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THE PRACTICAL PERILS OF AN ORIGINAL INTENT-BASED JUDICIAL PHILOSOPHY: ORIGINALISM AND THE CHURCH-STATE TEST CASE

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I. INTRODUCTION

Two important historical "events," the rise to power of the political right in the 1980s and the two hundredth anniversary of the Constitution and the Bill of Rights, prompted a proliferation of scholarship regarding the role the United States Supreme Court should play in our republic.[1] Within the larger interpretive debate, those on the right openly questioned the judicial activism

1. *See, e.g.*, JOHN AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY (1984); SOTIRIOS A. BARBER, ON WHAT THE CONSTITUTION MEANS (1984); RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); SUSAN R. BURGESS, CONTEST FOR CONSTITUTIONAL AUTHORITY: THE ABORTION AND WAR POWERS DEBATES (1992); LEIF H. CARTER, CONTEMPORARY CONSTITUTIONAL LAWMAKING: THE SUPREME COURT AND THE ART OF POLITICS (1985); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980); RONALD M. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); LEONARD WILLIAMS LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION (1988); STEPHEN MACEDO, THE NEW RIGHT V. THE CONSTITUTION (1986); GARY L. MCDOWELL, CURBING THE COURTS: THE CONSTITUTION AND THE LIMITS OF JUDICIAL POWER (1988); ARTHUR SELWYN MILLER, TOWARD INCREASED JUDICIAL ACTIVISM: THE POLITICAL ROLE OF THE SUPREME COURT (1982); RICHARD E. MORGAN, DISABLING AMERICA: THE "RIGHTS INDUSTRY" IN OUR TIME (1984); WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION (1986); MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY (1982); MARK V. TUSHNET, RED, WHITE, & BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988); GRAHAM WALKER, MORAL FOUNDATIONS OF CONSTITUTIONAL THOUGHT: CURRENT PROBLEMS, AUGUSTINIAN CONCEPTS (1990); CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW (1986); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

Justices on the Supreme Court have also contributed their scholarship. *See* William Brennan, *Text and Teaching Symposium, in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION: SPEECHES (1986); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

that characterized the Warren Court and, to some degree, the Burger Court.[2] Former Attorney General Edwin Meese, commenting on those judges, politicians, and academics who favor an active judiciary, noted:

> They appear to view the United States Constitution as a document virtually without legally significant, discernible meaning. To them, the Constitution is a text whose meaning must be created by judges supposedly sensitive to changing social conditions and, it seems, intoxicated by only the most recent moral or political philosophies.[3]

Once in power, the political right not only challenged the manner in which the Court was protecting "fundamental liberties," but began to fashion the judicial system in its own image by appointing judges, at all levels, who shared the philosophy of judicial restraint.[4]

Even without the emergence of the political right, the two hundredth anniversary of the Constitution undoubtedly would have generated an abundance of scholarly work. The overlapping of the two events simply intensified efforts by constitutional theorists to justify their approach to constitutional interpretation. Much more is at stake than celebration and academic debate.[5]

In advancing their case for judicial restraint, several on the political right argue that unchecked judicial activism is undemocratic and subordinates the Constitution to the personal predilections of the Justices.[6] They maintain it would be better for judges to interpret the Constitution by applying some objective principles rather than imposing their own views of rights and liberties on the nation. In fact, they suggest it would be better to liken the Constitution to a social contract.[7] Like any contract, the meaning of a

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2. The political right, or perhaps more appropriately the "new political right," is partially identified and discussed in MACEDO, *supra* note 1, at 1. *See* Sotirios A. Barber, *The New Right Assault on Moral Inquiry in Constitutional Law*, 54 GEO. WASH. L. REV. 253 (1986).

3. Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5, 5 (1988).

4. *See* ETHEN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989). "Reagan supporters both in and outside the administration said often and loudly that their goal was to remake the federal judiciary, to undo the 'activism' of the preceding quarter century." *Id.* at 120. President Bush picked up appointing conservative judges and justices where Reagan left off: "More than half of the nation's 828 federal appeals and district court judges were appointed by Reagan and Bush." W. John Moore, *Righting the Courts*, 17 NAT'L J. 200, 200 (1992).

5. The Robert Bork "event"—his nomination, confirmation hearings, and subsequent rejection by the full Senate—made it abundantly clear that the interpretive debate in constitutional theory can generate substantial political controversy. *See generally* BORK, *supra* note 1; BRONNER, *supra* note 4; Frank Guliuzza et al., *Character, Competency, and Constitutionalism: Did the Bork Nomination Represent a Fundamental Shift in Confirmation Criteria?* 75 MARQ. L. REV. 409 (1992).

6. *See* BERGER, *supra* note 1; BORK, *supra* note 1; WOLFE, *supra* note 1; Rehnquist, *supra* note 1; Scalia, *supra* note 1. For a thorough, if less than flattering, analysis of the originalists (or "preservatives"), see CARTER, *supra* note 1, at 40-70.

7. Meese, *supra* note 3, at 9.

particular clause can be found by discovering what the authors of the contract meant at the time of its inception.[8]

In searching for the original intent of the contract's framers, parties bound by the contract are not subject to the particular whims of the contract's interpreter. The interpreter simply tells the parties involved what the contract means without evaluating the fairness of its terms. If the original contract, like the Constitution, has an amendment process, the parties are free to maintain the contract or to alter or abolish any offending passage. The political right argues that a judicial philosophy of original intent better safeguards the democratic process. Coupled with the amendment process, it provides for democratic constitutional interpretation and allows the Constitution to live and breathe.[9]

Proponents of judicial activism have reacted strongly to this encroachment by interpretivists, intentionalists, and originalists into the judicial policymaking arena.[10] An active Court is necessary, they argue, to sustain individual liberties and to protect human rights. The proponents insist the Court must discover, articulate, and vigorously defend the republic's highest values.[11] Some go so far as to suggest the Court should move beyond the boundaries of the Constitution when necessary to protect fundamental human rights.[12]

It is not surprising judicial noninterpretivists or, perhaps more accurately, nonoriginalists, do not like the judicial philosophy of original intent as it is proffered by those on the right.[13] Nonoriginalists criticize original intent on both a theoretical, or philosophical, level and a practical level. On a theoretical level they argue "originalism" savages the unparalleled role the Court must play in contemporary society. They believe it is far more dangerous to the rights and liberties of minorities, and to the Constitution itself, to bind

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8. *Id.* at 9-10.

> The Framers thought that only a written constitution with a fixed meaning could be relied upon to limit the arbitrary exercise of governmental power. In addition, as good Lockians, the Framers liked the idea of having a written social contract as their charter of government. Such a contract could embody the popular, democratic consent which the Framers believed essential to legitimizing a system of government.

Id. at 9.

9. *See infra* parts II.A.1, II.A.2.

10. *See infra* notes 11-12.

11. *See, e.g.*, BARBER, *supra* note 1; CARTER, *supra* note 1; DWORKIN, *supra* note 1; MACEDO, *supra* note 1; MILLER, *supra* note 1; PERRY, *supra* note 1; Brest, *supra* note 1; Grey, *supra* note 1.

12. *See, e.g.*, PERRY, *supra* note 1.

13. Quite obviously, this brief summarization fails to do justice to the range and complexity of those arguments made in favor of judicial activism, or at least opposing the case for judicial restraint based upon "original intent." *See* Judith A. Baer, *Reading the Fourteenth Amendment: The Inevitability of Noninterpretivism*, *in* POLITICS AND THE CONSTITUTION 69 (1990); Alan M. Dershowitz, *The Sovereignty of Process*, *in* POLITICS AND THE CONSTITUTION 11 (1990).

judges to the whims of the Constitutional Framers, authored more than 200 years ago, than it is for the majority to allow judges to apply contemporary moral theory when making a decision.[14]

On a practical level, some constitutional scholars criticize originalism as unworkable.[15] These critics argue, for example, insufficient historical materials exist to reconstruct an original collective intent, and when materials do appear to be sufficient, contemporary constitutional scholars look at the data and often reach contradictory conclusions.[16] Thus, whether or not embracing a judicial philosophy of original intent is desirable, it simply will not work.[17]

The purpose of this Article is to examine the criticisms leveled at the judicial philosophy of original intent. This research focuses primarily on the "practical" criticism of originalism and the claim that, apart from its alluring promises, an original-intent-based philosophy will not work. The Article provides an empirical test of this argument by looking in depth at a portion of the scholarly reaction to the history surrounding the debate that eventually led to the First Amendment Establishment Clause. The church-state debate is helpful for two reasons. First, the historical materials are so abundant that a vast body of literature has given its attention to this data.[18] Second, and perhaps more important, the church-state debate in constitutional law is one area in which original intent is extremely important. Both sides in the contemporary debate, strict separationists and accommodationists (or non-

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14. *See* Sotirios A. Barber, *Epistemological Skepticism, Hobbesian Natural Right and Judicial Self-Restraint*, 48 REV. POL. 374 (1986). In summarizing Ronald Dworkin's attack on judicial self-restraint, Barber noted:

> Most importantly, Dworkin's work has changed scholarly perceptions on the issues. The upshot of his argument is that despite the unusual view, judicial activism does not compromise, and is in fact essential to, traditional constitutional presuppositions, while it is restraintist doctrine that is inconsistent with traditional theory. He argues that restraintist doctrine is rooted in a moral skepticism that denies presuppositions integral to the traditional belief that the Constitution can guide judicial decisions; namely, the meaningfulness of general constitutional standards like equal protection and due process and the possibility of rising above personal predilections in cases involving those standards. If Dworkin is right, judicial self-restraint is an unconstitutional practice grounded in propositions that preclude accepting the Constitution as law.

