

Church, State, and Original Intent

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Introduction

Those of us who contribute to the relentlessly expanding literature on the Constitution imagine that our exhaustive research and cogent analysis will enliven scholarly debates, advance the cause of higher education, and, perhaps, help justify the existence of hundreds of law journals. At the same time, we often harbor ambitions that our work will extend its reach beyond the narrow confines of academia, perhaps even influencing the Supreme Court's thinking when the next case arises under whatever constitutional article or amendment we have so brilliantly illuminated. The visible signs of our election to this heady realm may be found in a brief footnote reference in a Supreme Court opinion or even *mirabile dictu* a mention in the text itself along with glorious words like "seminal" or "landmark." Such recognition is rare indeed, although it does occur from time to time, and in 2003, Frank Schechter posthumously entered this scholarly promised land when Justice Stevens called upon his "seminal discussion" of trademark law in a 1927 *Harvard Law Review* article. Schechter's graduate studies at Columbia Law School, combined with his practical experience as trademark counsel for the BVD Company (where preparing briefs has a long history), helped the modern Court resolve a case involving trademarks used for "moderately priced, high quality, attractively designed lingerie sold in a store setting designed to look like a wom[a]n's bedroom," namely, *Moseley v. Victoria's Secret Catalogue, Inc.*¹

¹ *Moseley v. Victoria's Secret Catalogue, Inc.*, 537 U.S. 418 (2003), citing Frank I. Schechter, "Rational Basis of Trademark Protection," *Harvard Law Review* 40 (1927): 813. Although Schechter was unable to appreciate this twenty-first-century recognition, the Supreme Court was cognizant of his contributions to trademark law several generations earlier. The Supreme

Relatively few scholars achieve even the minor fame of a footnote appearance, and fewer still the Olympian heights of a text reference, but even those pale beside the historical import of a letter dated January 17, 1879, from Morrison R. Waite, chief justice of the United States, to one of the nineteenth century's most distinguished historians, George Bancroft. The letter related to the recent decision by the Supreme Court in *Reynolds v. United States*, a landmark case interpreting the free exercise clause of the First Amendment as it applied to Mormon polygamy. In pertinent part, it reads as follows: "As you gave me the information on which the judgment in the Utah polygamy case rests, I send you a copy of the opinion that you may see what use has been made of your facts."²

The balance of the short letter makes it clear that the "facts" elicited from Dr. Bancroft had nothing to do with the practice of polygamy, the Territory of Utah, or the relatively new phenomenon of the Mormon religion; rather, the "information on which the judgment . . . rests" related to the historical origins of the First Amendment's religion clauses. The background of the First Amendment is featured prominently in Justice Waite's opinion for the Court, which states that since there is no definition of religion in the Constitution, the Court "must go elsewhere . . . to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted."³ Ultimately, Justice Waite, relying heavily on Bancroft's clue that the amendment's inspiration could be found in Thomas Jefferson's Virginia Statute for Religious Freedom, happened upon "histor[ies] of the times" written by two Virginia historians, both of whom were ordained ministers with a deep-rooted theological

Court Historical Society has published the following summary from an oral history account by Milton Handler about his time as Justice Harlan Fiske Stone's clerk:

At one point, Holmes observed that in the course of writing the opinion in the recent trademark case, *Beech-Nut Packing Co. v. P. Lorillard Co.*, he had occasion to read a fascinating book on the history of law and usage of trademarks. Stone asked whether Holmes was referring to a doctoral dissertation by Frank Schechter. The senior Justice nodded. Stone told him that he had persuaded Schechter, who was a trademark counsel for BVD Co., to take a year off from practice to stand as the first candidate for a doctorate in law at Columbia. Learning that Stone had inspired the writing of this book, Holmes rose, walked across the room and shook Stone's hand. "I congratulate you on one of the great acts of your life," he said.

Supreme Court Historical Society 1988 Yearbook, available at http://www.supremecourt.history.org/o4_library/subs_volumes/o4-c10_g.html, citing Milton Handler, "Are the State Antidilution Laws Compatible with the National Protection of Trademarks?" *The Trade-mark Reporter* 75 (1985): 270-1.

² Transcript of letter in the Manuscript Division; Library of Congress, Washington, D.C. (transcription by Ernest J. Enrich, December 2, 2003).

³ *Reynolds v. United States*, 98 U.S. 145, 192 (1879).

commitment to the separation of church and state. The historians who provided the chief justice with more “facts” about the colonial Virginia backdrop to the First Amendment were Baptist Robert Semple, who wrote a highly praised (and periodically reissued) *History of the Rise and Progress of the Baptists in Virginia*, and Presbyterian Robert Reid Howison, who produced a rapidly forgotten (but in this case, quite influential) two-volume *History of Virginia*.⁴

Based on his study of these historical works, Justice Waite interpreted the Constitution’s religion clauses in the light of Virginia’s efforts in the 1780s to eliminate state funding for churches and to protect the freedom of religion. His analysis centered on James Madison’s Memorial and Remonstrance in opposition to a “bill establishing provision for the teachers of the Christian religion” and on the act “‘for establishing religious freedom,’ drafted by Mr. Jefferson.”⁵ Waite linked these Virginia materials to the Constitution by noting Madison’s role in initially proposing the First Amendment in Congress and Jefferson’s subsequent comments in a letter to a committee of the Danbury, Connecticut, Baptist Association, where he described the amendment as building a “wall of separation between Church and State.”⁶ And to this day, thanks to Chief Justice Waite’s silent partnership with the historian George Bancroft,⁷ Thomas Jefferson, and James Madison – and their church-state exploits in Virginia and elsewhere – have been the foundation upon which the Supreme Court has erected its church-state jurisprudence. A Findlaw.com search identifies over twenty-five Supreme Court cases mentioning Madison’s Memorial and over twenty cases employing Jefferson’s “wall of separation” language.⁸

⁴ Robert B. Semple, *A History of the Rise and Progress of the Baptists in Virginia* (Richmond, Va.: published by the author, 1810); Robert Howison, *History of Virginia from Its Discovery and Settlement by Europeans to the Present Time*, 2 vols. (Richmond, Va.: Drinker and Morris, 1848).

