

ANALOGIZE THIS: PARTIAL  
CONSTITUTIONAL TEXT, RELIGION, AND  
MAINTAINING OUR POLITICAL ORDER

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In a series of essays in this and other journals, a group of scholars including, but not limited to, Geoffrey Stone, Seth Barrett Tillman and Alan Brownstein<sup>1</sup> have carried out a dialogue about the complex relationships between the authors of the 1787 Constitution, contemporaneous religious practices and beliefs, and the enterprise of constitutional interpretation and “textual exegesis.”<sup>2</sup> At its source, much of this conversation has been animated by Stone’s contention that the absence, in the constitutional text, of explicit references to “God,” and the near absence of direct references to “religion,” are vital pieces of evidence in concluding that the Constitution

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<sup>1</sup> See, e.g., Geoffrey R. Stone, *The World of the Framers: A Christian Nation?*, 56 UCLA L. REV. 1 (2008) [hereinafter Stone, *The World of the Framers*]; Seth Barrett Tillman, *Blushing Our Way Past History*, 2009 CARDOZO L. REV. DE NOVO 46 (2009) [hereinafter Tillman, *Blushing Our Way Past History*]; Seth Barrett Tillman, *Blushing Our Way Past Historical Fact and Fiction: A Response to Professor Geoffrey R. Stone’s Melville B. Nimmer Memorial Lecture and Essay*, 114 PENN ST. L. REV. 391 (forthcoming 2009) [hereinafter Tillman, *Blushing Our Way Past Historical Fact and Fiction*]; Alan Brownstein, *The Reasons Why Originalism Provides A Weak Foundation for Interpreting Constitutional Provisions Relating to Religion*, 2009 CARDOZO L. REV. DE NOVO 196 (2009). Although this essay primarily responds to the scholarly exchange between Stone, Tillman, and Brownstein, one should note that there is an even broader discussion unfolding, prompted by Stone’s original essay, but with additional themes and contributors. See Samuel W. Calhoun, *Getting the Framers Wrong: A Response to Professor Geoffrey Stone*, 57 UCLA L. REV. DISC. 1 (2009); Geoffrey R. Stone, *The Perils of Religious Passion: A Response to Professor Samuel Calhoun*, 57 UCLA L. REV. DISC. 15 (2009) [hereinafter Stone, *The Perils of Religious Passion*]; Robert F. Blomquist, *Beyond Historical Blushing: A Plea for Constitutional Intelligence*, 2009 CARDOZO L. REV. DE NOVO 244 (2009); Steve Sheppard, *What Oaths Meant to the Framers’ Generation: A Preliminary Sketch*, 2009 CARDOZO L. REV. DE NOVO 273 (2009).

<sup>2</sup> Tillman, *Blushing Our Way Past Historical Fact and Fiction*, *supra* note 1, at 392.

was designed “to create a secular state” rather than a “Christian nation.”<sup>3</sup> Although not specifically challenging Stone’s ultimate conclusion, Tillman takes issue with the textual and historical claims Stone advances in contending that the Framers intended to erect a secular national state. For example, Tillman notes that any number of constitutional provisions implicitly or indirectly reference “God” or other religious ideas (such as oaths<sup>4</sup>). Tillman raises additional questions about the relationship between the Constitution, religion, and the founding generation by sketching the political topography of eighteenth century life, a landscape onto which the Constitution was superimposed over existing state governments (and a citizenry) that accepted and, indeed, often insisted upon, extensive religious, political, and legal interdependence.<sup>5</sup>

### I. “PARTIAL” CONSTITUTIONAL TEXT

In this essay, I attempt to turn the reader’s attention away from the prevailing tropes in this conversation—which, ultimately, feed a somewhat familiar discussion about what the Framers intended with respect to religion.<sup>6</sup> Instead, I try to draw our focus to what is, in my mind, a more important and undertreated set of issues suggested by the Stone-Tillman exchange and the ensuing, broader debate.

The appearance, or perhaps, more accurately, the indirect or partial appearance of “God” and “religion” in the Constitution poses questions about how to interpret and apply these and other constitutional phenomena for which there are only trace or incomplete textual references, but which, nevertheless, have significant implications for how we think about the Constitution’s operation and the overall health of our political and legal order.<sup>7</sup> Almost a century and a half ago,

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<sup>3</sup> Stone, *The World of the Framers*, *supra* note 1, at 5.

<sup>4</sup> See Sheppard, *supra* note 1. See generally Bruce Peabody, *Imperfect Oaths, the Primed President, and an Abundance of Constitutional Caution*, 104 NW. U. L. REV. COLLOQUY 12 (2009).

<sup>5</sup> Tillman, *Blushing Our Way Past Historical Fact and Fiction*, *supra* note 1, at 398.

<sup>6</sup> In this essay I capitalize “Framers” to refer, generally, to the historic individuals associated with the debate, creation, and ratification of the U.S. Constitution from 1787-1789. As discussed *infra*, I refer to “framers” as a more generic set of individuals interested in maintaining and developing a nation committed to constitutionalism and a constitutional rule of law.

<sup>7</sup> For a broader, but somewhat related argument, see LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* (2008) (discussing the constitutional “dark matter” that

Frederick Douglass suggested that “slavery” was such an aspect of our constitutionalism—an institution that was politically valuable in creating the Constitution of 1787 (and in fostering its early maintenance), but also an idea that was deliberately not given full textual expression and was, therefore, only partly visible in the Constitution.<sup>8</sup>

In the argument that follows, I contend that God and religion are somewhat analogous to slavery in this regard. These (and other) aspects of our constitutionalism are “partial” in the sense that they are alluded to in the Constitution but not given a more complete, direct articulation in the same manner as, say, the listing of the powers of Congress or the electoral college.<sup>9</sup> In order to describe our political system accurately, and sustain the general project of constitutionalism, we need to pay special attention (and apply distinctive interpretive tools) to these incomplete constitutional references.<sup>10</sup> More specifically, this essay calls for the adoption of a somewhat novel hermeneutic approach based on two distinct but compatible moves. First, we should assume a somewhat abstracted and ahistorical “framer’s perspective” that contrasts rather sharply with the “Framer’s intention” or “originalist” stance predominant in the Stone-Tillman colloquy (and holding such a prominent place in constitutional analysis generally).<sup>11</sup> Second, in reconciling

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accompanies our visible, parchment Constitution, including the “ocean of ideas, propositions, recovered memories, and imagined experiences”).