Id. at 375.

15. *See, e.g.*, MACEDO, *supra* note 1, at 9; Baer, *supra* note 13, at 75.

16. *See, e.g.*, MACEDO, *supra* note 1, 7-23.

17. *See* Richard Kay, *Adherence to the Original Intentions in Constitutional Adjudications: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988). Three general objections exist: First, adherence to the original intentions is impossible. *See id.* at 228. Second, "[original intentions adjudication] is self-contradictory." Third, "[original intentions adjudication] is wrong." *See id.* This Article terms the first objection the "practical" objection to originalism, and the third objection the "philosophical" critique of originalism. This Article's two categories encompass the second objection.

18. *See infra* notes 67-68.

preferentialists), make extensive use of the historical material available to bolster their respective arguments.[19]

For those who advocate originalism, what the church-state test case reveals is problematic. Although proponents of an original-intent-based jurisprudence might effectively refute the "philosophical" criticisms of their opponents, this Article suggests they are open to criticism on a "practical" level.

II. ORIGINALISM UNDER SCRUTINY

A. *The Promises of Originalism*

The most staunch proponents of originalism not only believe their theory to be a legitimate alternative to the judicial activism often associated with the modern Supreme Court, they believe it is the only legitimate interpretive methodology. For example, Robert Bork, in his celebrated book *The Tempting of America*,[20] made that abundantly clear when he summarized competing constitutional theories, arguing:

> *All* theories of constitutional law not based on the original understanding contain inherent and fatal flaws. That is true whether the theories are liberal or conservative. . . . Just as it is possible to show that the invention of a perpetual motion machine will never occur, not because of the repeated failures to build one but because the laws of physics exclude any possibility of future success, so too can it be demonstrated that there is no possibility of a successful revisionist theory of constitutional adjudication in a constitutional republic.[21]

Why would an originalist speak with such complete confidence? A brief review of the abundant literature proffered by proponents of originalism reveals their belief originalism engenders at least two related expectations: it safeguards the legitimacy of judicial review and better protects republican government.

1. *Originalism Safeguards the Legitimacy of Judicial Review*

Justice Scalia argues "[t]he principle theoretical defect of nonoriginalism . . . is its incompatibility with the very principle that legitimizes judicial

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19. For a brief definition of "separationists" and "accommodationists," see Frank Guliuzza III, *The Establishment Clause and the Quest for Originalism*, 54 REV. POL. 477, 478 (1992) (reviewing DEREK DAVIS, ORIGINAL INTENT: CHIEF JUSTICE REHNQUIST AND THE COURSE OF AMERICAN CHURCH/STATE RELATIONS (1991) and DONALD L. DRAKEMAN, CHURCH-STATE CONSTITUTIONAL ISSUES: MAKING SENSE OF THE ESTABLISHMENT CLAUSE (1991)).

20. BORK, *supra* note 1.

21. *Id.* at 251 (emphasis added).

review of constitutionality."[22] Although Scalia acknowledges originalism is not without flaws, he believes it better protects the legitimacy of judicial review.[23]

Scalia's arguments have substantial scholarly support.[24] Several reasons are given to support the proposition an original-intent-based jurisprudence better safeguards the legitimacy of judicial review. First, originalism prompts judges to begin the process of constitutional interpretation from the same "base line."[25] According to Ronald Rotunda, the Framers never expected future jurists to be bound to their intentions the way a city council might be bound to a particular city ordinance.[26] Their intentions were thought to create a "base line"—a place from which constitutional interpretation could begin.[27]

Second, originalism supplies judges with "core values" when interpreting cases.[28] Critics of original intent suggest original intent would limit the application of constitutional provisions to precise situations envisioned more than 200 years ago.[29] Rotunda maintains the criticism is nonsensical. He observes although we cannot know how the Framers would vote on specific cases today, modern day judges can look at the text, history, structure, and precedent to find a "'core value,' a major premise; the judge then supplies the minor premises in the circumstances of a particular case."[30]

Third, originalism sets boundaries on constitutional arguments. David Shea argues original-intent theory cannot govern constitutional interpretation with absolute precision because historical intent is seldom so clear that it impedes reasonable arguments.[31] It does serve, however, "to set some bounds on constitutional arguments, because it is usually possible to conclude that some interpretations have much more support in the historical evidence than others and to exclude wholly some interpretations."[32] Rotunda and Shea argue supplying core values, setting boundaries, and providing a base line for judges makes the Court become stronger—not weaker. Thus, the legitimacy of the institution of judicial review is enhanced. Rotunda argues:

> Not all judges and commentators who look at history—as well as the other tools of judicial review such as text, structure, logic and prece-

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22. Scalia, *supra* note 1, at 854.
23. *Id.* at 856, 864.
24. *See infra* notes 25-49.
25. Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507, 508 (1988).
26. *Id.*
27. *Id.* at 508-09.
28. *Id.* at 514.
29. *Id.* at 513-14.
30. *Id.* at 514.
31. David M. Shea, *The Limits of the Judiciary: Some Thoughts on Original Intent Theory*, 24 CONN. L. REV. 147, 148 (1991).
32. *Id.*

> dent—will reach the same conclusions on every issue, but they at least will start at the same base line, and that base line helps confer legitimacy on judicial review and cautions the courts in its exercise.[33]

Finally, originalism fosters stable, objective, and impersonal rules. Richard Kay argues that, by following original intentions, the judgments upon which individual decisions turn are based on data that is "in theory, and largely in fact, both fixed and available."[34] As a result, judges know what constitutional rules to apply in advance of some case action.[35]

Although the theory is not perfectly predictable, other models depend on judicial elaboration of extensive, poorly defined standards, and encourage judicial evolution of these principles over time. Thus, judges are less constrained by the discipline of the process, resulting in inconsistent decisions.[36] Kay notes, "[O]riginal intentions adjudication will lead to rules that are as stable, objective, and impersonal as human beings can manage when dealing with a source which can be regarded as authoritative."[37] He further notes, "The outstanding characteristic of original intentions adjudication, for good or ill, is that it is, compared with the alternative methods, most likely to produce relatively clear and stable rules for lawful government activity."[38]

2. *Originalism Better Protects Republican Government*

Proponents of originalism insist there are a number of ways an original-intent-based judicial philosophy better preserves republican government. First, originalism safeguards democratic-republican authority by protecting the idea of majority rule and the vision embraced by the Framers.[39] Originalism presumes that the people ratified the Constitution, understood its concepts to mean what they meant at the time of its inception-ratification, and charged the Supreme Court to safeguard the structures of government and the liberties articulated within.[40] When the Constitution speaks clearly, the Court should vigorously defend the founding document.[41] When it does not speak clearly, the Court should defer to the popularly elected policy-making branches.[42]

Alternative theories require judges to make moral decisions and, to have any legitimacy, these moral decisions should draw from a moral philos-

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33. Rotunda, *supra* note 25, at 508-09.
34. Kay, *supra* note 17, at 286.
35. *Id.*
36. *Id.* at 287-88.
37. *Id.* at 258.
38. *Id.* at 288.
39. BORK, *supra* note 1, at 252.
40. *Id.*
41. *Id.*
42. *Id.; see also* Lino Graglia, *How Should the Courts Interpret the Bill of Rights?*, 15 HARV. J.L. & PUB. POL'Y 149, 151 (1992) (discussing the right of people to govern themselves).

ophy upon which all can agree.[43] Bork argues, however, that because the greatest minds of our millennium—Kant, Kierkegaard, Hume, and Smith to name a few—were not successful in constructing a universally accepted system of moral philosophy, it is foolish to assume judges or constitutional scholars are up to the task.[44]