⁵ *Reynolds*, 98 U.S. at 163.

⁶ *Ibid.* at 164.

⁷ Bancroft received the thank-you note described above, but was not cited in Waite’s opinion.

⁸ Supreme Court opinions looking to the intentions of the framers to shed light on the meaning of the religion clauses are too numerous to list here. The first modern establishment clause case, *Everson v. Board of Education*, 330 U.S. 1 (1947), reh. denied, 330 U.S. 855 (1947), reaffirmed the statement in *Reynolds* that the “provisions of the first amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and intended to provide the same protection against governmental intrusion on religious liberty as the Virginia [Bill of Religious Liberty].” 330 U.S. at 15–16. Justice Rutledge’s dissenting opinion even included Madison’s Memorial and Remonstrance as an Appendix. Laurence Tribe has observed that “whether the Black-Rutledge version [in *Everson*] is accurate history has been disputed vigorously off the court [but] what is indisputable is that, with remarkable consensus, later Courts accepted the perspective of these Justices as historical truth.” Laurence H. Tribe, *American Constitutional Law*, 2nd ed. (Mineola,

considering an act repealing the charter of the Episcopal Church in the early nineteenth century, appealed to "the common sense of mankind and the maxims of eternal justice," which, he opined, were fully consistent with the common law understanding that "the division of an empire creates no forfeiture of previously vested rights."¹¹ He did not, however, offer a single historical source, case reference, or even simple footnote to guide the reader to the source of the maxims of eternal justice. Similarly Chief Justice Marshall's opinions in blockbuster cases such as *McCulloch v. Maryland* (1819) and *Barron v. Baltimore* (1833) invoked no authority beyond the text of the Constitution itself,¹² although in *Barron* he did acknowledge that antifederalist opposition to the Constitution was "universally understood," and simply "part of the history of the day," – one of the rare and remarkably brief moments of historical reflection in early nineteenth-century constitutional jurisprudence.¹³

Even when justices have looked at the origins of various constitutional provisions, Justice Waite's focus on the intentions of specific framers has not always been the Court's methodology. In a detailed analysis titled "The Original Understanding of Original Intent," H. Jefferson Powell argues that the "hermeneutical traditions" of the founding era rejected "intentionalism" – that is, referring to the opinions or actions of the framers to interpret the Constitution. Rather, the interpretation of the Constitution from the time it was ratified through the first few decades of the nineteenth century typically

¹¹ *Terrett v. Taylor*, 13 U.S. 43, 50 (1815).

¹² *McCulloch v. Maryland*, 17 U.S. 316 (1819); *Barron v. Baltimore*, 32 U.S. 243 (1833).

¹³ In another nineteenth-century use of constitutional history, Marshall himself is cited as a framer by an 1870 New Jersey Supreme Court case, which mentions a speech by Marshall delivered at the Virginia ratifying convention. *Martin v. Martin's Executor*, 20 N.J. Eq. 421 (1870). Interestingly, more recent Supreme Court justices and scholarly commentators have credited Marshall with being so much a part of the historical context that his views deserve special deference on issues relating to what the framers may have intended. In commenting on Marshall's opinion in *Marbury v. Madison*, Charles Beard wrote: "The great Justice who made the theory of judicial control operative had better opportunities than any student of history or law today to discover the intention of the framers. Marshall... was on intimate, if not always friendly, relations with the great men of his state [Virginia] who were instrumental in framing the Constitution." Charles A. Beard, *The Supreme Court and the Constitution* (New York: The Century Co., 1912), p. 1, quoted in John G. Wofford, "'The Blinding Light': The Uses of History in Constitutional Interpretation," *University of Chicago Law Review* 31 (1963-4): 502, 507. See also the opinions cited by Wofford in *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 587 (1949) (Justice Jackson: Marshall "wrote from close personal knowledge of the Founders and the foundation of our constitutional structure"; Justice Frankfurter: "Marshall had no mean share in securing adoption of the Constitution"). Wofford, "Blinding Light," p. 506.

involved the "standard techniques of statutory construction" that had been well established in English and colonial American common law. The term "original intent" then "referred to the 'intentions' of the sovereign parties to the constitutional compact, as evidenced in the Constitution's language and discerned through structural methods of interpretation; it did not refer to the personal intentions of the Framers or of anyone else."¹⁴

Powell's conclusion is, of course, open to debate: Raoul Berger has issued a sharp rebuttal of Powell's thesis, arguing that "from earliest times when courts spoke of 'intention' they meant . . . 'actual intent'";¹⁵ others, such as Charles Lofgren, have argued that there is strong evidence to support the primacy of the ratifiers' understanding of the Constitution.¹⁶ Meanwhile, dedicated originalist (or "textualist") Justice Antonin Scalia rejects the authority of the framers' intentions, opting instead to ascertain "what the text would reasonably be understood to mean, rather than . . . what it was intended to mean."¹⁷ As Gary Lawson has written, "Originalist analysis . . . is not

¹⁴ H. Jefferson Powell, "The Original Understanding of Original Intent," *Harvard Law Review* 98 (March 1985): 885-948 reprinted in Jack N. Rakove, ed., *Interpreting the Constitution* (Boston: Northeastern University Press, 1990), pp. 53-115. Powell goes on to note that neither James Madison nor John Marshall "regarded historical evidence of the Framers' personal intentions as a definitive or even particularly valuable guide to constitutional construction" (p. 85).

¹⁵ Raoul Berger, "'Original Intention' in Historical Perspective," *George Washington Law Review* 54 (1985-6): 296, 336.

¹⁶ Charles A. Lofgren, "The Original Understanding of Original Intent," in Rakove, *Interpreting the Constitution*, pp. 117-50. As to the establishment clause itself, Gerard Bradley argues that "ratification is the key event. . . . [T]he search for constitutional meaning is for the meaning apprehended by the ratifiers." Gerard V. Bradley, *Church-State Relationships in America* (New York: Greenwood Press, 1987), pp. 136-7. Daniel Conkle's definition of establishment clause originalism embraces both framers and ratifiers: "Originalist constitutional theory would limit constitutional restraints on government to those restraints that were originally intended by the framers and ratifiers of the Constitution including its various amendments." Daniel O. Conkle, "Toward a General Theory of the Establishment Clause," *Northwestern University Law Review* 82 (1987-8): 1115, 1119. He then expands (or perhaps modifies) this definition by indicating in a footnote that the "originalist meaning of a constitutional provision depends in the first instance on its language, read in light of its original context." *Ibid.*, n. 18, citing Dickerson, "Statutes and Constitution in an Age of Common Law," *University of Pittsburgh Law Review* 48 (1987): 773.