<sup>8</sup> See Herbert J. Storing, *Slavery and the Moral Foundations of the American Republic*, in THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC 313, 320 (Robert H. Horwitz ed., 3d ed. 1986) (discussing Douglass’s views on the relationship between slavery and the Constitution).

<sup>9</sup> U.S. CONST. art. I, § 8 (enumerated powers of Congress); U.S. CONST. art. II, § 1 (initial elements of the electoral college). The distinction between “partial” and more complete constitutional text is not really a matter of language specificity—the “equal protection” clause of the Fourteenth Amendment, for example, is clearly in the (amended) text of the Constitution, but its precise meaning has been the source of voluminous debate, in part because its semantic meaning is unclear.

<sup>10</sup> A more thoroughgoing discussion of partial text would distinguish and situate this phenomenon relative to other concepts that are not strictly captured or delimited by our constitutional text but are still critical supplements to our understanding of the Constitution’s meaning. For example, partial text is related to but not synonymous with “background” principles of constitutionalism—constitutive notions and ideals whose very existence is required to maintain the enterprise of constitutionalism. JOHN E. FINN, CONSTITUTIONS IN CRISIS 25–26 (1991). Also, as indicated, at least in the eighteenth century, “slavery” could be considered partial constitutional text even though it is not a concept vital to defining constitutionalism per se. See TRIBE, *supra* note 7.

<sup>11</sup> For purposes of simplicity, in this essay I largely conflate “originalism” and “framer’s intent” as modalities of constitutional interpretation. As discussed below, however, these theories have a number of different and sometimes divergent articulations. See *infra* note 26 and accompanying text. With these varied

religion and God as concepts incompletely contained within our supreme law, we need to consider the power and utility of constitutional analogies.

## II. RELIGION AND GOD AS PARTIAL CONSTITUTIONAL TEXT

It is a truism to note that what is actually written in the Constitution is pertinent, even core, to many questions of constitutional interpretation. Our commitment to constitutionalism rests, in part, on a collective belief (perhaps “faith”<sup>12</sup>) that we can understand and apply the written commands of an identifiable legal text to our political and social lives.<sup>13</sup> Much ink and intellectual agonizing has been expended poring over some of the problems and questions that flow from this presumption, such as how should we identify and read what are purportedly more and less clear textual provisions. A less examined, but still important issue, relates to how we respond to more and less *present* constitutional provisions. In other words, how do we approach aspects of the Constitution that are only implicitly referenced or exist merely in trace form—but aren’t fully expressed or written into its four corners?<sup>14</sup>

As intimated earlier, slavery is a candidate for this somewhat curious category. As Herbert Storing observes, the unamended Constitution (while broadly decried as a pro-

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expressions in mind, it might be helpful to distinguish “Framer’s intent” (emphasizing interpretation based solely on the views of those authoring a law) from “originalism” (which looks to a more general sense of what a legal provision meant, presumably within the society as a whole, at that time of its creation). See generally ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); Antonin Scalia, *Interpreting the Constitution*, in READINGS IN THE PHILOSOPHY OF LAW 132 (John Arthur & William H. Shaw eds., 5th ed. 2010).

<sup>12</sup> SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988).

<sup>13</sup> See 1 BRUCE ACKERMAN, WE THE PEOPLE 36–37 (1993) (evaluating the Constitution’s “critical role in the ongoing construction of national identity”); FINN, *supra* note 10, at 4 (noting the inherent “vanity” behind constitutions’ aspiration to bind our actions to written commands); SHELDON S. WOLIN, THE PRESENCE OF THE PAST: ESSAYS ON THE STATE AND THE CONSTITUTION 9 (1989) (discussing how a constitution creates “a structure of power and authority” while also constituting “a people in a certain way . . . [by] propos[ing] a distinctive identity and envision[ing] a form of politicalness for individuals in their new collective capacity”).

<sup>14</sup> To some extent this is a question with an established and lengthy academic pedigree. See, e.g., WALTER F. MURPHY, JAMES E. FLEMING & SOTIRIOS A. BARBER, AMERICAN CONSTITUTIONAL INTERPRETATION 109–17 (1995) (discussing the problem of “What is the Constitution?,” viz., what materials and traditions we include in our examination of American constitutional law).

slavery document<sup>15</sup>) actually makes no explicit mention of slavery, and only obliquely (and, arguably, somewhat inhospitably) references the institution and slaves (as “other Persons”).<sup>16</sup> As Storing argues, “[i]n their accommodation to slavery, the Founders limited and confined it and carefully withheld any indication of moral approval.”<sup>17</sup>

While the correspondence may be imperfect (a point I return to below), “God,” “Christianity,” and other religious notions and beliefs plausibly fall into a similar constitutional category. The combined effect of the evidence put forth by Stone and Tillman is to at once suggest that the authors of the Constitution were rather cautious in their textual references to religion and divinity, even as they acknowledged (how could they not?) the central role played by organized religion in the lives, beliefs, and society of many, if not most, Americans. Stated somewhat differently, while the constitutional text makes many explicit references to, say, “law” or “money,” its references to “slavery,” “God” and even “religion” are limited and indirect—an observation that should not lead us to conclude that these latter topics were deemed legally and politically insignificant.<sup>18</sup>

So what should we do with these “partial” constitutional provisions or concepts? Pretend they do not exist? Try to interpret them just as we would “normal,” more fully expressed constitutional language? These questions pose a genuine dilemma for a conscientious constitutional interpreter.<sup>19</sup>

Ignoring partial constitutional provisions seems unwise and perhaps impossible given their latent importance and their relationship to existing and “fully present” constitutional language. While, for example, “slavery” does not appear in the Constitution, the reference in Article I to “other Persons” is

<sup>15</sup> See, e.g., William Lloyd Garrison, *January 1843 Resolution of the Massachusetts Anti-Slavery Society*, reprinted in BERTELL OLLMAN & JONATHAN BIRNBAUM, *THE UNITED STATES CONSTITUTION: 200 YEARS OF ANTI-FEDERALIST, ABOLITIONIST, FEMINIST, MUCKRAKING, PROGRESSIVE, AND ESPECIALLY SOCIALIST CRITICISM* 96 (Bertell Ollman & Jonathan Birnbaum eds., 1990) (Garrison’s famous criticism of the Constitution as a “covenant with death, and an agreement with hell”).