Further, originalists insist the consequences of illegitimate, "results-oriented" judicial policy-making are disastrous for the Constitution. First, in the long run it weakens the judiciary, and therefore indirectly weakens the Constitution, by undermining judicial supremacy.[45] Second, it blurs the lines that distinguish the legislative and judicial branches.[46] This consequence, as it is often observed, is counter-democratic; it fosters an oligarchic institution composed of judges, appointed for life, who are empowered to strike down the majority will.[47] Third, it makes the Constitution meaningless.[48] As indicated above, the Constitution simultaneously places some limits, checks, and restraints on the power of government, and serves as a source for judicial authority. Raoul Berger notes, however,

> Once it is posited that adjudication inevitably is results-oriented—what is constitutional is just what a majority on the Court desires—we should not complain because a new majority prefers its own policies to those of its predecessor. On that view the Constitution is like a weather vane that turns with shifting political winds.[49]

Fourth, it undermines the vision of the republic conceived by the Framers.[50] The Framers understood the importance of community; they knew why religion and morality are critical for republican government, they knew what free speech means and why it must be respected, and the like.[51] Modern judges are using a different calculus when evaluating rights and liberties. They decide cases based on what effectuates good public policy at the moment.[52] Walter Berns observes:

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43. BORK, *supra* note 1, at 252. "If this unique feature of our democracy, judicial power to invalidate legislation implementing the majority will, is to make sense, it must be grounded on something firmer than judicial views of desirable social policy." Shea, *supra* note 31, at 151.

44. BORK, *supra* note 1, at 254-55.

45. *Id.*

46. Shea, *supra* note 31, at 150.

47. *Id.* at 151.

48. *Id.*

49. Raoul Berger, *The Imperial Court*, N.Y. TIMES, Oct. 9, 1977, § 6 (Magazine), at 38, *reprinted in* JOEL GROSSMAN & RICHARD WELLS, CONSTITUTIONAL LAW AND JUDICIAL POLICYMAKING 157 (1988).

50. *See* WALTER BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 229-37 (1976).

51. *See id.*

52. *See id.*

> Philosophic men of the past addressed themselves to these questions and provided answers. But the Supreme Court no longer remembers those answers. The Founders, in their different ways, also provided answers, but the Court no longer remembers their answers either. Instead, it has allowed itself to be carried about on the wind of modern doctrine.[53]

In summary, proponents of originalism maintain the theory will accomplish several objectives. It prompts judges to begin the process of interpretation at the same base line, it supplies judges with core values, it sets boundaries on constitutional arguments, and it leads to stable, objective, and impersonal rules. Thus, the theory permits its proponents to make two promises: Originalism serves to better safeguard judicial review and better protect constitutional republican government.

B. *Originalism: A "Practical" Critique*

The bulk of literature surrounding the question of judicial activism and judicial restraint focuses on the "philosophical" debate. The "philosophical" debate is indeed passionate. Those committed to an original-intent-based jurisprudence, however, are not likely to be dissuaded by nonoriginalists. Many political and judicial conservatives will continue to press for originalism, despite the philosophical objections, precisely because they believe it protects the democratic component of our "constitutional democracy."

Although the philosophical debate over the desirability and legitimacy of originalism rages on, and receives most of the attention in the literature, a number of opponents of originalism have advanced a "practical" critique that is potentially devastating to proponents of original intent.[54] It might well be true that originalism provides a base line for constitutional interpretation, sets boundaries, provides core values, and the like. The practical criticism of originalism is quite apart from its desirability or undesirability. The claim is it just will not work. Whether or not constitutional interpreters want to unearth the Framers' original intentions, they simply cannot employ the doctrine successfully. The "tools" simply do not exist to interpret the Constitution based on the intent of the Framers. These "practical" critiques of originalism cluster around several arguments.

1. *Who are the "Framers"?*

It is extremely difficult to analyze the original intent of the Framers when we do not know who they are. Stephen Macedo asks, "[W]hose intent is

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53. *Id.* at 237.
54. *See supra* note 15.

to count as original and authoritative?"[55] Do all the delegates who took part in the 1787 Constitutional Convention count equally? Do we count only those who were active participants? Do we assume the document they produced depicts their collective "intent," or do we stress heavily the remarks of those who prevailed over the dissenters?[56] Where do the ratification debates fit into the process of determining original intent? Certainly the document as ratified should be counted more heavily than the document as proposed.[57]

2. *What Was Their Original Intent?*

How do we know what the Framers intended the more elusive phrases of the Constitution to mean? "What counts as evidence of intent?"[58] Are unpublished correspondences and manuscripts acceptable? Do the records of congressional proceedings count even though they may have been edited as they are today? Which public statements did the delegates intend to serve as genuine evidence of their intent? What of those delegates and legislators who did not speak?[59]

More importantly, there is no official record of the convention itself. James Madison's notes, a rather unofficial record, were published posthumously in 1840; several important records were destroyed during the War of 1812; and the records of the state ratifying conventions are incomplete.[60]

Further, Richard Epstein recognizes even the record that is available does not point to a united, identifiable "intent."[61] Epstein supports Macedo's argument that "all that is available in the record is the inconsistent, ambiguous, and unreflective intentions of the large group of independent persons who participated in drafting or ratifying the Constitution."[62]

Perhaps the record does not point to an identifiable "intent" because it is difficult for a large group to have a collective intent appropriate for appli-

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55. MACEDO, *supra* note 1, at 11; *see also* LAWRENCE TRIBE, GOD SAVE THIS HONORABLE COURT 45 (1985) (stating an "obvious problem with asking 'what they meant' is that we must first determine who 'they' are").

56. *See* RONALD DWORKIN, LAW'S EMPIRE 318-20 (1986); *see also* Louis Fisher, *Methods of Constitutional Interpretation: The Limits of Original Intent*, 18 CUMB. L. REV. 43, 50 (1987-1988) (critiquing originalism on a practical level).

57. MACEDO, *supra* note 1, at 9. Charles Lofgren argues those who authored the constitutional text distinguished between their intent and the intent of the ratifiers. Charles Lofgren, *The Original Understanding of Original Intent*, 5 CONST. COM. 77, 79 (1988). Lofgren argues we should do the same: "If modern intentionalists focus on the [F]ramers . . . they have scant theoretical or historical grounds for history based hermeneutics." *Id.* at 112. He concludes, however, an original understanding does not rule out resorting to the intent of the ratifiers. *Id.*

58. MACEDO, *supra* note 1, at 9.

59. *Id.* at 9-10.

60. *Id.* at 10; *see also* Fisher, *supra* note 56, at 50 (stating the search for intent "is complicated by incomplete and unreliable records").

61. Richard A. Epstein, *Foreword* to MACEDO, *supra* note 1, at xii-xiii.

62. *Id.* at xiii.

cation to constitutional interpretation.[63] First, when analyzing "original intent," one does not look at the intentions of individuals, but of large bodies such as Congress and national and state conventions. Second, the time between constitutional utterances and attempts by scholars and jurists to understand them renders it extremely difficult to discover the original intentions.[64]

Finally, some have argued even if a complete record of the "Founding" were uncovered and all could agree on who constitutes the "Framers," it is still literally impossible to know the Framers' original intentions.[65] This contention challenges the capacity of human beings to communicate a conclusive meaning through language.[66] Kay observes, "The argument suggests that because linguistic communication is impossible, it is futile for judges to attempt to learn the intentions of the constitution-makers by studying what they said or what other people said about them."[67] Thus, no text is so clear as to allow for any fixed, correct, and exact meaning.[68]

3. *Contemporary Interpreters Arrive at Different Conclusions When Applying Original Intent*

Judith Baer argues originalism "does not do what it promises to do."[69] Even those constitutional interpreters who support original intent reach different conclusions. For example, former Justice Hugo Black read the Framers to require "the total incorporation" theory of the Fourteenth Amendment.[70] Attorney General Edwin Meese, relying on original intent, castigated the Court for those decisions incorporating state action into parts of the Bill of Rights.[71] Hence Meese states, "When the same approach permits contradictory conclusions it is hard to see how it restrains judges or provides consistency."[72] The Black and Meese examples are hardly isolated. The same methodological approach often engenders different interpretations of the historical evidence. Lief Carter argues, "Even those who profess strict fidelity to the past often arrive at contradictory conclusions. Raoul Berger,

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63. Brest, *supra* note 1, at 214-15; *see also* H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 663-64 (1987) (stating the constitution was "the result of deliberations by a divided convention, actually drafted by subcommittees thereof, and given its normative force by the separate actions of state conventions").

64. Kay, *supra* note 17, at 243.

65. *Id.* at 236; *see* CARTER, *supra* note 1, at 60-62.