¹⁷ Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, N.J.: Princeton University Press, 1997), p. 144. "What I look for in the Constitution," he writes, "is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended" (p. 38). See also Antonin Scalia, "Originalism: The Lesser Evil," *University of Cincinnati Law Review* 57 (1989): 849. For a textualist interpretation of the establishment clause, see William C. Porth and Robert P. George, "Trimming the Ivy: A Bicentennial Re-examination of the Establishment Clause," *West Virginia Law Review* 90 (1987-8): 110.

a search for concrete historical understandings held by specific persons."¹⁸ Instead, he asserts that for "most contemporary originalists," it involves "a hypothetical inquiry that asks how a fully informed public audience, knowing all that there is to know about the Constitution and the surrounding world, would understand a particular provision."¹⁹

Irrespective of whether we focus on the framers' preconstitutional acts, floor debates, post-adoptive writings, the ratifiers' views, or the general public's sense of the text's original meaning, the fact remains that the early nineteenth-century Supreme Court spent little time consulting any potential sources of original intent or meaning.²⁰ Interestingly, however, as the framers and ratifiers literally died out, their views started to become increasingly important as the Supreme Court's arsenal of interpretive approaches began to expand. Powell notes, for example, that by midcentury, the tide was

¹⁸ Gary Lawson, "Delegation and Original Meaning," *Virginia Law Review* 88 (2002): 327, 398.

¹⁹ Ibid. See also Michael Stokes Paulsen, "How to Interpret the Constitution (and How Not To)," *Yale Law Journal* 115 (2006): 2037. For a detailed study of "originalism" of this type, see Jonathan O'Neill's *Originalism in American Law and Politics: A Constitutional History* (Baltimore, Md.: Johns Hopkins University Press, 2005): "First, originalism holds that ratification was the formal, public, sovereign, and consent-conferring act which made the Constitution and subsequent amendments law. Second, originalism holds that interpretation of the Constitution is an attempt to discover the public meaning it had for those who made it law. Third, originalism holds that although interpretation begins with the text, including the structure and relationship of the institutions it creates, the meaning of the text can be further elucidated by extrinsic sources. This includes evidence from those who drafted the text in convention as well as from the public debates and commentary surrounding its ratification. . . . Finally, because originalism regards the sovereign act of lawmaking authority as having 'fixed' the meaning of a constitution to be interpreted by ordinary legal methods, consultation of extrinsic evidence is usually limited to historical sources that might reveal the public meaning of the text at the time it became law" (p. 2).

²⁰ Interestingly, there are mixed views from the framers themselves on the extent to which constitutional history should be an authoritative source for future interpretations. Some scholars, for example, quote Madison's comments in the Congress to the effect that "whatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the Oracular guide in expounding the Constitution. . . . [It] was nothing more than the draft of a plan . . . until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions." Quoted in Powell, "Original Understanding," p. 83. See also Jack N. Rakove, "Mr. Meese, Meet Mr. Madison," in Rakove, *Interpreting the Constitution*, p. 179. But see Donald O. Dewey, "James Madison Helps Clio Interpret the Constitution," *American Journal of Legal History* 15, no. 1 (January 1971): 38-5: "Despite his frequent assertions that the Constitution should be allowed to speak for itself, Madison always put more confidence in the historical facts concerning the development of the Constitution than in the verbiage and phraseology of the document" (p. 38). As discussed more fully below, it is not clear that Madison took either of these positions in his effort to interpret the establishment clause during his presidency and thereafter.

turning, and by "the outbreak of the Civil War, intentionalism in the modern sense reigned supreme in the rhetoric of constitutional interpretation."²¹ Evidence of this novel approach to the Constitution can be found in Judge Abel Parker Upshur's 1840 "A Brief Enquiry into the True Nature and Character of Our Federal Government," where he wrote, "The strict construction for which I contend applies to the intention of the Framers of the Constitution and this may or may not require a strict construction of their words."²² Not surprisingly, George Bancroft, constitutional historian and the inspiration for Chief Justice Waite's originalist technique in the *Reynolds* decision, adopted this kind of intentionalism. In an 1884 letter to Waite he lambasted the result in the Court's recent "paper money" case, *Juilliard v. Greenman*,²³ saying, "I have been over the ground again and again and have found only evidence after evidence making clear the *intention of the authors* of the constitution and the meaning of that instrument on the point which has been questioned."²⁴

In recent times, professional historians have periodically reviewed the Court's use of history to interpret the Constitution, and they have assigned poor grades to the effort. Perhaps the most common epithet is "law office history," the concept that lawyers will excavate the dry, cracked volumes of history comprising the constitutional foundation of a case for one, and only one, purpose: to unearth archival material supporting their clients' cases. So if their clients seek a strong and resolute division of church and state, they read the history through a "strict separationist" lens and find Jefferson's wall of separation, whereas opposing counsel will dig up evidence that James Madison not only sat on a committee that appointed a congressional chaplain but, when he was President, also proclaimed national days of prayer.²⁵ In other words, the lawyers are living up to the historical version

²¹ Powell, "Original Understanding," p. 87.

²² A. Upshur, *A Brief Enquiry into the True Nature and Character of Our Federal Government* (Petersburg, 1840), quoted in Powell, "Original Understanding," p. 87.

²³ *Juilliard v. Greenman*, 110 U.S. 421 (1884).

