

## Church, State, and Original Intent

This provocative book shows how the United States Supreme Court has used constitutional history in church-state cases. Donald L. Drakeman describes the ways in which the justices have portrayed the framers' actions in a light favoring their own views about how church and state should be separated. He then marshals the historical evidence, leading to a surprising conclusion about the original meaning of the First Amendment's establishment clause: the framers originally intended the establishment clause only as a prohibition against a single national church. In showing how conventional interpretations have gone astray, he casts light on the close relationship between religion and government in America and brings to life a fascinating parade of church-state constitutional controversies from the founding era to the present.

Donald L. Drakeman is a Lecturer in the Department of Politics at Princeton University. He is the author of *Church-State Constitutional Issues*, and his writings have appeared in *Constitutional Commentary*, *Journal of Church and State*, *American Journal of Legal History*, *The Christian Century*, *Religion and American Culture*, and several law reviews. He is also co-editor of *Church and State in American History*. He has served as legal counsel for a coalition of religious organizations acting as friends of the Court in federal church-state litigation, and he has been a member of the Religious Liberty Committee of the National Council of Churches and the Civil Rights Committee of the Association of the Bar of the City of New York. He is a co-founder and chairman of the Advisory Council of the James Madison Program in American Ideals and Institutions at Princeton University and a former co-chair of the Advisory Council for Princeton's Department of Religion.

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DONALD L. DRAKEMAN

*Princeton University*



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## Preface

Nowhere have the intentions of the American Constitution's framers been more important than in church-state cases. The United States Supreme Court's devotion to the original meaning of the First Amendment's "establishment clause" began in the 1870s and continues to the present, as constitutional questions regularly arise over issues ranging from aid to religious schools and courthouse Christmas displays to children pledging allegiance to one nation "under God." This book seeks to address two critical questions in the realm of "church, state, and original intent": (1) Why did the Supreme Court pursue this quest for the First Amendment's original meaning, and once it did, where did the justices find the history they have so firmly grafted onto the text of the establishment clause? (2) What is a reasonable originalist interpretation of the establishment clause in light of all of the relevant materials?

The first chapter sets the stage by introducing the Supreme Court's "wall of separation" jurisprudence, which first appeared in the 1870s in the Reynolds Mormon polygamy case. This interpretation was based on locating the origins of the establishment clause in the church-state views of Thomas Jefferson and James Madison. Chapter 1 then outlines the three principal schools of thought that have emerged in scholarly works, judicial opinions, and the popular press to compete for attention in this arena, all of which are focused on discerning the intentions of the framers of the Bill of Rights.

Chapter 2 examines the Reynolds case in considerable detail, and it shows that the Supreme Court's view of history can be traced back through prominent historian George Bancroft to evangelical Baptist and Presbyterian historians writing in nineteenth-century Virginia whose texts were driven by theological commitments to a strict separation of church and state.

Chapter 3 focuses on the Supreme Court's 1947 *Everson* decision, which is widely acknowledged to be the single most important establishment clause case, in large part because all nine justices were committed to building a wall of separation between church and state based on their understandings of the framers' intentions. By analyzing the justices' files and private papers, this chapter shows that Justice Wiley Rutledge dominated the opinion writing and historical analysis, not Justice Hugo Black, as is commonly thought. Moreover, correspondence and memoranda in Justice Rutledge's papers show that one of his primary goals was to minimize the threat of Roman Catholic influence in the public schools and that he employed his arguments about the framers' intentions to shield that motivation from public view. This chapter reviews the historical sources cited by both Rutledge and Black and concludes that they do not fully support the historical claims made by the justices.

Chapter 4 describes the explosion of the church-state historical literature that was touched off by the *Everson* Court's emphasis on original intent. These works by scholars and constitutional lawyers have attempted either to shore up the Court's analysis or to replace it with an entirely different historical understanding, and many of the arguments are inconsistent with each other. A critical element of this chapter is to identify the specific historical claims underlying the various interpretations so that these claims can be evaluated in light of the documents constituting the original record.