66. Kay, *supra* note 17, at 243.

67. *Id.*

68. *Id.* at 237.

69. Baer, *supra* note 13, at 75.

70. *Id.*

71. *Id.*

72. *Id.*

Charles Fairman, and William Crosskey all sought truths from the details of the historical records, but they came to very different legal conclusions."[73]

4. *The Framers Could Not Anticipate Everything that Would Become Constitutional Issues*

Simply put, the Framers did not address many issues that, because of technological and sociological innovations, routinely become issues in constitutional law. For example, would the Framers permit citizens to own machine guns and other military hardware? What is the allowable congressional check on presidential powers when the President is commander in chief over a military weapon that might lead to global annihilation? Would the Framers find the congressional ban on television advertising of cigarettes and cigars to be an unconstitutional violation of free speech? How would the Framers respond to the request of some church members to take hallucinogenic drugs as a part of their free exercise of religion? Can a police officer search the trunk of a car he or she has stopped for probable cause? What of the suitcase in the trunk? Would the Framers permit a mandatory blood test for AIDS? These are just a handful of cases available to the Court in 1993 that were not debated in 1793. Each example requires the interpretation of a clear, original textual provision. How are judges to resolve contemporary constitutional cases if original intent should control the interpretation?[74]

To a great extent these "practical" considerations are just as, or maybe even more, damaging to the case for original intent as are the philosophical arguments. Even if originalists successfully make their case that, whenever possible, the original intent should control interpretation, they have a substantial burden of proof to show a sweeping original-intent-based jurisprudence is possible.[75]

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73. CARTER, *supra* note 1, at 53.

74. *See* Douglas S. Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 883-85, 914-15 (1985-1986); *see also* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (arguing that although early constitutional discussion contained reference to the "intent of the Framers," the Framers themselves thought such an interpretative strategy inappropriate).

75. The originalists are not silent in the face of these "practical" criticisms of their interpretive method. Many of their responses are inherent within the "promises" listed above. *See, e.g.*, BORK *supra* note 1, at 143-85; DANIEL DREISBACH, REAL THREAT AND MERE SHADOW 33-43 (1987) (Dreisbach notes that although he responds to the courts treatment of the Framers' intentions, and discusses originalism/intentionalism as a judicial philosophy, he does not fully embrace originalism as an interpretive method); Frank Easterbrook, *Approaches to Judicial Review*, *in* POLITICS AND THE CONSTITUTION 17-29 (1990); Kay, *supra* note 17, at 236-59. For reactions to Bork's important book, see Anthony Cook, *The Temptations and Fall of Original Understanding*, 1990 DUKE L.J. 1163, and Harry Tepker, *Justice Brennan, Judge Bork and a Jurisprudence of Original Values*, 43 OKLA. L. REV. 665 (1990). Not to be outdone, note Raoul

III. THE TEST CASE: ORIGINALISM AND THE ESTABLISHMENT CLAUSE DEBATE

A. *The Importance of Historical Analysis*

One way to test the claim that originalism is unworkable is to find an area of controversy in constitutional law in which an abundance of historical evidence appears, and in which original intent matters to the participants in the debate. The church-state debate allows for just such a test case.

Examining the case law surrounding the First Amendment Establishment Clause[76] reveals a pattern of inconsistency. In one decision religious institutions will receive government aid, and in another case, apparently similar to the first, religious institutions are denied support.[77] One decision might exalt the religious freedom of an individual or group, although other decisions might place what seem to be unnecessary restrictions on the free exercise of religion.[78] Moreover, a careful reading of the

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Berger's defense of Bork's book in Raoul Berger, *Activist Censures of Robert Bork*, 85 NW. U. L. REV. 993 (1991).

76. U.S. CONST. amend. I.

77. State aid to sectarian schools in the form of textbooks is acceptable, although supplies and services are not. *Compare* Board of Educ. v. Allen, 392 U.S. 236 (1968) (holding constitutional a New York statute authorizing loan of textbooks to students attending parochial school) *with* Meek v. Pittenger, 421 U.S. 349 (1975) (holding unconstitutional portions of Pennsylvania statute providing for direct loan of instructional materials and equipment to nonpublic schools). Salary supplements to parochial school teachers are not acceptable, but property tax exemptions to all religious institutions are permitted. *Compare* Lemon v. Kurtzman, 403 U.S. 602 (1971) (holding unconstitutional statutes providing for salary supplements to parochial school teachers and providing for reimbursements of nonpublic schools for teachers' salaries, text books, and instructional materials) *with* Walz v. Tax Comm'n, 397 U.S. 664 (1970) (holding constitutional a statute exempting religious organizations from real property tax). In many cases, the Court determined government support for institutions, individuals, or religious activities is unacceptable. *See* County of Allegheny v. ACLU, 492 U.S. 573 (1989); Aguilar v. Felton, 473 U.S. 402 (1985); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985); Stone v. Graham, 449 U.S. 39 (1980); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948). In other cases the Court upheld government support. *See* Board of Educ. v. Mergens, 496 U.S. 226 (1990); Bowen v. Kendrick, 487 U.S. 589 (1988); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986); Lynch v. Donnelly, 465 U.S. 668 (1984); Marsh v. Chambers, 463 U.S. 783 (1983); Mueller v. Allen, 463 U.S. 388 (1983); Wolman v. Walter, 433 U.S. 229 (1977); Tilton v. Richardson, 403 U.S. 672 (1971); Zorach v. Clauson, 343 U.S. 306 (1952); Everson v. Board of Educ., 330 U.S. 1 (1947).

78. Why, for example, is the government required to compensate Sabbatarians who refuse to work on Saturdays, *see* Sherbert v. Verner, 374 U.S. 398 (1963), but not required to accommodate those who can demonstrate dire financial consequences from Sunday closing laws, *see* Braunfeld v. Brown, 366 U.S. 599 (1961)? Why does the Free Exercise Clause protect a young man from military combat during wartime, *see* United States v. Seeger, 380 U.S. 163 (1965), but not safeguard an officer who wishes to wear his *yarmulke* with his uniform, *see* Goldman v. Weinberger, 475 U.S. 503 (1986)? *Compare* Employment Div. v. Smith, 494 U.S. 872 (1990)

Establishment Clause cases reveals the suspect nature of the analysis behind the decisions. Often the Justices' reasoning was so counterintuitive that inconsistent results were inevitable.[79]

Just how bad are the Court's Establishment Clause decisions? It is not simply that the decisions are analytically suspect. Steven Pepper argues they are "in significant disarray."[80] Mark Tushnet finds the constitutional law of religion to be "incoherent."[81] Leonard Levy calls some decisions "disastrous."[82] Gerard Bradley states that "these counterintuitive judicial commandments are also historically counterfactual."[83]

One might argue the Court's haphazard approach to the Establishment Clause is inconsequential. The Justices are addressing a touchy issue, a sensitive area of constitutional law, and have, by and large, adeptly negotiated the potential landmines. That laudatory assessment is simply invalid. Francis Lee correctly observes pragmatic reasoning does not equate with principled or prudent reasoning:

> In fact, the voices of reason and common sense would defend the Court's actions regarding both free exercise and establishment as being realistic, politically sound, and at bottom, pragmatic. They may be all three, but a Court that is solely realistic, political, and pragmatic may have problems convincing the realistic, pragmatic, and political types that inhabit the halls of Congress and the White House that it is the Constitution, and not the Justices, speaking. They may fail—in fact, in the realm of religion they *have* failed to persuade. Consequently, they find their decisions in this arena scorned by a majority of Americans and, not surprisingly, transformed into political issues. Such surely is the case with prayers in the public schools and possibly with the issue of aid to religious schools. These problems rather than being resolved, seem to have been aggravated even inflamed as a result of Court's ministering.[84]

(holding a compelling interest test would not apply to free exercise claims seeking exemption from what are otherwise neutral laws of general applicability) *with* Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding Amish parents may not be compelled by a religion-neutral statute to send their children to high school). The Court's treatment of the Free Exercise Clause has produced a debate in the literature regarding the constitutional validity of religion-based exemptions. *See* William Marshall, *The Case Against the Constitutionality of Compelled Free Exercise Exemptions*, 40 CASE W. RES. L. REV. 357 (1990); Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591 (1990);

79. *See* Norman Redlich, *Separation of Church and State*, 60 NOTRE DAME L. REV. 1094 (1985); Frank Guliuzza III, Beyond Incoherence: Making Sense of the Church-State Debate (1990) (unpublished Ph.D. dissertation, University of Notre Dame).

80. Stephen Pepper, *The Conundrum of the Free Exercise Clause—Some Reflections on Recent Cases*, 9 N. KY. L. Rev. 303 (1982).