²⁴ M. A. DeWolfe Howe, *The Life and Letters of George Bancroft*, 2 vols. (New York: Charles Scribner's Sons, 1908), vol. 2, p. 299 (emphasis added). In quoting this letter, Waite's first biographer, Bruce Trimble, notes, "Bancroft's assistance to the Court, however was not always of so little avail. See his aid in the [*Reynolds*] Polygamy Case." Bruce R. Trimble, *Chief Justice Waite: Defender of the Public Interest* (Princeton, N.J.: Princeton University Press, 1988), p. 288.

²⁵ In an article on the First Amendment's religion clauses, Philip Kurland cautions: "Care must be taken that the so-called history is not what historians properly denounce as 'law office history,' written in the way brief writers write briefs, by picking and choosing statements and events favorable to the client's cause." But, a few pages later, when he sets out the Virginia colonial history that he believes to be relevant to his interpretation of the religion

of the popular joke in which three professionals are asked by their client: "What is 2 plus 2?" The accountant says, "Four"; the engineer says, "Four point zero"; and the lawyer says, "What do you want it to be?" The point of the joke is that, for clever lawyers, even mathematical certainties can be manipulated in service of the argument that best serves the client's interest, let alone fuzzier and less determinate things like complex historical events. And the Supreme Court justices, trained as lawyers rather than as historians, may have little choice but to adopt one or another version of law office history for lack of any better information, leading to this blunt appraisal by the chief justice of the West Virginia Court of Appeals: "Lawyers . . . who take seriously recent U.S. Supreme Court historical scholarship as applied to the Constitution also probably believe in the Tooth Fairy and the Easter Bunny."²⁶

Academic historians may use more moderate language (at least some of the time), but their verdicts are generally similar when historical materials are brought to bear on modern cases and controversies. Historian Jack Rakove, in his testimony before the House Judiciary Committee regarding the history of impeachment, commented: "Many historians are uncomfortable with the cruel and unusual use often made of historical materials in contemporary debate. The nuance, subtlety, and respect for ambiguity that we cherish and relish in our research cannot easily be translated into urgent political discussion."²⁷ In a similar way, historian Gordon Wood observes

clauses, he writes: "My estimate, *perhaps because it satisfies my desires*, is that Madison turned to his own experience in Virginia to guide his efforts, rather than looking to the sister states for enlightenment" (emphasis added). Philip B. Kurland, "The Origins of the Religion Clauses of the Constitution," *William and Mary Law Review* 27 (1985-6): 839, 842, 853.

²⁶ Richard Neely, *How Courts Govern America* (New Haven, Conn.: Yale University Press, 1981), p. 18. Or, as Leonard Levy has written, "Two centuries of Court history should bring us to understand what really is a notorious fact: the Court has flunked history." Leonard W. Levy, *Original Intent and the Framers' Constitution* (New York: Macmillan, 1988), p. 300. See also Eric Foner, "The Supreme Court's Legal History," *Rutgers Law Journal* 23 (1991-2): 243-7.

²⁷ Jack N. Rakove, "Confessions of an Ambivalent Originalist," *New York University Law Review* 78 (2003): 1346-56, 1347. Despite his concerns about translating historical research into political discussions, even Rakove has entered the church-state originalism debate, albeit with an article whose title reflects some ambivalence: "Once More into the Breach: Reflection on Jefferson, Madison, and the Religion Problem," in Diane Ravitch and Joseph Viteritti, eds., *Making Good Citizens: Education and Civil Society* (New Haven, Conn.: Yale University Press, 2001). Rakove notes, "No discussion of the sticky quandary posed by the double helix of the Religion Clause . . . can long avoid some invocation of the authority of the two Virginians [Madison and Jefferson]." Why, he asks, do these two have such a hold on our formulation of the problem? "First, it might well be true that there really is something to be learned from our political ancestors, not because they were patriarchs or

that "[i]t may be a necessary fiction for lawyers and jurists to believe in a 'correct' or 'true' interpretation of the constitution in order to carry on their business, but we historians have different obligations and aims."²⁸ Ultimately, lawyer/historian Jonathan Martin summarizes the oblique way in which history and law address the same materials, arguing that "[w]hile historians' logic of evidence acknowledges complexity, nuance, and contingency, lawyers' logic of authority prizes determinative evidence – the knockout punch."²⁹

What is perhaps most interesting about studying the Supreme Court's treatment of the religion clauses is that at crucial moments – Waite's opinion in *Reynolds*, which is essentially the first chance the Court gets to apply the religion clauses, and then again about fifty years later in *Everson v. Board of Education*, a busing-to-parochial-schools case in which the Court returns to the history of the First Amendment to launch the modern era of church-state jurisprudence – the justices have actually looked past the arguments of the litigants and their lawyers for insights into the origins of the First Amendment. In fact, they have sought out some of the most learned historians of their day, men of letters with no interest in the parties or lawsuits, popular and distinguished historians at the peak of their craft, whose insights would be piped directly into the justices' opinions, in some

because their opinions are legally authoritative, but simply because they thought deeply and powerfully about the matter in question. Second, the ongoing debate no longer permits us to pretend that their thoughts do not matter" (pp. 234, 236). Thus he avoids directly taking a position on whether Jefferson and Madison should be the authoritative interpreters of the religion clauses but proceeds from the separate historical observation that they have already been put into that position by courts and commentators. Perhaps more interestingly, his characterization of the "religion clause" (expressed in the singular) as a double helix is a far bolder interpretive statement than the straightforward observation that Madison's and Jefferson's fingerprints have been placed on the First Amendment irrespective of whether it was, in fact, their handiwork. Rakove may simply have been reaching for an interesting turn of phrase to express a two-component construct, but in the post-Crick and Watson world, it is hard not to call to mind our most famous double helix. And if DNA should be our guide, Rakove may be telling us that the religion clause contains two components such that the Court, playing the role of DNA replicative machinery, could have fashioned each portion of the clause simply from the template provided by the other. That is an interesting interpretive approach that, unfortunately, Rakove does not amplify. I am grateful to Nils Lonberg for helping me try to unravel the double helix analogy.

²⁸ Quoted in Jonathan D. Martin, "Historians at the Gate: Accommodating Expert Historical Testimony in Federal Courts" *New York University Law Review* 78 (2003): 1518–49, 1526.

