

# THE INDETERMINACY OF HISTORICAL EVIDENCE

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I view my task in this Article to be proving that history is indeterminate. The rest of the Articles from this Panel may discuss what to do about the indeterminacy. I would like to put aside the normative questions and a number of empirical questions, including the question that Larry Alexander raised last night about whose intent we are examining. Rather, I would like to attempt an historical or originalist analysis of some interesting and controversial contemporary constitutional questions.

There is a recent case that raises quite a few of these controversial questions. The case is *Rosenberger v. Rector of the University of Virginia*,<sup>1</sup> in which a religious student organization challenged the University of Virginia's refusal to provide the organization's newspaper with the financial support that the university offers other nonreligious student publications.<sup>2</sup> The University of Virginia's original defense, which it subsequently abandoned, was that the Establishment Clause prohibits a state university from funding any religious publication.<sup>3</sup> This case raises interesting questions about freedom of speech, the Establishment Clause, and other constitutional provisions.

Imagine that you were clerking last Term for a Supreme Court Justice who happens to be a very strict originalist. The Justice instructs you to research how the Framers would have answered the various questions raised by *Rosenberger*. Because you are not a professional historian and have limited time, you decide to examine the conclusions of scholars who have carefully studied the history.

First, the case raises a question of jurisdiction. Because the University of Virginia is a state entity, the Eleventh Amendment may prohibit this suit. The Eleventh Amendment states, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted

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1. 115 S. Ct. 2510 (1995).

2. See *Rosenberger*, 115 S. Ct. at 2516.

3. See *id.* at 2516.

against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The text of the Eleventh Amendment does not mention suits commenced against a State by a citizen of that State. Does the Eleventh Amendment bar the students' action because the students are citizens of the Commonwealth of Virginia? The historical authorities provide an equivocal response.

Two scholars who have conducted careful historical research have reached contradictory conclusions. Calvin Massey has concluded that the State should be immune from suit.<sup>4</sup> William Fletcher, however, has concluded that the State should not be immune.<sup>5</sup> They are only two of most prominent scholars who have studied the Eleventh Amendment question. Other scholars are also divided in their opinions.<sup>6</sup>

Assuming, in the absence of conclusive historical evidence, that the Eleventh Amendment does not bar the suit, you must reexamine a previously settled question in light of the Framers' intent. This question is whether the First Amendment applies to the States. As a matter of original intent, does the Fourteenth Amendment incorporate the Bill of Rights?

Returning to the library, you find that scholars are again in conflict. On the basis of a careful examination of the historical sources, Michael Kent Curtis has concluded that the Fourteenth Amendment was intended to incorporate most of the first ten amendments.<sup>7</sup> Another respected scholar, Charles Fairman, reached the opposite conclusion after examining some of the same historical sources considered by Curtis.<sup>8</sup>

4. See Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 (1989).

5. See William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983).

6. Proponents of the "diversity theory" advanced by Fletcher argue that the Eleventh Amendment bars federal jurisdiction only in cases in which that jurisdiction is based solely upon the status of the parties. See, e.g., Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1473-519 (1987); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988). Other scholars have challenged this theory as inconsistent with both the text and history of the Eleventh Amendment. See, e.g., Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989); William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372 (1989).

7. See MICHAEL K. CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986).

8. See Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

Because the historical evidence on incorporation is not helpful, you begin to examine the substantive issues. One of the substantive issues that the University of Virginia has dropped is the Establishment Clause question. Does the Establishment Clause prohibit the University of Virginia from funding a religious student organization?

This question raises two distinct issues. The first issue is whether a State may aid religion if it does not discriminate among religions. A number of scholars interpret the Establishment Clause to prohibit only discriminatory aid to particular religions.<sup>9</sup> Does this interpretation, known as nonpreferentialism, reflect the intent of the Framers?

Another search through the library yields the same equivocal answer. Robert Cord supports nonpreferentialism, arguing that the Framers intended to prohibit only government discrimination among religions.<sup>10</sup> Douglas Laycock, however, has argued that the Framers intended to prohibit aid to religion generally.<sup>11</sup> Attempting to define "aid to religion" would make this issue even more complicated.