<sup>16</sup> Storing, *supra* note 8. In fact, the only explicit reference to slavery in the Constitution is found in the Thirteenth Amendment. U.S. CONST. amend. XIII. See generally *THE ANNOTATED U.S. CONSTITUTION AND DECLARATION OF INDEPENDENCE* (Jack N. Rakove ed., 2009).

<sup>17</sup> Storing, *supra* note 8, at 324.

<sup>18</sup> Stone, *The World of the Framers*, *supra* note 1.

<sup>19</sup> Paul Brest, *The Conscientious Legislator’s Guide to Constitutional Interpretation*, 27 *STAN. L. REV.* 585 (1975).

surely best understood by importing the concept of slavery into the text.<sup>20</sup>

At the same time, it is not obvious that we can treat terms partly in and outside of the Constitution just as we would provisions squarely identified therein. To begin with, the exclusion of certain terms is probably purposeful (as Storing argues in the context of slavery<sup>21</sup>), and, as a pragmatic concern, it is not clear what guidelines we would use for identifying *what* partial or incomplete constitutional provisions should actually be included in our constitutional analysis, or *how* they would be applied. Identifying the Constitution's references to "Bankruptcy," "Commerce," and "the Securities and current Coin of the United States" does not automatically allow us to "smuggle" the terms "bank" or "market economy" into the Constitution.<sup>22</sup>

So again: how should we approach and apply "partial" constitutional terms—those provisions at least indirectly referenced (but not given full expression) in our constitutional text—and especially "God" and "religion," the focus of the current conversation?

My initial answer to this question is in the form of a negative. The interpretive tack prevalent in Tillman and Stone's analyses (based on an examination of the Framers' intentions) is not sufficient for this task. Three problems bedevil the use of "Framer's intent" as an interpretive modality for looking at partial constitutional concepts.<sup>23</sup> First, as discussed by both Stone and Brownstein (and a host of other scholars), looking to the authors of the Constitution (or any law) presents a range of "technical" problems for those seeking to uncover their intended meaning.<sup>24</sup> Among these: who is to "count" as a Framer? How do we reconcile diverging views of different Framers or the inconsistent (evolving?) views of a single constitutional author?<sup>25</sup> In the more specific

<sup>20</sup> U.S. CONST. art. I, § 1.

<sup>21</sup> Storing, *supra* note 8.

<sup>22</sup> See generally HOW CAPITALISTIC IS THE CONSTITUTION? (Robert A. Goldwin & William A. Schambra eds., 1982).

<sup>23</sup> PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991) (discussing "modalities" of constitutional interpretation).

<sup>24</sup> See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 60–75 (2002) (offering criticisms of "framers' intent" as a method of constitutional interpretation); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). But see Barnett, *supra* note 11 (discussing originalism's current vitality and reformulation).

<sup>25</sup> The problem of determining intent is particularly acute in democratic regimes

debate about the application of “Framer’s intent” to religion and the Constitution, Brownstein effectively summarizes the problem in noting that “there were an extraordinary range of values relating to the relationship between church and state that were important to the various political constituencies” in the period between when the Constitution was drafted and ratified. As he concludes, “it is extraordinarily difficult [therefore] to determine whether there was a coherent and accepted meaning of the religion clauses.”<sup>26</sup>

Even if we are able to set aside this set of concerns about the provenance of intent, skeptics have raised a second set of philosophical and normative concerns about originalism as an interpretive modality. Among the (again, well established and extensively argued) claims against this approach is the concern that we should not allow the current generation to be bound by the inevitably parochial and often morally flawed assumptions and beliefs of our forbearers.<sup>27</sup> In constitutional interpretation, we should aim for “aspiration,” for trying to overcome outdated practices and prior prejudice.<sup>28</sup> Brownstein again captures aspects of this objection by noting that we may well have misgivings “about a framework of interpretation that by presuming perfection of government

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where the law has multiple persons involved in proposing, drafting, and adopting (and interpreting) the final form of the law. These problems are exacerbated further in systems that diffuse power through structural political arrangements such as federalism and the separation of powers. In more authoritarian, centralized, or socially uniform oligarchic regimes that speak with greater unanimity, the problem of determining intent may be much diminished. My thanks to Seth Tillman for this set of points.

<sup>26</sup> Brownstein, *supra* note 1, at 201. We should note that originalism comes in a number of variants, including the relatively recent “new originalism” emphasizing legal interpretations based not on the particular outcomes sought by those who wrote (or ratified) laws, but “what the public of that time would have understood the[ir] words to mean.” ROBERT H. BORK, *THE TEMPTING OF AMERICA* 144 (1990); *see also* Scalia, *supra* note 11, at 133–38. This focus on “the objective or publicly-accessible *meaning* of the terms” at the time they were written helps avoid or at least diminish some of the problems posed by the Powell-Brest objections. Barnett, *supra* note 11, at 625 (emphasis added). But, for reasons touched upon throughout this essay, even new originalism faces perhaps insuperable challenges in reconciling partial constitutional text. For a critique of originalism based on the observation that it admits of many different forms and is something of a moving target, *see* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 *DUKE L.J.* 239 (2009).

<sup>27</sup> *See, e.g.*, Lawrence Lessig, *Fidelity and Constraint*, 65 *FORDHAM L. REV.* 1365, 1416 (1997); Sanford Levinson, *Law as Literature*, 60 *TEX. L. REV.* 373, 379 (1982) (questioning “why intentions of long-dead people from a different social world should influence us”).