²⁹ *Ibid.*, pp. 1525–6. For further discussions on the subject of originalism, see the following symposia: "Originalism, Democracy, and the Constitution – Symposium on Law and Public Policy – 1995," *Harvard Journal of Law and Public Policy* 19 (1995–6): 237–532, and "Symposium: Fidelity in Constitutional Theory," *Fordham Law Review* 65 (1996–7): 1247–1818.

cases via long-standing personal relationships between historian and jurist. In researching his opinion in *Reynolds*, Chief Justice Waite called upon his former next-door neighbor, George Bancroft, whose advice pointed him to Virginia historians Semple and Howison. Half a century later, in the opinions that defined the modern Court's approach to establishment clause originalism in *Everson*, Justice Black virtually copied his major interpretive point from well-known historian Charles Beard, and Justice Rutledge drew his inspiration from the biography of James Madison written by his good friend Irving Brant. It is at the feet of these eminent scholars that we can lay responsibility for many of the knockout punches and the Easter Bunny history that has emerged from these First Amendment opinions.

If, as Philip Kurland suggests, law office history is "written the way brief writers write briefs by picking and choosing statements and events favorable to the client's cause,"³⁰ then it seems that the same approach to one-sided interpretative craftsmanship can also be found among historians themselves. In other words, the opinions in *Reynolds* and *Everson* look like one-sided, goal-oriented law office history not just because they depict how lawyers write history but because that is the way the historians themselves were writing. At least at that time, it appears that the modern scholar's commitment to nuance and subtlety in the study of American history had not yet evolved from an earlier era's desire for clarity and certainty. In fact, constitutional scholar Ken Kersch has pointed to the influence on modern civil liberties thought of a number of highly regarded historians (often called Whig historians) who "endeavor to cut 'a clean path through . . . complexity,' through 'an over-dramatization of the historical story' that pits the forces of progress against the forces of reaction."³¹

To date, establishment clause jurisprudence clearly owes a considerable debt to Whiggish myth-making by a number of respected historians in the

³⁰ Philip B. Kurland, "The Origins of the Religion Clauses," p. 842.

³¹ Ken I. Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (Cambridge, U.K.: Cambridge University Press, 2004), pp. 2, 11, quoting Herbert Butterfield, *The Whig Interpretation of History* (New York: W. W. Norton, 1965), pp. 5, 29, 34. Examples cited by Kersch include the works of Charles A. Beard and Vernon Parrington. Butterfield writes, for example, that it "is part and parcel of the Whig interpretation of history that it studies the past with reference to the present. . . . Through this system of immediate reference to the present-day, historical personages can easily and irresistibly be classed into the men who furthered progress and the men who tried to hinder it. . . . The total result of this method is to impose a certain form upon the whole historical story . . . which is bound to converge beautifully upon the present – all demonstrating throughout the ages the workings of an obvious principle of progress, of which the Protestants and Whigs have been the perennial allies while Catholics and Tories have perpetually formed obstruction." Butterfield, *Whig Interpretation*, pp. 11–12.

nineteenth and early twentieth centuries. It remains to be seen whether, in light of the current era's commitment to academic rigor in the profession of history, we will continue to find evidence of this kind of narrative-as-argument style of Whiggish historical scholarship. But, when *Reynolds* appeared in the late 1870s, and again in the middle of the twentieth century, when *Everson* was decided, the distinguished historians consulted by the Court not only believed in an originalist approach to the religion clauses, but they were also not bashful in offering up clear, direct, and decidedly unnuanced historical evidence of an original constitutional intent supporting a strict separation of church and state in the mode promoted by some of the writings of Thomas Jefferson and James Madison.

In assessing the Court's originalist jurisprudence, and in analyzing the historiography surrounding it, we should bear in mind that the *Reynolds* case had a relatively modest effect (except on the Mormons) because, at the time, the First Amendment applied only to actions of the federal government. Several decades later, when the *Everson* case extended the establishment clause's reach to the actions of state and local governments, the opinions in that case would fundamentally change how scholars would read and write about church-state interactions throughout the colonial and early national periods. Pre-*Everson*, when the First Amendment applied only to the rare interactions between the federal government and religion, the historians whose works later appeared in Supreme Court cases may have had grander interpretive goals than merely recounting the facts for the sake of an accurate chronicle of past events – Bancroft to position his hero, Thomas Jefferson, at the center of the action; Semple to glorify God through His people the Baptists, who had been persecuted at the hands of Virginia's established church; Howison to celebrate the Old Dominion's contributions to the new nation; and so on – but none wrote with the primary intention that his description of past events would directly inform the Court's view of the future of constitutional law.³² Their authorial decisions to include some materials and not others, to identify particular cause-and-effect relationships, and the like, may have been motivated by any number of factors,

³² George Bancroft could be an exception here. He later wrote a two-volume history of the Constitution that he may have hoped would influence Supreme Court decisions. Since we do not know how Chief Justice Waite framed his original question to Bancroft about the religion clauses, it is impossible to tell whether his answer, which focused on Jefferson and Virginia, was motivated by a specific desire to influence the Court to pursue any particular interpretation of church-state issues, especially since the context was a Mormon polygamy case. See George Bancroft, *History of the Formation of the Constitution of the United States*, 2 vols. (New York: Appleton, 1882).

but influencing the supreme law of the land was not likely to be a primary goal because, as Powell has shown, at least until later in the nineteenth century, the Court did not spend much time inquiring into the intentions of the Founding Fathers.