81. TUSHNET, *supra* note 1, at 247.

82. LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE 140 (1986).

83. GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA xiii (1987).

84. FRANCIS LEE, WALL OF CONTROVERSY 6 (1986).

How have the scholars, those expert in church-state relations, reacted to the inconsistency abounding in the case law? What explanations do they offer for incoherence?

One debate appears to dominate the abundance of books and articles addressing the church-state controversy. A great many of those with a stake in the church-state debate are occupied with what may be termed the "Quest for Originalism."[85] These scholars struggle to discover the intent of the Founding Fathers for religious freedom—and to put the Founders' intent into some sort of context. Thus, theirs is a quest to unearth the attitudes toward religious liberty of the colonists, those in the early states, the Framers of the original Constitution, and those associated with drafting and ratifying the First Amendment. Although it is not the only important consideration in the church-state debate,[86] the historical argument has generated a substantial

85. Although there are substantial differences between them, the following scholars offer a historical argument either for more or for less separation of church and state: ROBERT S. ALLEY, JAMES MADISON ON RELIGIOUS LIBERTY 13-18 (1985); THOMAS J. CURRY, THE FIRST FREEDOMS (1986); DEREK DAVIS, ORIGINAL INTENT (1991); MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS; RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY (1965); LEVY, *supra* note 82; LEO PFEFFER, GOD, CAESAR, AND THE CONSTITUTION (1975); LEO PFEFFER, RELIGION, STATE AND THE BURGER COURT (1984); Steve Gey, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463 (1981); Richard J. Hoskins, *The Original Separation of Church and State in America*, 2 J. L. & RELIGION 221 (1984); Laycock, *supra* note 74; Dallin H. Oaks, *Separation, Accommodation, and the Future of Church and State*, 35 DEPAUL L. REV. 1 (1985-1986); James Wood, *"No Religious Test Shall Ever Be Required," Reflections on the Bicentennial of the United States Constitution*, 29 J. CHURCH & STATE 199 (1987). Several other works also take the Court to task for its usage of history, rejecting, however, the wall of separation that the Court erected in Everson v. Board of Education, 330 U.S. 1 (1947). *See* CHESTER ANTIEU ET AL., FREEDOM FROM ESTABLISHMENT (1964); BERNS, *supra* note 50; BRADLEY, *supra* note 83; ROBERT CORD, SEPARATION OF CHURCH AND STATE (1982); DREISBACH, *supra* note 75; MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978); Harold J. Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 EMORY L.J. 777 (1986); Gerard V. Bradley, *No Religious Test Clause and the Constitution of Religious Liberty*, 37 CASE W. RES. L. REV. 674 (1987); Robert L. Cord, *Church-State Separation: Restoring the "No Preference" Doctrine of the First Amendment*, 9 HARV. J.L. AND PUB. POL'Y 129 (1986); Edward S. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3 (1948); Gary Glenn, *Forgotten Purposes of the First Amendment Religion Clauses*, 47 REV. POL. 340 (1987); Rodney K. Smith, *Establishment Clause Analysis: A Liberty Maximizing Proposal*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 463 (1989-1990).

86. Others writing on the church-state question move beyond the "Quest for Originalism." Several scholars acknowledge the imprecision evident in the Court's decision making without relying on excessive historical analysis. Typically, policy questions or interpretive questions, rather than historical integrity, motivate their assessment of the church-state debate. *See* DONALD L. DRAKEMAN, CHURCH-STATE CONSTITUTIONAL ISSUES (1991); TUSHNET, *supra* note 1 (exposing carefully the weaknesses in the Court's doctrinal and theoretical analysis); Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1979-1980); Steven G. Gey, *Why is Religion Special? Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L.

amount of scholarly writing—a portion of which will be discussed below. Those jurists and academicians who use historical analysis to justify their interpretation of the Establishment Clause roughly fit into two camps. The "separationists" believe their historical analysis justifies the Court's separation doctrine.[87] The "accommodationists" insist the historical evidence supports nonpreferential accommodation.[88]

In many respects the quest to discover the original intent behind the First Amendment religion clauses is attractive. First, many constitutional scholars would argue originalism is the only acceptable method of constitutional interpretation. Second, the historical debate carries with it an automatic explanation for the Court's incoherence. Separationists maintain the Court accurately portrayed the Framers' wishes in *Everson v. Board of Education*.[89] Incoherence, therefore, is easily explained. When the Court departs from the desire of Jefferson and Madison for separation of church and state, it is doomed to incoherence. Accommodationists, or nonpreferentialists, insist the Court misinterpreted history in *Everson* and, as a result, are likewise misinterpreting the Constitution. An accurate interpretation of the First Amendment does not disallow accommodation between church and state. It simply requires government to extend its support to religion nonpreferentially—without respect to any denomination or group.

This "Quest for Originalism" is not confined to the academic literature. Historical analysis has been pivotal in several of the Supreme Court's Establishment Clause decisions. The case for strict separation was first fashioned in *Everson*.[90] In this landmark decision, the Court not only made the Establishment Clause binding on the states through the Fourteenth Amendment, and developed the separation doctrine, but argued separation is constitutionally sound because it reflects the will of the Framers.[91] Justice Black identified the importance of the debate over religious liberty in Virginia, and its subsequent impact on the Framers of the First Amendment, stating, "This Court has previously recognized that the provisions of the First

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REV. 75 (1990-1991); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233 (1988-1989); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990); Rosalie Berger Levinson, *Separation of Church and State: And the Wall Came Tumbling Down*, 18 VAL. U. L. REV. 707 (1984); William P. Marshall, *The Concept of Offensiveness in Establishment Clause and Free Exercise Clause Jurisprudence*, 66 IND. L.J. 351 (1990-1991); William P. Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986); Thomas R. McCoy & Gary A. Kurtz, *A Unifying Theory for the Religion Clauses of the First Amendment*, 39 VAND. L. REV. 249 (1986).

87. *See, e.g.*, ALLEY, *supra* note 85; DAVIS, *supra* note 85; LEVY, *supra* note 82; Laycock, *supra* note 74; Wood, *supra* note 85.

88. *See, e.g.*, BRADLEY, *supra* note 83; CORD, *supra* note 85; DREISBACH, *supra* note 75; MALBIN, *supra* note 85; Berman, *supra* note 85; Corwin, *supra* note 85.

89. Everson v. Board of Educ., 330 U.S. 1 (1947).

90. *Id.* at 18.

91. *Id.* at 8-18.

Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against government intrusion on religious liberty as the Virginia statute."[92]

Several Justices have made a serious effort to bolster their opinions through an original-intent argument in numerous cases. Justices Black, Frankfurter, and Jackson remained firmly committed to historical analysis in both *McCollum v. Board of Education*[93] and in their respective dissenting opinions in *Zorach v. Clauson*.[94] Justice Douglas, in *Zorach*, reiterated Justice Black's historical evaluation of the First Amendment. He noted that "the First Amendment reflects the philosophy that [c]hurch and [s]tate should be separated . . . [and] within the scope of its coverage permits no exception . . . ; the prohibition is absolute."[95] Justice Black, in *Engel v. Vitale*,[96] interpreted the Religious Liberty Clauses in light of his earlier assessment of the historical record. He argued the First Amendment at least means government should not be in the business of composing and sanctioning official prayers for public school children.[97] Historical evidence persuaded Justice Black he was on firm ground when announcing the First Amendment's minimum requirements: "[The colonists] knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval . . . [upon] one particular form of religion."[98]

Justice Brennan, in his concurring opinion in *School District v. Schempp*,[99] appears, on the surface, to shift away from the Framers' intent when he argued:

> A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected for several reasons: First, on our precise problem the historical record is at best ambiguous. . . . Second, the structure of American education has greatly changed since the First Amendment was adopted. . . . Third, . . . [t]oday the Nation is far more heterogeneous religiously. . . .[100]

However, rather than rejecting the conclusions the Court adopted in *Everson*, predicated on the Madisonian and Jeffersonian philosophy of religious liberty, Justice Brennan's argument actually augments Black's historical

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92. *Id.* at 13.
93. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948).
94. Zorach v. Clauson, 343 U.S. 306, 315-20 (1952) (Black, J., dissenting); *id.* at 320-23 (Frankfurter, J., dissenting); *id.* at 323 (Jackson, J., dissenting).
95. *Id.* at 312.
96. Engel v. Vitale, 370 U.S. 421 (1962).
97. *Id.* at 435 n.21.
98. *Id.* at 429-31.
99. School Dist. v. Schempp, 374 U.S. 203 (1963).
100. *Id.* at 237-40 (Brennan, J., concurring).

analysis. By offering his own three-part test for neutrality, Justice Brennan defines "[w]hat the Framers mean to foreclose" and precisely what he believes the Court's decisions under the Establishment Clause must forbid.[101] "When the secular and religious institutions become involved in such a manner," argues Brennan, "there inhere in the relationship precisely those dangers—as much to church as to state—which the Framers feared would subvert religious liberty."[102]

The historical argument for accommodation also has had substantial support in the Burger and Rehnquist Courts. In both *Marsh v. Chambers*,[103] and *Lynch v. Donnelly*,[104] former Chief Justice Burger rejected the historical interpretation that fashioned the wall of separation in favor of a historical analysis consistent with the accommodationists' argument. Further, on the current Court, Chief Justice Rehnquist appears to be fully persuaded by the nonpreferentialist's historical argument.[105]

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101. *Id.* at 294.