<sup>28</sup> David L. Fitzgerald, *Let Justice Flow Like Water: The Role of Moral Argument in Constitutional Interpretation*, 65 *FORDHAM L. REV.* 2103 (1997) (reviewing intellectual fault lines between originalism and aspirational theory).

actors ends up enshrining state failings as constitutional gospel.”<sup>29</sup>

Notwithstanding these two broad reasons for approaching originalism with caution as an approach to understanding partial constitutional terms (and religion specifically), there is a third (and for the purposes of this essay), even more important argument against this orientation. Framers’ intent is perhaps best defended as an interpretive methodology for giving relatively clear guidelines to judges looking at specific aspects of a legal text. Stated somewhat differently, if originalism is effective, it can help to bind down judges and prevent them from exercising a “dangerous discretion to roam at large in the trackless field of their own imagination.”<sup>30</sup>

But this emphasis includes many assumptions that are in tension with our efforts to make sense of “partial” constitutional references. To begin with, originalism is generally defended as an approach to help judges scrutinize more or less specific legal provisions and resolve particular disputes between adversarial parties in court. Again, the potential strength of originalism lies in its ability to address this fairly specific set of objectives. But, as discussed, the focus of this essay is on somewhat elusive elements of the Constitution that are at once implicated by specific words in the text but also, for whatever reasons, are also not carefully or explicitly codified in that document. To the extent that these partial constitutional principles require knowledge, speculation, argument, and application “outside” both the Constitution and the norms of traditional legal analysis, they seem to invite doubts about the ability of judges to serve as effective expositors of these phenomena. As many judges and scholars have argued, our courts arguably operate best when they are steeped in the fact- and context-rich specifics of existing, enacted laws and actual legal controversies.<sup>31</sup> Inviting judges to weigh in on aspects of our Constitution that *aren’t* written or are only partly written invites charges of abuse and poor judicial practices.<sup>32</sup>

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<sup>29</sup> Brownstein, *supra* note 1, at 204.

<sup>30</sup> 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 373 (Boston, Little, Brown & Co., 9th ed. 1858). For defenses of originalism generally see ORIGINALISM, *supra* note 11.

<sup>31</sup> See, e.g., LOUIS FISHER, CONSTITUTIONAL DIALOGUES 89–93 (1988) (discussing judicial disavowals of “advisory opinions” as being in tension with the Constitution’s “case or controversy” requirement).

<sup>32</sup> For some of the criticisms leveled against today’s judges see, generally, THE POLITICS OF JUDICIAL INDEPENDENCE (Bruce Peabody ed., forthcoming 2010); Bruce G. Peabody, *Legislating from the Bench: A Definition and a Defense*,

So, if conventional judicial analysis in general, and originalism in particular, may not be equal to our examination of aspects of our Constitution that are only partly congealed in the text, what interpretive stance should we assume? In the remainder of this essay, I argue that two distinctive orientations or analytic tools help us in this project. First, we should adopt a “framer’s perspective”—the view (and role) of one who would seek to develop and maintain a constitutional order—rather than looking to the more specific intentions or beliefs of our founding generation.<sup>33</sup> Second, and in concert with this first approach, we can supplement our understanding of partial constitutional terms through the use of analogies designed to help us reconcile seemingly incompatible elements in our constitutional order.

Originalism presumes that legal texts and interpretive “instruments” should be applied “according to the sense of the terms, and the intentions of the parties.”<sup>34</sup> While this essay has raised general concerns about originalism as a mode of constitutional interpretation, it has stressed, more specifically, the objection that originalism is unlikely to be equal to the problems posed by “partial” constitutional terms, in part because such phenomena take judges out of their institutional and jurisprudential “comfort zone” by asking them to reflect on elements of our constitutional order not squarely contained within the text of our supreme law.<sup>35</sup>

As an alternate approach to construing constitutional partialities, we might assume the viewpoint not of the particular “Framers of 1787” (whomever they might be), but instead of a somewhat ahistorical, unspecified, generic figure interested in sustaining a political system committed to constitutionalism.<sup>36</sup> “Our task” in this regard “is not to perpetuate the Framer’s blind spots, but to implement their vision” and their general aspiration to create a society guided by a written constitution of ordered liberty.<sup>37</sup> In assuming

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11 LEWIS & CLARK L. REV. 185 (2007).

<sup>33</sup> I am indebted to Jeff Tulis for suggesting that we can profitably contrast the framer’s perspective from “Framer’s intent.”

<sup>34</sup> Joseph Story, quoted in ORIGINALISM, *supra* note 11, at 5.

<sup>35</sup> On some of the difficulties judges face in acquiring and applying information purportedly beyond their institutional ken, see DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

<sup>36</sup> In seeking to identify a “framer’s perspective” that transcends the particular historical assumptions, personal interests, and prejudices we might associate with any individual legal founder or author, my approach is somewhat reminiscent of John Rawls’ “original position.” See JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

<sup>37</sup> Brownstein, *supra* note 1, at 204 (quoting Douglas Laycock, “Nonpreferential”

this initial, somewhat abstract orientation, we ask and answer broad questions about the purposes of our Constitution, the central mechanisms through which we will achieve these goals, and the relationship between our supreme law and the political, social, and economic systems in which it is embedded. We can then move on to a second order of questions that train this “framer’s perspective” to more particular inquiries about coming to terms with partial constitutional text—in this case, how we should comprehend the relationship between the Constitution and religion.

There have been many other efforts to distinguish the somewhat specific, temporally-bound intentions of the eighteenth century Framers<sup>38</sup> from the more aspirational elements of their general constitutional project.<sup>39</sup> It is beyond the goals of this essay to survey these scholarly endeavors, much less integrate them into a general account of the contours of the framer’s perspective. My project is much more modest. I simply identify a few salient features consonant with a “framer’s perspective” approach, explain how these elements differ from the traditional judicial approach to constitutional law and originalism, and, finally, apply this understanding to the problem of the relationship of the Constitution to God and religion.