Post-*Everson*, a new game is afoot. With the religion clauses applicable, essentially for the first time, to many high-intensity church-state issues (such as state aid to parochial schools), and with all nine Supreme Court justices devoting themselves to an originalist approach to the establishment clause, historians of the relevant times cannot help but write in the hot-house environment of constitutional decision-making. Even scholars who do not write with constitutional interpretation foremost in mind are hard-pressed to avoid it, being invariably confronted with the fact, as described by Jon Butler, that "it is no longer possible for historians . . . to pretend that any judgment about [patterns of American religion in the late eighteenth century] is merely an exercise of abstract scholarship. The questions of the last three decades have inevitably politicized scholarship in this area."³³ Meanwhile, a number of commentators have put abstract scholarship aside to address the church-state constitutional issues directly. In fact, the opportunity to pen what could become the seminal work in First Amendment history that fundamentally alters establishment clause jurisprudence (or, alternatively, protects the Court's current approach from new challenges) has created a cottage industry populated by prolific originalists. Each hopes to emulate the success of Frank Schechter's BVD-inspired article, which moved the Court to fashion its trademark analysis in the *Victoria's Secret* case. These historians, political scientists, legal scholars, judges, and others have contributed to an impressively large body of literature, offering any number of mutually exclusive apologia for particular approaches to church-state issues, every one apparently mandated by the one true reading of constitutional history. Their books and articles are frequently written in what may be termed the first-person argumentative, as in *I-can't-believe-anyone-could-possibly-see-it-any-other-way*, a tone emulated by some of the Supreme Court justices as they pick and choose among the histories and the historians.³⁴

³³ Jon Butler, "Why Revolutionary America Wasn't a 'Christian Nation,'" in James H. Hutson, ed., *Religion and the New Republic: Faith in the Founding of America* (Lanham, Md.: Rowman & Littlefield, 2000), pp. 188–9.

³⁴ Suzanna Sherry uses this establishment debate as an example illustrating the observation that "careful historical analysis of the same historical evidence may yield opposite conclusions," thus often making history "indeterminate" for the purposes of constitutional interpretation. Suzanna Sherry, "The Indeterminacy of Historical Evidence," *Harvard Journal of Law and Public Policy* 19 (1995–6): 437, 440.

The vast majority of these commentators share a fundamental belief in the interpretive principle enunciated in *Reynolds* and *Everson* – namely, they are all originalists, at least regarding the establishment clause. They believe that church-state issues can and should be resolved by reading the First Amendment in light of its original meaning. Finding this many originalists in one constitutional place is particularly intriguing in a modern era in which construing the Constitution in accordance with views of the framers – deceased, Caucasian, sometimes slave-holding, frequently wealthy men – is often associated with politically conservative platforms and politicians.³⁵ In church-state cases, the defining originalist approach fits this profile: At the outset, it was inaugurated in *Reynolds* through the efforts of a President Grant-appointed, Republican railroad lawyer, Morrison Waite, the man who declared that corporations were entitled to constitutional protection as “persons” under the Fourteenth Amendment,³⁶ but then it was fully embraced and amplified in *Everson* by two New Deal Democrats, Justices Hugo Black and Wiley Rutledge. Ever since these landmark cases, those favoring a strict separation of church and state (including a large number who would consider themselves political liberals) have invoked the framers as frequently as those who favor a more accommodating relationship between religion and government (including many political conservatives).³⁷

³⁵ See, e.g., Judge Robert Bork, who has written, “For the past 20 years conservatives have been articulating the philosophy of originalism, the only approach that can make judicial review democratically legitimate.” Robert H. Bork, “Slouching Towards Miers,” *Wall Street Journal* (October 19, 2005), p. A12. Constitutional scholar Keith Whittington has pointed out that originalism has typically been associated with judicial restraint and the “contemporary conservative political views of the New Right,” but he has argued that it is possible to base “originalist theory on more defensible justificatory arguments”; as a result, “originalism can neither be advanced nor defeated with simple arguments for or against judicial passivism or political conservatism but must be debated on its own terms.” Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence: University of Kansas Press, 1999), p. 167. Justice John Paul Stevens, generally seen as the leader of the Supreme Court’s liberal wing as of this writing, includes originalism in his interpretive toolkit: “Originalism is perfectly sensible. I always try to figure out what the original intent was, but to say that’s the Bible and nothing else counts seems to me quite wrong.” Quoted in Jeffrey Rosen, “The Dissenter,” *New York Times Magazine* (September 23, 2007), p. 79. For an argument against originalism, as well as various other “grand unified theories” of constitutional interpretation, see Daniel A. Farber and Suzanna Sherry, *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations* (Chicago, Ill.: University of Chicago Press, 2002). For a recent celebration of originalism, see Steven G. Calabresi, ed., *Originalism: A Quarter-Century of Debate* (Washington, D.C.: Regnery Publishing, 2007).

³⁶ *Santa Clara County v. Southern Pacific Railroad Company*, 118 U.S. 394 (1886).

³⁷ Referring to the “striking consensus” over the “view that interpretation [of the religion clauses] should be guided by the intentions of the Framers and Ratifiers,” Robert P.

Despite widespread commitment to originalism as the proper interpretative method, the establishment clause debates in the modern era have been heated, and they most frequently boil down to just one underlying substantive issue: Does the First Amendment permit nonpreferential aid to religion – that is, support available to all churches or religions equally – or does it require a “strict separation” of church and state that would forbid essentially any governmental encouragement or funding of religion? The two camps, typically referred to as the “nonpreferentialists” (or accommodationists) versus the “strict separationists,” join the battle in Supreme Court briefs, scholarly publications, and public relations campaigns, and the language is unrestrained. Princeton professor Edward Corwin accused the Court of making up its strict separationist version of establishment clause history,³⁸ and Brooklyn College professor James M. O’Neill, leaping into the post-*Everson* fray with what has been called the “leading manifesto for the nonpreferentialist position,”³⁹ was “shocked” by the “misunderstanding and confusion in regard to the Bill of Rights” in *Everson*; he called Justice Rutledge’s strict separationist opinion in *Everson* “the greatest threat to our civil liberties in recent times.”⁴⁰ O’Neill’s manifesto prompted a vigorous defense of the Court by the prolific scholar and attorney Leo Pfeffer, who declaimed that “[a]cceptance of the O’Neill [nonpreferentialist] thesis would pervert the First Amendment.”⁴¹ Each succeeding generation has inspired yet another matched set of scholarly screeds and diatribes. In the 1980s, when Northeastern University political scientist Robert Cord published a nonpreferentialist book detailing Pfeffer’s “error[s],” Pulitzer Prize-winning Claremont historian Leonard Levy responded with a sharply worded volume condemning Cord’s work as “[m]ostly historical fiction masquerading

George notes that “even people . . . who reject originalist readings of, for example, the First Amendment’s free speech provision, or the . . . Fourteenth Amendment’s guarantees of due process and equal protection, tend nevertheless to embrace originalism when it comes to the religion clauses.” Robert P. George, “Protecting Religious Liberty in the Next Millennium: Should We Amend the Religion Clauses of the Constitution?” *Loyola Los Angeles Law Review* 32 (1998–9): 27, 27–8.