The second aspect of the Establishment Clause question is the issue of coercion. Scholars dispute whether the Establishment Clause forbids government aid to religion that is not used to coerce anyone into subscribing to a particular religion, attending particular religious services, or aiding religion in any way. Michael McConnell has argued that coercion is a necessary element; there is no violation of the Establishment Clause unless someone is subject to government coercion.<sup>12</sup> Douglas Laycock, however, has argued that coercion is not a necessary element; government aid to religion may violate the Establishment Clause

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9. See, e.g., MICHAEL J. MALBIN, *RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT* (1978); Edwin Meese, *Toward a Jurisprudence of Original Intention*, 2 BENCHMARK 1, 5 (1986); Rodney K. Smith, *Getting Off On the Wrong Foot and Back On Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and Critique of the Reynolds and Everson Decisions*, 20 WAKE FOREST L. REV. 569 (1984).

10. See ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982); Robert L. Cord, *Church-State Separation: Restoring the "No-Preference" Doctrine of the First Amendment*, 9 HARV. J.L. & PUB. POL'Y 129 (1986).

11. See Douglas Laycock, *The Origins of the Religion Clauses of the Constitution: "Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875 (1986).

12. See Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

even if it involves no coercion.<sup>13</sup> Again, these two scholars have reached opposite conclusions based on careful historical analysis, often of the same historical evidence.

Finally, the students may argue that they have an unenumerated fundamental right to the University funding. This claim implicates the Ninth Amendment, but differing interpretations of the Ninth Amendment provide another example of the difficulty in determining original intent. The Ninth Amendment says, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Although speakers have mentioned this provision several times in preceding Panels, none of the panelists has examined its original meaning. However, a number of articles address this question. In fact, both Tom McAfee and I have written in the area, and we disagree completely. Tom McAfee has argued that the Ninth Amendment does not create any judicially enforceable unenumerated rights.<sup>14</sup> I have suggested, relying upon much of the same historical evidence considered by Professor McAfee, that the Framers did intend to protect judicially enforceable unenumerated rights under the Ninth Amendment.<sup>15</sup>

Even this brief analysis of just this one case thus demonstrates the indeterminacy of original intent. For each issue examined, careful historical analysis of the same evidence may yield opposite conclusions. Unfortunately for proponents of originalism, there are similar disputes about any issue worth taking to the Supreme Court, including affirmative action, privacy, and criminal procedure. Indeed, similar disputes exist over almost any constitutional issue.

Yesterday, Raoul Berger mentioned one question about which there seems to be very little debate. He suggested that the Fourteenth Amendment was not intended to address voting. Although some of today's earlier panelists might dissent, there appears to be a general consensus on this question. One reason for this consensus is that the historical evidence includes the Fifteenth Amendment, which directly addresses voting. The Fifteenth Amendment remedies the omission of voting from the

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13. See Douglas Laycock, *"Noncoercive" Support for Religion: Another False Claim About the Establishment Clause*, 26 VAL. U. L. REV. 37 (1991).

14. See Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215 (1990).

15. See Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHI-KENT L. REV. 1001 (1989).

express terms of the Fourteenth Amendment and thus makes moot the question whether the Fourteenth Amendment applies to voting.<sup>16</sup> The problem with originalism is that it cannot resolve an active controversy; it provides answers only where original intent has become irrelevant to the resolution of the question.

I offer in closing one final point. You may have noticed that all of the scholars that I have mentioned this morning are either law professors or political scientists. Why have I not discussed any professional historians who do not teach in law schools? The answer is that professional historians do not attempt to answer the questions which I have raised, because they recognize that history is indeterminate. Perhaps we should follow their wise example.

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16. Compare U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.") with U.S. CONST. amend. XIV, § 2 ("But when the right to vote in any election . . . is denied to any of the male inhabitants of such State . . . the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.").