### III. THE FRAMER’S PERSPECTIVE: CORE COMPONENTS

What does it mean to “think like a Framers?” What modes

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*Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 923 (1985/1986); see also THE FEDERALIST NO. 1, at 33 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>38</sup> As a general proposition, speaking about the “intentions of the eighteenth century Framers” is rather incomplete; in discussing the Constitution’s Framers, we should consider, at a minimum, those who helped create the document ratified in 1789, but also the authors (and, presumably, ratifiers) of amendments to our supreme law. For some of the complications attending our evaluation of “what counts” as an amendment, however, see Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) < 26; (B) 26; (C) 27; (D) > 27: Accounting for Constitutional Change*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 13 (Sanford Levinson ed., 1995) [hereinafter Levinson, *How Many Times Has the United States Constitution Been Amended?*].

<sup>39</sup> For some prominent arguments about the Constitution’s aspirational elements, see SOTIRIOS BARBER, ON WHAT THE CONSTITUTION MEANS (1984); RONALD DWORKIN, LAW’S EMPIRE (1986); MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS (1994); Michael C. Dorf, *The Living Constitution and Future Generations: The Aspirational Constitution*, 77 GEO. WASH. L. REV. 1631 (2009); Robin West, *The Aspirational Constitution*, 88 NW. U. L. REV. 241, 242–43 (1993).

of thought and predispositions (including necessary frames of reference, anxieties and hopes, assumptions and beliefs, and information sought) generally distinguish and unify those who seek to build and maintain constitutional orders? One exercise that can help in plumbing these questions is to reflect upon the broad intellectual stance assumed in *The Federalist*, the kinds of questions asked and answered in what is arguably the most important work of American constitutional theory.<sup>40</sup> Again, without any pretense of offering anything approaching a complete model, I offer, for consideration, four basic features of the framer's perspective (that I believe also recur within *The Federalist*).

*Holism:* First, a framer's perspective is based upon a holistic and structural approach. While pursuit of the "Framer's intentions" seems to invite relatively discrete, isolated inquiries ("How did the authors of the Constitution understand the scope of 'interstate commerce?'" or "In their references to God, what theological beliefs did those responsible for framing the Constitution hope to invoke?"), a framer's perspective presumes that many of the most important questions about our constitutional order can only be answered by looking at the complex interplay of its different and moving parts.

This basic motif certainly recurs throughout the essays of *The Federalist*. To take just one of the more eminent examples, *The Federalist No. 51* argues that an essential mechanism for securing liberty and avoiding tyrannical accretions of power entails "contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."<sup>41</sup> In order to turn the "parchment barriers" of the Constitution into a vibrant working political reality, *The Federalist* reflects, simultaneously, on the

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<sup>40</sup> My appeal to *The Federalist* in this context is primarily to offer a set of examples for what a "framer's perspective" might look like in practice. While *The Federalist* enjoyed a revival in the twentieth century as a source of American political theory, there are certainly reasons to be cautious with respect to its application. See Seth Barrett Tillman, *The Federalist Papers as Reliable Historical Source Material for Constitutional Interpretation*, 105 W. VA. L. REV. 601 (2003) (arguing that *The Federalist* contains multiple clear errors); Seth Barrett Tillman, *The Puzzle of Hamilton's Federalist No. 77*, 33 HARV. J.L. & PUB. POL'Y 149 (forthcoming 2010) (arguing that *The Federalist* is misunderstood by modern readers).

<sup>41</sup> THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961); see also THE FEDERALIST NO. 78 (Alexander Hamilton) (contextualizing worries about the powers of the judicial branch by taking into account its dependence upon the other branches, and the institutional contingency of its authority).

operations and purposes of the various departments of government, the motivations of their personnel, and the instruments at their disposal.

While judges can adopt cognate structural arguments about constitutional meaning,<sup>42</sup> such usage is not ordinarily (or comfortably) expanded past the “four corners” of the constitutional text or beyond distinct, contained controversies between legal parties. Indeed, regular judicial appeals to overarching, macroscopic, and integrated constitutional outlooks would be in some tension with oft-celebrated legal doctrines that emphasize limiting the scope and implications of decisions.<sup>43</sup>

*Law and Society:* A second notion I associate with the framer’s perspective is an open concession that (and active assessment of how) the operation and meaning of our Constitution depends upon the wider social context within which it is rooted. While seemingly a facile point, this idea is resisted by some proponents of a “Framer’s intent” approach, who contend that the Constitution’s meaning is and should be largely static and independent of the evolving society.<sup>44</sup> The outlook delineated in this essay, on the other hand, insists that our constitutional planning requires us to account for the myriad ways in which the (constantly shifting) social milieu surrounding our supreme law both threatens and supports our most important legal and political objectives.

Some of this idea is captured by Robert Goldwin, who argues that it is sensible and productive to speak of both a Constitution, or a formal “frame of government,”<sup>45</sup> and a

<sup>42</sup> See MURPHY, *supra* note 14, at 399–409, 422–29, 514–16 (surveying various “structural” arguments in constitutional interpretation).

<sup>43</sup> *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288 (1936) (identifying guidelines for avoiding reaching constitutional decisions). See generally FISHER, *supra* note 31, at 85–188 (1988) (various methods adopted by courts to “husband” power and prestige and avoid resolving conflicts or aspects of conflicts); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999) (advocating an interstitial and gradual approach to jurisprudential development).

<sup>44</sup> See, e.g., Morton J. Horwitz, *The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 41 (1993) (criticizing originalism on the grounds that it provides no clear theory of constitutional change); Scalia, *supra* note 11, at 133–38 (defending a theory of “original meaning” and criticizing an “evolutionary” view which says that the Constitution’s meaning “changes”); Louis E. Wolcher, *A Philosophical Investigation into Methods of Constitutional Interpretation in the United States and United Kingdom*, 13 VA. J. SOC. POL’Y & L. 239, 254 (2006) (“From the standpoint of strict originalism the meaning of the Constitution is immutably fixed by its language and its specific historical intent, and the only legitimate way for constitutional meaning to change is through the process of formal amendment.”).