³⁸ Edward S. Corwin, *A Constitution of Powers in a Secular State* (Charlottesville, Va.: Michie, 1951), p. 116.

³⁹ Daniel Dreisbach, “*Everson* and the Command of History: The Supreme Court Lessons of History, and Church-State Debate in America,” in Jo Renee Formicola and Herbert Morken, eds., *Everson Revisited: Religion, Education and Law at the Crossroads* (Lanham, Md.: Rowman & Littlefield, 1997), pp. 34–5; James M. O’Neill, *Religion and Education under the Constitution* (New York: Harper & Brothers, 1949).

⁴⁰ O’Neill, *Religion and Education*, pp. xi–xii.

⁴¹ Leo Pfeffer, “Church and State: Something Less Than Separation,” *University of Chicago Law Review* 19 (Autumn 1951): 28.

as scholarship."⁴² Then, in 1998, James Hutson, Chief of the Library of Congress's Manuscript Division, published his analysis of the political intent behind Thomas Jefferson's "wall of separation" letter, which emerged from the ability to use the FBI's state-of-the-art laboratory tools to identify words in earlier drafts of the letter that had been crossed out by Jefferson.⁴³ Worried that nonpreferentialists would seize the scholarly moment to proclaim that the newfound evidence of Jefferson's political motivation meant that the Court's traditional reading of the letter as a statement of church-state principle was just a myth, twenty-four scholars, led by University of Virginia law professor Robert M. O'Neill and University of Richmond humanities professor Robert S. Alley, issued a public letter vigorously attacking Hutson's paper as "an unbalanced treatment [based on] questionable analysis [depending on] a flawed premise."⁴⁴

The stakes in this debate are high, from tactical victories in the modern culture wars to the flow (or not) of millions of dollars in aid to "faith-based initiatives," which could include parochial schools as well as church-run soup kitchens and daycare centers. The debaters often show little, if any, respect for their opponents' arguments. Law professor Douglas Laycock defends calling nonpreferentialist arguments "false" or "frivolous" because "[s]cholars should not feel constrained to publish only turgid prose in obscure journals. They should not leave the public debate to those who feel no scruples whatever to conform their claims to the evidence."⁴⁵ In response, Roman Catholic bishop and historian Thomas Curry, in more restrained but equally pointed prose, counters that Laycock's certainty that the framers meant to forbid nonpreferential establishments can "only be maintained by projecting a modern concept of non-preferential establishment into the past . . . and ignoring the overwhelming body of historical evidence to the contrary."⁴⁶

⁴² Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (New York: Lambeth Press, 1982), and Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* (New York: Macmillan, 1986), p. 221.

⁴³ See James H. Hutson, "Thomas Jefferson's Letter to the Danbury Baptists: A Controversy Rejoined," *William and Mary Quarterly*, third series, 56, no. 4 (October 1999): 775-90.

⁴⁴ The scholars' letter, which was released by Americans United for the Separation of Church and State, is available at www.atheists.org/flash.line/jeff2.htm. See also "Jefferson's Church-State Views Debated: Thomas Jefferson, Library of Congress Exhibit Controversy," *The Christian Century* (August 26, 1998).

⁴⁵ Douglas Laycock, "The Origins of the Religion Clauses of the Constitution: 'Nonpreferential' Aid to Religion: A False Claim about Original Intent," *William and Mary Law Review* 27 (Summer 1986): 875, 877, 994.

⁴⁶ Thomas J. Curry, *Farewell to Christendom: The Future of Church and State in America* (New York: Oxford University Press, 2001), p. 119, n. 23.

The post-*Everson* church-state literature thus appears as a study in essentially Newtonian argumentation: For every strict separationist action, there is an equal and opposite nonpreferentialist reaction. Throughout these heated debates, and despite blunt aspersions such as false, frivolous, and fiction, the underlying facts are rarely, if ever, in dispute. No one doubts Madison's authorship of the anonymously circulated Memorial and Remonstrance, all acknowledge Madison's role in introducing drafts of the religion clauses in the First Congress, everyone cites the same account of the congressional debates, and so on. The differences center on which facts should be embraced as indicative of the framers' true intentions – or perhaps the text's original meaning – and which must be discarded as irrelevant, unimportant, or merely idiosyncratic. Do we focus on the national days of prayer declared by Madison when he was President or on his retirement writings opposing the practice? Is our Jeffersonian muse the "wall of separation" letter or the treaty funding Christian missions to Native Americans?

Despite the name calling by both camps, church-state disputants do not necessarily differ as to which framers' vision should inform our interpretation of the establishment clause, but, rather, they seek to invoke different words or deeds of the same Founding Fathers – most commonly Jefferson and Madison – to figure out what those particular framers really meant. In the meantime, others have parsed the precise language ("an" establishment versus "the" establishment, for example), or have taken on the philological task of determining what words such as "establishment" meant at the end of the eighteenth century.

It is quite rare in this debate for anyone to make the argument that a fact cited by an opponent is "false" in the sense that a claimed event did not occur or that a logical or mathematical certainty prevents reaching a particular conclusion. No matter how much the client wants two plus two to equal something other than four, "law office math" is not open to interpretation. In church-state debates, however "fiction" and "false" are more broadly used to refer to an interpretation of the (generally undisputed) facts that is not as well supported by all of the available facts as the opposing argument. In trying to avoid the "turgid prose" endemic to scholarship, writers on all sides of this debate tend to encourage their readers to see this controversy as resolvable by a dedicated and objective review of the facts ("true facts" versus "false facts," as it were) rather than what it is, which is a bitter dispute over which of the largely undisputed facts are the most important ones for interpreting the establishment clause.⁴⁷

⁴⁷ In the postmodern academic world, one could ask whether there is such thing as a false interpretation, or even better and worse interpretations. In light of the need for courts to

Cutting across the strict separationist/nonpreferentialist debate is yet another school of thought, a group of scholars whose focus on the language that Congress is forbidden from making laws "respecting" – that is, on the subject of – "an establishment of religion" leads them to conclude that this provision merely resolves a jurisdictional issue. That is, the clause was enacted to prevent any federal interference with the states' power to establish religions if they chose to do so. In its most enthusiastic form, this school of thought would permit both the states and the federal government, even today, to maintain formally established churches.