102. *Id.* at 295.

103. Marsh v. Chambers, 463 U.S. 783 (1983).

104. Lynch v. Donnelly, 465 U.S. 668 (1984).

105. One might argue no one, not even the conservatives on the current Court, advocates an original intent-based judicial philosophy with the passion of an Edwin Meese III or Raoul Berger. Had Judge Robert Bork been confirmed to the Supreme Court in 1987, originalists would have had a champion—a true believer. As it is, there is some evidence conservatives on the Rehnquist Court are more likely to embrace or jettison originalism based more on the results such a choice would generate rather than on a commitment to a particular methodology. *See* DAVID SAVAGE, TURNING RIGHT (1992); Jeffrey Rosen, *Leader of the Opposition*, NEW REPUBLIC, Jan. 18, 1993, at 20. For example, although then Justice Rehnquist claimed fervently that the Court had misread the Framers' intentions in its Establishment Clause jurisprudence, originalism is not necessarily his *modus operandi* when deciding cases:

> Sometimes, the clerks were surprised, too, by what they saw as his simple and political view of the Court. Rehnquist rarely gave much credence to broad theories as to how the Court should judge cases, even ones favored by conservatives. For example, Attorney General Meese, in a series of speeches, suggested that the [J]ustices should look to the "original intent" of the [F]ramers of the Constitution. This hardly answered the hard questions, according to the [C]hief [J]ustice. He and Brennan could look at the history and "original intent" of the First Amendment, for example, and come to opposite conclusions.

SAVAGE, *supra*, at 150. Similarly, Justice Scalia, another likely proponent of original intent, was hard to peg. Recently, Scalia authored a scholarly piece in favor of originalism, but he identified it as "the lesser evil." *See* Scalia, *supra* note 1, at 849. Further, Jeffrey Rosen stated:

> In some cases, admirably, Scalia's principles do restrain his passions. Unfortunately, in the cases Scalia feels most deeply about, his passions lead him to betray his principles. In constitutional interpretation, he has ignored or misrepresented evidence of the original understanding of the framers and ratifiers when it conflicts with his own policy views.

Rosen, *supra*, at 21. This insight does not diminish the importance of studying "originalism." It is still an interpretive method embraced by prominent academicians. *See supra* note 6. In addition, it is still an important tool used by judges, even if only for strategic reasons. *See* Robert

In his dissenting opinion in *Wallace v. Jaffree*,[106] Rehnquist argued that historical analysis is critical in formulating the sound constitutional doctrine necessary to interpret the Establishment Clause accurately.[107] After analyzing the historical evidence, and particularly the importance of Jefferson and Madison as Framers,[108] he concluded:

> It would seem from this evidence that the Establishment Clause of the First Amendment had acquired a well-accepted meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations. . . . There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in *Everson*.[109]

B. *Methodology*

What does the "Quest for Originalism" in the church-state debate say about the "Case for Originalism" in the larger interpretive debate? If the historical data is plentiful, as both sides maintain, and if the two sides can look at the evidence and reach two very different conclusions, then one might argue that there is no clear-cut, definitive "Framers' intent." Or, if there is an obvious Framers' intent, then some scholars cannot see it, or choose not to, because of their own political predilections. Either way, it prompts one to

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Glennon, *Will the Real Conservatives Please Stand Up?*, A.B.A. J., Aug. 1990, at 49; Moore, *supra* note 4; Rosen, *supra*, at 24.

106. Wallace v. Jaffree, 472 U.S. 38 (1985).

107. *Id.* at 112-13 (Rehnquist, J., dissenting). Rehnquist observed the *Everson* Court failed history: "It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years." *Id.* at 92 (Rehnquist, J., dissenting).

108. Rehnquist largely disregards Jefferson's role as a Framer of the Establishment Clause because he was in France at the time the First Amendment was drafted and ratified. *Id.* (Rehnquist, J., dissenting). His famous letter to the Danbury Baptist Association, the source of his "wall of separation" metaphor, was written as a note of courtesy 14 years after Congress passed the amendment. *Id.* (Rehnquist, J., dissenting). Madison, a far more important source, served as a sensible legislator willing to compromise, not as an advocate for incorporating the Virginia Statute of Religious Liberty. *Id.* at 98-99 (Rehnquist, J., dissenting). Further, Rehnquist argued:

> It seems indisputable from these glimpses of Madison's thinking, as reflected by actions on the floor of the House in 1789, that he saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion.

Id. at 98 (Rehnquist, J., dissenting).

109. *Id.* at 106 (Rehnquist, J., dissenting). For the most recent example of the importance of history to the Court's Establishment Clause jurisprudence, see Lee v. Weisman, 112 S. Ct. 2649 (1992).

hypothesize that originalism is not likely to overcome its most serious practical obstacle. Thus, the theory cannot promise it will sufficiently protect Americans from illegitimate judicial policymaking.

Examining four pieces from the abundant literature addressing the church-state debate will test whether or not different scholars can look critically at the same historical evidence and come to widely divergent conclusions regarding the Framers' intent. Two authors advocate separation of church and state.[110] The other two believe the historical evidence permits government accommodation of religion.[111] They were all published at roughly the same time. This Article uses the selected literature to examine the debate in the First Congress in 1789 regarding the framing of the First Amendment's Establishment Clause.[112] Although this is hardly a complete review of the literature in the historical debate, it should permit one to see how scholars reach markedly different conclusions concerning the original intentions of the Framers.

C. *Findings*

The four commentators present a fairly consistent account of what occurred in the First Congress during the summer of 1789.[113] On June 8, 1789, James Madison introduced nine formal amendments into the House of Representatives with nineteen substantive elements.[114] Madison proposed Article I, Section 9 be amended to include the fourth of the proposals, which stated: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[115] Further, he proposed Article I, Section 10 be amended to include: "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."[116]

The House agreed to consider Madison's amendments as a committee of the whole on June 10, but they failed to take action for six weeks.[117] Therefore, on July 21, the House sent the proposed amendments to a select committee.[118] Madison was a member of the committee, and there were rep-

110. *See* LEVY, *supra* note 82; Laycock, *supra* note 74.

111. *See* BRADLEY, *supra* note 83; DREISBACH, *supra* note 75.

112. *See* BRADLEY, *supra* note 83, at 85-110; DREISBACH, *supra* note 75, at 47-68; LEVY, *supra* note 82, at 75-89, 95-100, 181-85; Laycock, *supra* note 74, at 875-923.

113. This very brief synopsis of how the Establishment Clause came to be is based on a summary of the four selected works. In particular, the summary borrows heavily from DREISBACH, *supra* note 75, at 57-66, and the complete text of the August 15, 1789 debate provided in LEVY, *supra* note 82, at 77-79.

114. DREISBACH, *supra* note 75, at 58.

115. LEVY, *supra* note 82, at 75.

116. *Id.* at 76.