<sup>45</sup> See Robert A. Goldwin, *Of Men and Angels: A Search for Morality in the Constitution*, in *THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC* 24, 31

lowercase “constitution,” the character, habits, manners, morals, mores, and culture that shape a people and help define their national identity. Goldwin observes that these two aspects of a society are mutually affecting and further contends that in the U.S. context the Constitution’s “Framers” deliberately tried to impact the constitution of the American people by making them “better” and leading them to “habits of right action.”<sup>46</sup>

Again, this basic picture of reciprocal influence between societies and their Constitutions certainly finds expression in *The Federalist* as well. *The Federalist No. 10* famously proposes to find a cure to the “mischiefs of faction” (identified as the likelihood, even the inevitability, that a free society will generate groups working against the rights of minorities and the public good). Publius vests much of the solution to this malfeasance in a constitutionally delimited, “extended” republic in which the diversity of “parties and interests” makes it improbable that a majority “will have a common motive to invade the rights of other citizens.” The society’s vast geographic reach will thwart such factions from collaborating effectively even if they do manage to assemble.<sup>47</sup> In other words, the Publian solution to faction is to assume, depend upon, and interlay aspects of our “private” lives and interactions onto the mechanisms of our public constitutional scheme. From the perspective of the judiciary, this open admission that our constitutional system requires explicitly identifying and “importing” (and perhaps even encouraging) behaviors and political impulses seemingly outside of the ordinary ambit of law, is idiosyncratic, to say the least.

*Constitutional Phases:* A third distinguishing component of what I am calling a framer’s perspective is the assumption that the application and implications of the Constitution (including its partial constitutional concepts) admits to considerable variation based upon the instant context and challenges facing a political order. While the appeal of originalism is based, in part, upon its purported invariability, the alternate paradigm advanced here presumes that shifting political imperatives appropriately color how we read our constitutional text.

Broadly speaking, we might delineate at least three constitutional phases or settings that prompt fundamentally different assumptions about the purposes and focus of

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(Robert H. Horwitz ed., 3d ed. 1986).

<sup>46</sup> *Id.* at 32.

<sup>47</sup> THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961).

constitutional analysis. First, we can identify moments of “constitutional foundation” as the potentially protracted periods during which new legal and political orders are established.<sup>48</sup> Among other considerations, such interludes require particular attention to government legitimacy, the authority of fledgling institutions, and building and identifying consensus about the appropriate scope and nature of power under the nascent constitutional regime.

“Constitutional maintenance,” in contrast, includes the more routine efforts to entrench and develop constitutional ideals whose basic contours, at least, are widely accepted.<sup>49</sup> Such periods will also entail reconciling, concealing, or displacing more controversial aspects of a constitutional system, including legal and political principles over which there is deep level of disagreement or at least a lack of resolution.

Finally, problems of “constitutional preservation” are posed when a nation confronts a crisis.<sup>50</sup> This may occur when a polity faces sustained threats to previously stable constitutional norms or when enduring compromises or states of equilibrium regarding these norms are disrupted. More severely, preservation may be required when a Constitution’s very claims to rule and endure are questioned and jeopardized. Those assuming a framer’s stance in this context should, arguably, adopt a different set of standards and objectives in construing our constitutional text and its relationship to the wider society, considering, for example, whether the exercise of emergency rule can be subsumed under somewhat elastic constitutional constraints or represents instead an “extra-constitutional resort to raw political power, necessary but not lawful.”<sup>51</sup>

While admittedly a cursory discussion, introducing this

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<sup>48</sup> Constitutional “foundation” does not necessarily occur only when a Constitution is initially created. As Bruce Ackerman and others have argued, constitutional amendments and political change can transform the content and meaning of a constitutional order. ACKERMAN, *supra* note 13. On the various means through which the Constitution’s meaning can be changed (and even dramatically transformed) see Levinson, *How Many Times Has the United States Constitution Been Amended?*, *supra* note 38.

<sup>49</sup> While the concepts referenced in this discussion of “constitutional phases” recur throughout legal scholarship, the particular ways in which I use the terms and definitions identified are not widespread. *See, e.g.*, FINN, *supra* note 10, at 5–6 (discussing “constitutional maintenance” in the context of responding to emergencies).

<sup>50</sup> For discussions of constitutional emergencies, see FINN, *supra* note 10; CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP* (1948).

<sup>51</sup> JOSEPH M. BESSETTE & JEFFREY TULIS, *THE PRESIDENCY IN THE CONSTITUTIONAL ORDER* 22 (1981).

contextual or “phases” approach to our understanding of the “framer’s perspective” provides distinctive analytic leverage on our recurring example of slavery as a “partial” constitutional phenomenon. While morally repugnant, slavery’s oblique, partial inclusion in our constitutional text can be partly defended from the framer’s perspective by arguing that in order to advance the project of “constitutional foundation” the practice was necessary to garner sufficient initial political support for the 1787 Constitution. The Constitution’s partial inclusion of slavery was “strong enough to allow the structure to be built, but unobtrusive enough to fade from view when the job was done.”<sup>52</sup> At the same time, this view elides the deep-seated problems slavery posed during the period of “constitutional maintenance” after ratification, when a deeply divided nation sought to account for an institution alluded to, but not wholly confined by our supreme law. Indeed, thinking about slavery suggests that other “partial” constitutional text may pose recurring problems for our political order, since these aspects of our constitutionalism (again, not squarely captured within the four corners of our Constitution) are not easily addressed through traditional legal interpretation or even constitutional amendment.

The “constitutional phases” presumption that we must read the Constitution differently in periods of foundation, maintenance, and preservation is largely incompatible with traditional judicial analysis and interpretive modalities.<sup>53</sup> This is especially true with respect to originalism which, to the extent it is compatible at all with the phases approach, would seem to privilege periods of constitutional founding at the expense of other phases of a Constitution’s life cycle. But beyond this observation, many of the questions we would pose under a “phases” approach to constitutionalism require judgments well beyond those we can expect judges to ask and competently answer.<sup>54</sup>

*Constitutional Planning:* As implicitly indicated already, a framer’s perspective approach to constitutionalism requires a

<sup>52</sup> Storing, *supra* note 8, at 320.

<sup>53</sup> See, e.g., *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 425 (1934) (“The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government . . . were determined in the light of emergency and they are not altered by emergency.”); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120 (1866) (“The Constitution of the United States is a law for rulers and people, equally in war and in peace.”).