However they emerge on their ultimate interpretation of the establishment clause, and whatever facts they marshal in support of those interpretations, these scholars and jurists are originalists, one and all. They believe that history can and should provide a clear church-state constitutional mandate.⁴⁸ Meanwhile, there are a few iconoclastic commentators who suggest either that the breathtakingly sparse evidence of the framers' intentions offers little or no helpful guidance at all⁴⁹ or that, at the very least, we should recognize, as John F. Wilson has pointed out, that the sharply bifurcated strict separationist/nonpreferentialist interpretations of the framers' views may be less an accurate description of eighteenth-century debates than "modern positions . . . worked out in the last half-century or so."⁵⁰

My goal in this contentious environment is two-fold. First, before delving directly into this historical quagmire, I want to advance our understanding of how the Supreme Court came to adopt what has become its dominant historical approach to church-state questions. Irrespective of whether the Court is right or wrong, the question is: What inspired the Court's devotion

determine the outcome of constitutional cases, this work will proceed on the assumption that if the court selects originalism as a valid interpretive methodology, that court will also believe that there are, in fact, better and worse originalist arguments based on the persuasiveness of the evidence cited and the arguments offered for consideration.

⁴⁸ Or, if they are not really committed originalists, they are willing to be originalists-pro-tem in the hopes of influencing the Supreme Court in establishment clause cases.

⁴⁹ See, e.g., Wood, "American Religion." "We do not, and cannot, base American constitutional jurisprudence on the historical reality of the Founding. Our constitutional jurisprudence accepts a fiction involving the Founders' intent – it may have become a necessary legal fiction as the country's laws have taken shape but it is a fiction nonetheless" (p. 63). See also Steven G. Gey, "More or Less Bunk: The Establishment Clause Answers That History Doesn't Provide," 2004 *Brigham Young University Law Review* (2004): 1617, and Steven K. Green, "'Bad History': The Lure of History in Establishment Clause Adjudication," *Notre Dame Law Review* 81 (2005-6): 1717.

⁵⁰ John F. Wilson, "Religion, Government, and Power in the New American Nation," in Mark A. Noll, ed., *Religion and American Politics: From the Colonial Period to the 1980s* (New York: Oxford University Press, 1990), p. 77. See also Vincent Phillip Muñoz, "Religious Liberty and the American Founding," *Intercollegiate Review* 38, no. 2 (Spring-Summer 2003): 33-43.

to the intentionalist version of establishment clause originalism and how did the Court settle on the now familiar history, or what we might call the classical mythology, of the First Amendment religion clauses? Then I will take on a second, considerably more challenging task: To determine which – if any – of the competing mythologies and methodologies best represents the original meaning of the clause. That is to say, my goal is not to defend (or attack) originalism but to take that exegetical method as a given.⁵¹ If we are to be establishment clause originalists, as so many commentators seem to be, what is the most consistent and supportable approach to originalism based on the many interpretations that have been advanced since 1789?

Since it appears that the various groups of originalists do not necessarily agree with each other as to where to look for evidence of the Constitution's original meaning, for the purposes of this exercise in establishment clause originalism, I use the term "originalism" to refer broadly to an attempt to determine how the establishment clause may have been understood – by any and all – around the time that it was adopted and ratified;⁵² this analysis will be based on a range of possible evidence, including framers' and ratifiers' statements or acts that might shed light either on their intentions or on what they saw as the clause's purpose or expected meaning, as well as materials that bear on how other Americans at the time might have understood the text.⁵³ Once that analysis is complete, we can decide whether we need to return to the methodological issue of the relative importance for constitutional interpretation of, for example, the views of specific framers versus other evidence concerning the clause's contemporary meaning.⁵⁴

⁵¹ For a summary of the reasons why the use of history to interpret the religion clauses may have significant shortcomings, see, e.g., Jesse H. Choper, *Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses* (Chicago, Ill.: University of Chicago Press, 1994), pp. 1–6, and Green, "Bad History."

⁵² Since the Supreme Court has decided that the Fourteenth Amendment has caused the establishment clause to apply to the states as well as to Congress, the relevant times for originalist analysis may therefore include the eras of the adoption of both the First Amendment and the Fourteenth Amendment.

⁵³ Powell has set out fourteen rules for "using history responsibly." H. Jefferson Powell, "Rules for Originalists," *Virginia Law Review* 73 (1987): 659, 662. While I have not specifically set out to follow them rule by rule, I have, by the same token, tried to avoid breaking too many of them.

⁵⁴ As we will see in the chapters that follow, we will need to confront an interesting methodological issue that arises when a "hypothetical inquiry that asks how a fully informed public audience, knowing all there is to know about the Constitution and the surrounding world," in Lawson's words, comes up with a possible reading of the text that does not appear to have corroborative evidence of actual use from the records of the time. Lawson, "Delegation and Original Meaning," p. 398. That is, what do we do when the evidence of an actual public meaning conflicts with an equally reasonable but largely (or entirely) hypothetical original meaning?

In the end, it may well be the case that our establishment clause jurisprudence – and much of the commentary surrounding it – misses the historical mark. That is not to say that our quest for the historical establishment clause is necessarily doomed from the start, only that if we focus clearly on both what was and what was not going on at the time the First Amendment was adopted, we may find that modern desires to find useful answers to specific questions have led us to imagine an eighteenth-century debate between competing constitutional creation myths that simply did not take place. We can, in fact, determine with some clarity what the establishment clause meant to the framers, the ratifiers, and the general public, at least in the Founding Era, and if we set aside the strict separationist/nonpreferentialist debate to which we have become so accustomed, it becomes far more visible. But first we need to see how the Supreme Court ended up in the middle of this historical quest.