117. DREISBACH, *supra* note 75, at 59.

118. *Id.*

resentatives from each of the eleven states that made up the First Congress.[119] The select committee deleted the phrase "the Civil Rights of none shall be abridged on account of the religious beliefs or worship."[120] One explanation for the deletion is it is largely redundant with the language in Article VI of the original Constitution.[121] The select committee also deleted the word "national" so the Establishment Clause they proposed to the House on July 28, read: "[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed."[122]

On August 13, Representative Lee of Virginia moved that the House, once again as a committee of the whole, consider the report of the select committee.[123] Two days later, the House began deliberations on the proposed amendment affecting religious liberty.[124]

Representative Sylvester opened the August 15 debate by articulating his concern that the language of the proposal could be construed to "abolish religion altogether" by interfering with the religious establishments existing in the several states.[125] Representative Sherman argued about the need for any amendment at all.[126] Madison then explained the reason for the proposal.[127] First, it was intended to make clear Congress should not establish a religion, and then enforce the legal observation of the national religion by law, or compel worship contrary to conscience.[128] Second, some of the state ratifying conventions felt a proposed amendment to be necessary because they feared Congress's power to take such action under the Necessary and Proper Clause.[129] Representative Huntington was concerned the language might be taken to the level "as to be extremely hurtful to the cause of religion."[130] First, he held the amendment should be written so as to secure the rights of conscience and the free exercise of religion, but not "to patronize those who professed no religion at all."[131] Second, Huntington insisted the amendment could not be construed so as to preclude courts from enforcing, for example, contractual obligations because they potentially smacked of establishment.[132] Madison offered a compromise, adding the word "national" before "religion," so as to alleviate the objections of Sylvester and

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119. *Id.*
120. *Id.*
121. *Id.* (citing MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 5 (1978)).
122. *Id.*
123. *Id.*
124. *Id.*
125. LEVY, *supra* note 82, at 77.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 78.
131. *Id.*
132. *Id.*

Huntington.[133] Livermore was not satisfied with the proposal and offered his own amendment: "Congress shall make no laws touching religion, or infringing the rights of religious conscience."[134]

Representative Gerry also disliked Madison's suggestion.[135] He observed an important distinction was made between a "national" government and a "federal" government.[136] In ratifying the Constitution, the states had embraced the latter.[137] Gerry argued Madison's language smacked of the former and might concern the anti-Federalists.[138] Madison withdrew his motion but made it clear his language was not intended to imply central government was indeed a "national" one.[139] His objective was to safeguard against a national religion emerging from within the federalist structure.[140] Livermore's motion passed thirty-one to twenty.[141]

On August 20, Representative Ames moved that the House reject Livermore's version in favor of a version similar to that the select committee submitted on July 28.[142] Ames' proposal read: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."[143] On August 24, Ames' version was sent to the Senate, and the following day the Senate was asked to concur with the amendments adopted by the House.[144]

The Senate began debate over the proposed amendments on September 3.[145] The debate was conducted in secrecy, so no records exist with the exception of motions offered and votes listed in the *Senate Journal*.[146] The Senate considered five versions of the no establishment proposal. The first indicated that "[c]ongress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed."[147] Next, the Senate debated the alternative: "Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society."[148] Third, the Senate rejected a substitution that stated: "Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the

133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 78-79.
137. *Id.*
138. *Id.*
139. *Id.* at 79.
140. *Id.*
141. *Id.*
142. DREISBACH, *supra* note 75, at 62.
143. *Id.*
144. *Id.* at 62-63.
145. LEVY, *supra* note 82, at 81.
146. *Id.*
147. Laycock, *supra* note 74, at 880.
148. *Id.*

rights of conscience be infringed."[149] Fourth, the Senate adopted a proposal that read: "Congress shall make no law establishing religion, or prohibiting the free exercise thereof."[150] Finally, on September 9, the Senate again changed its mind and approved a new proposal, which stated: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion."[151]

The House rejected the version adopted by the Senate and proposed a joint conference committee.[152] On September 24, 1789, the House voted to accept the language containing the religious liberty clauses of the First Amendment.[153] The Senate voted to accept the amendment the following day.[154] The final version read: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[155] The language was very similar to Ames' proposal, with two exceptions. First, the rights of conscience language was discarded. Second, the Establishment Clause was altered to read "no law respecting an establishment" of religion.

Because Bradley, Dreisbach, Laycock, and Levy agree on what transpired in the First Congress regarding the debate over the proposed Establishment Clause, it should be fairly easy to discover and concur on the "Framers' intent."[156] Although one might anticipate disagreements as to how each author looks at a particular speech, vote, or accompanying event, one would think a substantial amount of harmony would exist among the four authors regarding the major intentions of the Framers. That is not the case. Several areas of disagreement exist between the experts.

1. *What was the Role of James Madison in the Process?*

Each of the four authorities agrees James Madison was not highly motivated to push for a religious liberties amendment to the Constitution; he was not even enthusiastic about a written bill of rights.[157] What prompts this discussion, however, is their disagreement as to the level at which Madison favored an amendment that would prevent government from providing support for religion.

In presenting the proposed constitutional amendments, Levy argues Madison went through the motions to deflate the anti-Federalist charges he

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149. *Id.*
150. *Id.* at 881.
151. *Id.*
152. *Id.*
153. DREISBACH, *supra* note 75, at 64.
154. *Id.*
155. U.S. CONST. amend. I.
156. This observation is made for the sake of argument. The discussion above indicates many might legitimately contend the authors of the First Amendment were not the "Framers."
157. *See* BRADLEY, *supra* note 83, at 85-90; DREISBACH, *supra* note 75, at 55-60; LEVY, *supra* note 82, at 79; Laycock, *supra* note 74, at 885-88.

would not champion individual rights.[158] Therefore, even though his initial proposal included the language "nor shall any national religion be established," it does not merit a nonpreferentialist interpretation.[159] First, the term "national religion" is ambiguous.[160] It might mean an official preference for one denomination over others.[161] It could also mean general support for all denominations.[162] Madison does not make this clear.[163] Levy notes that Congress, in which Madison played a larger role, later abandoned the term, and argues this indicates "Congress rejected that (the more narrow) intention and meant something broader by its ban on an establishment of religion."[164]

Levy notes Madison's speeches during the House debate lend some support to the claim Madison favored the more narrow interpretation of the Establishment Clause.[165] Madison is not a nonpreferentialist, however.[166] Other evidence clearly indicates Madison's belief that even if government were to support all denominations without preference, the results would still be an establishment of religion.[167] Levy argues Livermore's language, "no law touching religion," was very close to Madison's own convictions.[168] "Livermore's motion for a change in the wording," observes Levy, "apparently expressed what Madison meant by his use of the word 'national' and satisfied the Committee of the Whole."[169]

Bradley and Dreisbach take issue with Levy's interpretation. First, Bradley observes it is difficult to conclude very much of anything about Madison's intent during the House debates.[170] His motivation, as in the earlier Virginia debates over religious liberty when he authored the famous "Memorial and Remonstrance," was mostly pure political expediency.[171] Thus, one cannot use Madison's larger theory on religious liberty in order to interpret his speeches during the House debates.[172] That assumes, of course, one can discover Madison's larger theory.[173] Is it what Madison articulated about religious liberty before the Convention, which was during the Virginia

158. LEVY, *supra* note 82, at 79.
159. *Id.* at 79-80.
160. *See id.* at 80.
161. *Id.*
162. *Id.*
163. *Id.* at 79.
164. *Id.* at 75-76.
165. *Id.* at 79-80.
166. *Id.* at 80.
167. *Id.*
168. *Id.* at 81.
169. *Id.*
170. BRADLEY, *supra* note 83, at 86.
171. *Id.*; *see id.* at 37-41 for Bradley's interpretation of Madison's role in the Virginia debates.
172. *Id.* at 86.
173. *Id.*

debates?[174] Can it be gleaned from his activities as a Congressman, when he served as a representative who articulated a very narrow, nonpreferentialist interpretation of the Establishment Clause, supported thanksgiving proclamations, and voted to provide land reservations for religious groups?[175] Is it evident later when, as President, he "issued pungently pious Thanksgiving Day proclamations"?[176] Is it best articulated when Madison was a retired public figure who denounced many of his own decisions to support religion made while in public service?[177]

Dreisbach is not as concerned with Madison's motivations or whether or not he was engaging in hypocrisy.[178] Personal or political, his impetus was to assuage the concerns of Sylvester and Huntington. He wanted to persuade them, and those who shared their distress, that the proposed amendment did not damage religious liberty.[179] It is noteworthy Madison twice added "a" before religion in his first speech.[180] Had the indefinite article been there from the outset, argues Dreisbach, Sylvester likely would not have protested against the motion.[181] Madison's compromise—offered after Huntington's objections—to reinsert "national" before religion, "pointedly used the language of no preference or no preeminence."[182]

Laycock finds Madison's behavior puzzling. He agrees Madison's tactics were not to challenge Sylvester and Huntington, but to allay their fears by putting the most narrow possible spin on the Establishment Clause.[183] Laycock observes that Madison, a separationist, may have been settling for all he could get: the narrow interpretation in the House.[184] He may have thought pressure for a single establishment with compulsory worship service was the issue most likely to surface, and at least the House version eliminated that possibility.[185] The Senate put forth another version opening the door for him to change the clause.[186] Perhaps it was, for Madison, a federalism issue. He wanted to place limits on the national government.[187] Regardless, Madison's actions are puzzling because these tactics are inconsis-

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174. *Id.*
175. *Id.*
176. *Id.* at 87.
177. *Id.* at 86-87.
178. *See* DREISBACH, *supra* note 75, at 135-58 (providing a full look at Madison's "Quest for Religious Liberty").
179. *Id.* at 60.
180. *Id.*
181. *Id.*
182. *Id.* at 61.
183. Laycock, *supra* note 74, at 891-92.
184. *Id.* at 893.
185. *Id.*
186. *Id.*
187. *Id.*

tent with Madison's previous and subsequent statements regarding religious liberty.[188]

If, as Dreisbach notes, Madison is "considered by separationists and nonpreferentialists alike as the statesman all Americans must thank for his efforts on behalf of religious liberty and for formulating a federal system of constitutional government,"[189] then it would seem worthwhile to grasp his "intent." The four experts do not come close to a clear consensus, however, regarding Madison's intentions during the debates in the First Congress. For example, on one hand, Levy argues Madison's concern was there be no law touching religion, no permissible point of contact between religion and the national government. On the other hand, Dreisbach maintains Madison simply wanted to prevent the establishment of a single sect or denomination, and to keep the national government from interfering with state establishments.

