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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.supremecourthistory.org/04_library/subs_volumes/04-c10_g.html, citing Milton Handler, "Are the State Antidilution Laws Compatible with the National Protection of Trademarks?" *The Trademark 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,

There are many remarkable aspects of the Reynolds case; not least among them was the fact that the chief justice even raised the issue of the historical background of the First Amendment to the Constitution. Digging around in the records of the founding era was hardly the common practice in nineteenth-century jurisprudence that it has become in some modern judicial opinions and academic publications. Today, First Amendment interpreters of virtually every political and intellectual stripe endeavor to find support for their views of the religion clauses via appeals to a variety of eighteenth-century luminaries who may have influenced, to one degree or another, the thoughts or actions of the men who wrote, debated, voted on, ratified, or implemented the Bill of Rights, leading historian Gordon Wood to observe that "showing that the Founders would have approved of the writer's position seems to be essential to any argument over religion and government."[9] But this kind of originalism was relatively uncommon during the Supreme Court's early encounters with the Constitution.

Early nineteenth-century Supreme Court opinions were relatively brief – extremely so by today's standards; the dissenting and concurring opinions that are now virtually ubiquitous appeared considerably less frequently; and, perhaps most surprisingly for a generation of jurists who knew some of the framers personally, citations to constitutional history or intent were most noteworthy by their absence. There may have been an occasional reference to common law principles, which were typically derived from English cases, or to Blackstone, Coke, or other distinguished legal scholars, again often imported from England.[10] And when traditional English sources were not on point, justices reached out for much higher authorities than their political contemporaries. The eminent and ever quotable Justice Joseph Story, in

N.Y.: Foundation Press, 1988), p. 1160. More recently, Justice Souter's dissenting opinion in *Mitchell v. Helms*, 530 U.S. 793 (2000), in which he is joined by Justices Ginsberg and Stevens, relies heavily on Madison's Memorial and Jefferson's Bill for Establishing Religious Freedom. A few years ago, Daniel Dreisbach compiled a list of federal and state cases referring to Jefferson's Bill and Madison's Memorial in "Thomas Jefferson and Bills Number 82–86 of the Revision of the Laws of Virginia, 1776–1786: New Light on the Jeffersonian Model of Church-State Relations," *North Carolina Law Review* 69 (1990): 173–5 nn. 77–83. For a quantitative analysis, see Mark David Hall, "Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religion Clause Cases," *Oregon Law Review* 85 (2006): 563–614.

[9] Gordon S. Wood, "American Religion: The Great Retreat," *New York Review of Books* 53, no. 10 (June 8, 2006), p. 60.

[10] This penchant for looking to common law antecedents extended to state court cases as well. See, e.g., *The People v. Ruggles*, 8 Johns. 290 (1811), a New York case citing Blackstone; and *Maddox v. Maddox's Administration*, 52 Va. 804 (1854), where the court even reached out to a "writer on Scotch Criminal Law."

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 anti-federalist 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* (Petersberg, 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.