<sup>54</sup> To take just two possible examples: “What governing coalitions are needed to guarantee the continuing legitimacy of a new constitutional regime?” or “What officials are best positioned, legally and politically, to lead the nation through a crisis?”

proactive, forward looking approach to constitutional design and development. While the judiciary is not strictly a passive and reactive institution, especially given modern appellate courts' ability to exert substantial control over their dockets,<sup>55</sup> we still look to judges to resolve issues somewhat narrowly and "after the fact," that is, after a dispute has already taken shape. Such incremental and limited approaches are regularly praised for helping to ensure that courts do not veer from their areas of institutional proficiency, but also to keep public debate on legally contested issues open, and to maintain a balance between democratic and constitutional ideals.<sup>56</sup>

Such restrictions, however, are not as appropriate when assuming a framer's perspective to the Constitution. To argue cogently about how we will maintain the constitutional rule of law or preserve it in the throes of a crisis, we need to anticipate future events, imagine contingencies, and offer expansive reflections on the current health, dysfunction, and trajectory of our republic: judgments requiring a mix of theoretical insight, pragmatic forecasting, and political knowledge and discretion not obviously found in even our most able judges. In other words, defending constitutionalism requires a level of constitutional planning and engineering that goes well beyond what we ordinarily associate with judicial legal interpretation in general and originalism in particular. This stance is openly announced at the outset of *The Federalist Papers*, as Publius indicates that his entire enterprise is based on the question of "whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force."<sup>57</sup>

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<sup>55</sup> LAWRENCE BAUM, *THE SUPREME COURT* 69–101 (9th ed. 2007) (discussing the processes through which cases reach the Supreme Court). For at least one judicial opinion suggesting that the Court can and should take a more proactive, forward looking role, see *Weems v. United States*, 217 U.S. 349, 373 (1910) ("The future is [the distinctive] care [of constitutions] and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be."); cf. Jack M. Balkin, *The Use that the Future Makes of the Past: John Marshall's Greatness and Its Lessons for Today's Supreme Court Justices*, 43 WM. & MARY L. REV. 1321, 1335–36 (2002) (arguing that Justices seeking "greatness" should engage in "constitutional prophecy" in which they outline "a vision of the country and what it means. . . . [A] vision of what America is and what its future and its destiny should be").

<sup>56</sup> See, e.g., SUNSTEIN, *supra* note 43.

<sup>57</sup> THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 37, at 33.

## IV. PARTIAL TEXT AND CONSTITUTIONAL ANALOGIES

To this point, I have argued that our efforts to account for partial constitutional text (phenomena that are seemingly essential to understanding, and perhaps maintaining, our constitutional order, but only incompletely referenced in our Constitution) can be partly supported by turning to a “framer’s perspective,” an orientation substantially distinct from an appeal to the Framers’ specific intentions. In addition to this approach, we might adopt a second, complementary strategy: turning to constitutional analogies as a mechanism for helping us account for our partial constitutional text.<sup>58</sup>

As a general proposition, analogies connect two things that do not initially seem to be alike, giving us at least an initial set of reference points for comparing and analyzing disparate phenomena.<sup>59</sup> As Lloyd Weinreb puts it, analogies help us reduce “uncertain[ty] about the extension of some term” beyond its ordinary context and application.<sup>60</sup> We use analogies in law when we seek to understand or categorize concepts that do not, at first glance, seem readily subsumed by existing legal rules, definitions, or vocabulary. Finding an apt analogy helps us reconcile and explain aspects of our legal order that otherwise seem incompatible or incongruent.

These functions of analogical reasoning seem especially appealing when confronting partial constitutional text which, by its very nature, possesses an ambiguous and uncertain relationship with the Constitution and, by extension, constitutional law. Selecting the “right” analogy in engaging partial text helps us understand the relationship between the extra-textual phenomenon under consideration and the Constitution and, therefore, how we should “read” or apply it. Thus, in their efforts to account for the seeming anomalous status of slavery in a document purportedly committed to advancing human liberty, both Douglass and Storing invoke an analogy that reflects slavery’s impermanent and irregular constitutional status. “If in its origin slavery had any relation to the [constitutional] government,” Douglass argued, “it was only as the scaffolding to the magnificent structure, to be

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<sup>58</sup> While what I describe as the “framer’s perspective” is certainly compatible with the use of constitutional analogy, the two analytic devices are not necessarily intertwined.

<sup>59</sup> LLOYD L. WEINREB, *LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT* 20 (2005).

<sup>60</sup> *Id.*

removed as soon as the building was completed.”<sup>61</sup>

Turning to analogies, therefore, may help us interpret and explain the status of partial constitutional text, although this contention puts off the difficult questions of how to choose amongst competing analogies or develop their usage.

#### V. THE FRAMER'S PERSPECTIVE, CONSTITUTIONAL ANALOGY AND THE STATUS OF RELIGION

We have now, finally, assembled at least the initial framework for considering religion and God as partial constitutional text. Therefore, drawing upon the arguments already advanced in this essay, what can we say, even in a preliminary way, about how we should view the Constitution's (albeit orthogonal) references to and dependence upon religious ideas (Tillman) and its simultaneous reticence to speak about religion directly (Stone)?

To begin with, we might posit that the framer's perspective sketched in this essay underscores the propriety, even the obligation, of considering religion and different conceptions of divinity as phenomena appropriately included rather than excluded within our constitutional thinking. Tillman makes a convincing case that, considered on their own (and taken together), constitutional provisions such as the “Attestation Clause,” the “Sundays Excepted Clause” and the multiple “Oaths and Affirmations Clauses” appearing both in the original Constitution of 1787 and in the Bill of Rights cast considerable doubt upon (or at least complicate) Stone's claim that the U.S. was founded as a “secular state.”<sup>62</sup> Tillman's textual analysis further suggests that we can more fully understand certain clauses in the Constitution by “importing” (my word, not his) religious ideas and a religious context that is not explicitly described and identified in the Constitution. This approach is consistent with my earlier assumption that our constitutional exegesis requires understanding the society surrounding a constitutional system, as well as a willingness of the interpreter to work outside of the four corners of the Constitution in order to comprehend its workings and meaning.

