. CONST. of 1792, *with* DEL. CONST. of 1776, art. 22. Delaware's silence on the issue of equal protection in its 1792 constitution "may have been assumed as a part of religious freedom, and omission of this equal protection was probably more open-minded than limiting it to certain believers." Wilson, *supra* note 3, at 762.

26 PA. CONST. of 1790, art. IX, § IV.

27 *See* PA. CONST. of 1776, ch. 2, § 10.

28 *See* KY. CONST. of 1792, art. XII, § 4.

No state had a more dramatic transformation than South Carolina, which had officially established Protestantism in 1778,[29] but did not do so in its 1790 Constitution. In 1778, it had declared that only those "persons and religious societies who acknowledge that there is one God, and a future state of rewards and punishments, and that God is publicly to be worshipped, shall be freely tolerated."[30] In contrast, the 1790 Constitution provided for "[t]he free exercise and enjoyment of religious profession and worship, without discrimination or preference," with an exception for acts of conscience deemed licentious or inconsistent with peace and safety.[31] And unlike the 1778 Constitution, South Carolina's 1790 Constitution contained no provisions limiting equal protection of the laws or public office based on the religious denomination to which an individual belonged.[32]

While full eradication of denominational preferentialism did not come until all states ended their established religions several decades later,[33] the choice of several states to end or at least loosen their denominational preferences in the immediate aftermath of the First Amendment's adoption is illustrative of the nation's movement toward a conception of denominational neutrality closer to the one employed by the Court today.

CONCLUSION

The Founding generation's state constitutions show that denominational neutrality emerged as an American principle in the country's earliest years. Although Revolutionary-era Americans did not understand the doctrine in the full sense we do today, the adoption of the First Amendment marked a turning point at which the states began to move toward a broader denominational neutrality. That principle emerged from intertwined concerns about both establishment and free exercise. This history counsels against reading denominational neutrality as a one-clause doctrine, as the Court has done. When courts treat denominational neutrality as a product of the Establishment Clause alone, they risk narrowing its protection and distorting the doctrine. To truly protect denominational neutrality, courts must treat the doctrine as a constitutional commitment born of both religion clauses—a promise that the state will favor none and protect all.

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

30 *Id.*

31 S.C. CONST. of 1790, art. VIII, § 1.

32 *See generally id.*

33 *See* Vincent Phillip Muñoz, Book Review, *What is an Establishment of Religion? And What Does Disestablishment Require?*, 38 CONST. COMMENT. 219, 226 (2023).