Chapter 5 presents and analyzes the primary source material and historical context from the eighteenth century, and it seeks to provide as full a picture as can be obtained of the origins and meaning of the establishment clause at the time it was adopted by Congress and ratified by the states. It then tests each of the three dominant originalist interpretations against the historical data, and finds all of them wanting.

Chapter 6 explores how the establishment clause was interpreted by presidents, legislators, judges, and the public during the period from its adoption until the Reynolds case discussed in Chapter 2. This chapter includes an analysis of how the establishment clause may have been understood by Congress and the American public around the time that the Fourteenth Amendment was adopted, an action that the Supreme Court has interpreted as causing the mandates of the establishment clause to apply to the states as well as to the federal government.

Chapter 7 advances a fresh interpretation of the historical evidence, leading to a new approach to the establishment clause. While some aspects of the evidence can be employed to support each of the various conventional interpretations, the only reading of the clause that is persuasively supported

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by all of the relevant data shows that its original meaning was to forbid the establishment of a single national religion. It is unclear whether such a prohibition only applied to an entity like the Church of England or whether more ecumenical forms of governmental financial aid might also have been included within the original meaning of the phrase “an establishment of religion.” On this latter point, the record is (and probably always will be) too murky to tell for sure. Interestingly, this no-national-religion interpretation is not the conclusion that I expected to reach when I began this project, nor is it necessarily in line with my personal views of how church and state should interact, but it appears to be compelled by an as-objective-as-possible analysis of the history.

Earlier versions of portions of Chapters 2 and 3 appeared in the following journal articles, and I would like to thank the journals’ editors for permission to use those materials here: “*Reynolds v. United States*: The Historical Construction of Constitutional Reality,” *Constitutional Commentary* 21, no. 3 (2004): 697–726; “The Church Historians Who Made the First Amendment What It Is Today,” *Religion and American Culture: A Journal of Interpretation* 17, no. 1 (2007): 27–56; and “*Everson v. Board of Education* and the Quest for the Historical Establishment Clause,” *American Journal of Legal History* 49 (2007): 119–68.

In the course of this effort, I have managed to disagree on one point or another with just about everyone who has written on these topics, including teachers, friends, and colleagues who have been enormously helpful in my educational development, in particular, Robert P. George, Kent Greenawalt, and John F. Wilson. I am hopeful that this exercise in biting the scholarly hands that have fed me will be seen as the compliment that was intended.

I would like to thank those who were kind enough to review and comment on drafts of the entire manuscript, especially Daniel Dreisbach and Phillip Muñoz, with whom I have had numerous lively, enjoyable, and immensely productive discussions, as well as Lewis Bateman and Emily Spangler and their external reviewers at Cambridge University Press. Many thanks are also due to those who graciously provided helpful insights in discussions, debates, and conference sessions, or who thoughtfully commented on various aspects of the material that has found its way into this book, including Akhil Reed Amar, Gerard Bradley, Mark Brandon, Nicole Davida, Thomas Davis, Richard Garnett, Nils Lonberg, Raj Parekh, Leigh Schmidt, Christine Whelan, Stephen Whelan, Keith Whittington, and Eric Yun, as well as more than fifteen years’ worth of Princeton students who have helped me wrestle with all manner of complex constitutional concepts. Special thanks are due to Thomas Clark, whose terrific research work, including trips to

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Most of all, I was inspired, informed, and intellectually challenged by Amy, Cindy, and Lisa Drakeman. It was Lisa's wonderful work on nineteenth-century religion that convinced me that those of us who focus on church-state constitutional issues too often overlook more than 100 years of rich and fertile American history; and Amy's studies in psychology and social work have provided a critical reminder that, however important they may have been, framers are people too. And then there is Cindy, whose pursuit of a classical archaeology D.Phil. was the muse that reawakened and renewed my interest in the life of the mind and the pursuit of scholarship. Our worlds were an ocean and millennia apart, but our common devotion to asking "What do we know and how do we know it?" while musing about parallels between Romano-Celtic religion and American church-state practices sharpened my thinking, sustained my efforts, and made this a labor of love.