Perhaps more interestingly, by adopting a constitutional phases orientation, we might posit that much of the debate

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<sup>61</sup> Storing, *supra* note 8, at 320.

<sup>62</sup> Tillman, *Blushing Our Way Past History*, *supra* note 1, at 49.

about the “world of the Framers and Ratifiers”<sup>63</sup> is beside the point in the twenty-first century. To the extent we are concerned with a Constitution’s “maintenance” rather than its “founding,” we should train our attention on the relationships between religion and constitutionalism today and examine whether the assumptions made in the late eighteenth century in this regard are still valid. Tillman’s scholarship is especially instructive here as well in noting that both before and after constitutional ratification, “our national government continued to coexist (comfortably) for many years with its component states, many of which had established churches.”<sup>64</sup> Today, of course, this picture of official religious entrenchment and compatibility has transformed, and the relationship between religion and the Constitution (and the place of religion in the republic more generally) is colored by the observation that many, if not all, states have state constitutional and statutory provisions barring government-sanctioned establishment of particular churches or other religious institutions, as well as laws that protect a wide-range of religious practices (and even abstention from religious practice).<sup>65</sup>

All of these points, while perhaps interesting, do not directly engage the central question animating this essay: how should we understand the place of religion and God in our constitutional order? For the most part, our political leaders have answered this query by assuming their symbiosis.<sup>66</sup> For

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*; see also Podcast: *The World of the Framers: A Christian Nation?*, A Presentation by Geoffrey Stone at The University of Chicago Law School (July 11, 2008), available at <http://www.law.uchicago.edu/node/1514> (noting that during the era of the Constitution’s proposal and ratification, eleven of the thirteen states had established churches).

<sup>65</sup> See, e.g., MASS. CONST. amend. XI (“[A]ll religious sects and denominations, demeaning themselves peaceably, and as good citizens of the commonwealth, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law.”); N.J. Const. art. I, § 4 (“There shall be no establishment of one religious sect in preference to another; no religious or racial test shall be required as a qualification for any office or public trust.”); N.Y. CONST. art. I, § 3 (“The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind; and no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief . . . .”); TEX. CONST. art. I, § 4 (“No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments . . . .”). One might note that, as a historical matter, state non-establishment provisions may well have been designed to protect society and religious organizations from states’ cooption or infringement (as opposed to protecting the general populace from the entrenchment of a particular faith).

<sup>66</sup> See, e.g., Robert N. Bellah, *Civil Religion in America*, 96 DÆDALUS 1 (1967).

example, with varying degrees of elaboration and sophistication, Presidents from George Washington to Barack Obama have invoked religious beliefs and worship of God as sources of national solidarity and “indispensable supports” to “political prosperity.”<sup>67</sup> Indeed, throughout much of our history, we have addressed religion’s somewhat ambiguous status in our constitutional system by simultaneously erecting a more or less formally secular state while publicly embracing “civil religion” as a “religion of the republic” resonant with Judeo-Christian values and beliefs, but sufficiently generic to unify large portions of the populace and become deeply intertwined in our public rituals and ceremonies.<sup>68</sup>

But this reconciliation of constitutionalism and religion is hardly sufficient from the point of view advocated in this essay—that is, from the vantage of one who would try to (re)imagine the relationship between public institutions and private practices that is most conducive to the goals of our constitutionalism. The civil religion celebrated and ingrained in political rhetoric, the “Pledge of Allegiance,” and our national holidays does not provide answers to any number of critical questions about constitutional maintenance and preservation: (How) do contemporary religious practices and beliefs contribute, if at all, to our continued political health and the goals of constitutionalism? Is religion something that contributes (positively) to the operation of our regime through its impact on our behavior or character (Goldwin’s constitution), especially in serving as a source of social stability and moral education?<sup>69</sup> To what degree should government accommodate and support religious practices, particularly if they redound to the benefit of public institutions and government legitimacy?<sup>70</sup> And what, in all

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<sup>67</sup> President George Washington, *Farewell Address* (Sept. 17, 1796), in 1 DOCUMENTS OF AMERICAN HISTORY 169, 173 (Henry Steele Commager ed., 1973); see also Robert F. Blomquist, *The Presidential Oath, the American National Interest and a Call for Presiprudence*, 73 UMKC L. REV. 1 (2004) (reviewing the rhetoric accompanying presidential oaths). For his part, Obama stated (while U.S. Senator) “I think we make a mistake when we fail to acknowledge the power of faith in people’s lives—in the lives of the American people—and I think it’s time that we join a serious debate about how to reconcile faith with our modern, pluralistic democracy.” Senator Barack Obama, Keynote Address at the Call to Renewal “Building a Covenant for a New America” Conference (June 28, 2006) (transcript available at <http://obamaspeeches.com/081-Call-to-Renewal-Keynote-Address-Obama-Speech.htm>).

<sup>68</sup> Bellah, *supra* note 66.

<sup>69</sup> See Obama, *supra* note 67.

<sup>70</sup> See generally ROBERT PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 65–79 (2000) (discussing the effects of declining participation in organized religion in the U.S. as one of the factors contributing to

this, is the proper stance a conscientious citizen or leader should adopt? Should she be actively encouraging the development of religious groups as a bulwark to ideals and practices essential to our constitutionalism—and if so, which ones? Or, consistent with *The Federalist*, should our interest in religion, as a constitutional planner, be primarily focused on its “regulation” as one of many competing and potentially “interfering interest[s]” in a free, democratic society?<sup>71</sup>

While this essay does not provide answers to these questions, it has argued that engaging them is consistent with responsible constitutional planning, and a task beyond both originalism and the normal roles assigned to our judges. Our scrutiny of these issues should be guided instead by more sustained and rigorous examination of partial constitutional text and the “framer’s perspective,” and a more systematic set of reflections on how analogical reasoning can serve as a tool in clarifying our thinking about religion and the Constitution.

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declining social capital and broad distrust in governing institutions).

<sup>71</sup> THE FEDERALIST NO. 10 (James Madison), *supra* note 47, at 79.