2. *What are the Ramifications of the House Debates?*

Not surprisingly, there is a strong linkage between how each of the experts looks at Madison's involvement in the process, and their analysis of the House debates.

Dreisbach argues the debates must be read as responding to the apprehensions of Sylvester, Huntington, and others.[190] Sylvester was concerned the proposal might abolish religion by interfering with the religious establishments that existed in the several states.[191] Huntington was worried the language might be taken to the level "as to be extremely hurtful to the cause of religion."[192] His particular concerns were, first, that some distinction be made between free exercise of religion and one's nonreligious rights of conscience and, second, that the amendment not be construed so as to preclude the courts from enforcing religious contractual obligations that might smack of an establishment.[193] With that in mind, Dreisbach notes, the remainder of the debate falls into place: Madison's statements, whether politically motivated or not, were offered to placate the concerns of Sylvester and Huntington.[194] Livermore's proposal, "no law touching religion," was nonpreferentialist language and clarified Madison's "national religion" compromise.[195] Livermore shifted the debate, in part, into a federalism question. His proposal was designed to ensure Congress could not affect existing state establishments.[196] Dreisbach acknowledges it is possible to read

188. *Id.*
189. DREISBACH, *supra* note 75, at 136.
190. *Id.* at 60.
191. *Id.*
192. *Id.*
193. *Id.* at 60-61.
194. *Id.* at 61.
195. *Id.*
196. *Id.*

Livermore's language as prohibiting any form of federal assistance to religion.[197] This reading of the proposal, however, would have exacerbated the expressed fears of Sylvester and Huntington that such a prohibition would lead to the demise of religion.[198] The same result is achieved, Dreisbach notes, with the Ames proposal.[199] No record of the debate on the Ames proposal exists. It does not make sense, however, to suggest that at this point the House abandoned the concerns of Sylvester, Huntington, and the others.[200]

Levy's understanding of the House debates is similar to his interpretation of Madison's role in the exchange. Thus, Levy maintains Livermore had captured Madison's separationist views in his proposal.[201] Ames's motion was fairly consistent with that of Livermore.[202] It was probably a necessary addition for those who would not accept the House proposal without some language specifically preventing establishment of religion.[203]

Laycock argues the draft of the Establishment Clause that came to the House from the select committee was ambiguous regarding nonpreferentialist aid.[204] The House rejected the draft and substituted one that was not ambiguous.[205] The House version banned any aid touching religion and, to the House members, any governmental aid constituted aid that would "touch" religion.[206] Laycock would quarrel with Dreisbach regarding the importance of those involved in the debates. Sylvester, Huntington, Gerry, and others either were not clear in their support for nonpreferentialist aid, or were not able to command a majority in the House.[207] Madison, who seemed to support a narrow interpretation of the proposed Establishment Clause, was no nonpreferentialist.[208] Livermore's motion prevailed.[209] The principle consequence of the debate was forcing the House to become less ambiguous and more specific. Compared with the clear choices articulated in the Senate and in the Conference Committee, however, Laycock argues the House debates cast very little "useful light on the problem."[210]

Like Dreisbach, Bradley looks carefully at the particular delegates and concludes the House's action does not justify the broader interpretation of the

197. *Id.*
198. *Id.* at 62.
199. *Id.*
200. *Id.*
201. LEVY, *supra* note 82, at 81.
202. *Id.*
203. *Id.*
204. Laycock, *supra* note 74, at 885.
205. *Id.* at 886.
206. *Id.* at 887.
207. *Id.* at 888-91.
208. *Id.* at 891-94.
209. *Id.* at 887.
210. *Id.* at 894.

Establishment Clause.[211] Those on the select committee were not proponents of separation: Vining was on record as supporting religion, Madison authored the original "no national religion" proposal, Boudinot was later President of the American Bible Society, Benson helped draft the Confederation-Era ordinances reserving lands for churches, and others from the South and Northeast opposed separation.[212] Further, the reaction by Sylvester, Gerry, Carrol, Huntington, and others to the select committee's report is inconsistent with the broader interpretation.[213] Placed in its proper context, Livermore's substitution makes sense: "Congress shall make no law touching religion." It protects the states from congressional (national) establishments and safeguards state establishments thereby assuaging the concerns raised in the House debates.[214]

What were the intentions of the House in the proposal sent to the Senate on August 24, 1789? No clear consensus exists among the selected experts. Laycock says it was a very clear rejection of nondiscriminatory governmental aid to religion. Dreisbach and Bradley argue the proposal offered by the House makes little sense unless it is read to satisfy the fears raised by those who participated in the debates and who were afraid the Constitution was a document dangerous to religion.

3. *What Conclusions can be Drawn from the Senate's Handling of the Establishment Clause?*

Those who analyze the Senate debates over the religious liberty clauses are no more successful in arriving at a clear consensus regarding the Framer's intent than are those who study the debates in the House.

Laycock believes the Senate debates provide compelling evidence the First Congress did not intend to permit nonpreferential aid to religion.[215] He concedes the first proposal in the Senate presented the "no preference position."[216] The second and third proposals included largely stylistic changes.[217] The Senate's rejection of all three shows, however, "if the First Congress intended to forbid only preferential establishments, its failure to do so explicitly was not for want of acceptable wording."[218] The fourth proposal debated by the Senate explicitly indicated its desire to reject government accommodation and, though the Senate changed its mind a week later and adopted the narrowest version of the Establishment Clause deliberated by either house, it

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211. BRADLEY, *supra* note 83, at 90-93.
212. *Id.* at 90-91.
213. *Id.* at 91.
214. *Id.* at 92.
215. Laycock, *supra* note 74, at 880.
216. *Id.*
217. *Id.*
218. *Id.*

was subsequently rejected by the Conference Committee.[219] Perhaps the Senate did not understand the implications of the final version of the Establishment Clause and thought it included only minor, stylistic changes. Laycock argues the texts, both those rejected and those finally accepted, are obvious and it is unlikely the Senate was mistaken.[220] Moreover, responsible constitutional interpretation requires one to support a plain textual meaning when contrasted with a confused connotation hinting at what the Framers meant or might have meant.[221] Although it is difficult to miss Congress's message, Laycock insists most nonpreferentialists ignore the rejected drafts:

> The nonpreferentialists tend not to mention the rejected drafts . . . . An approach to interpretation that disregards the ratified amendment and derives meaning exclusively from rejected proposals is strange indeed. The "no preference" position requires a premise that the Framers were extraordinarily bad drafters—that they believed one thing but adopted language that said something substantially different, and that they did so after repeatedly attending to the choice of language.[222]

Bradley examines the evidence and arrives at nearly the opposite conclusion. He hypothesizes that although limited records of the Senate debates exist, if one looks at the participants in the Senate and the influence of Senators Lee and Grayson, it is impossible to conclude they would disallow public support for religion:

> The considerable historical evidence reveals not a single senator whose personal views were even close to Madison's (much less those attributed to them by the Supreme Court) and no one who thought nonestablishment meant anything more than sect equality. To put the point a little differently, a proposal that prohibited all aid, encouragement, or support of religion would not have been milk and water to them; it would have scandalized them. Such an amendment would not have garnered two votes, much less two-thirds.[223]

Bradley argues the Senate's intent was to prohibit a national church and that is why they adopted the language they did.[224]

Similarly, Dreisbach and Levy come to opposite conclusions when evaluating the Senate debates. Dreisbach maintains the language finally embraced by the Senate was not only nonpreferentialist, but at one point in the debates, the Senate considered a version that would "'have permitted the

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219. *Id.* at 881-83.
220. *Id.*
221. *Id.* at 882-83.
222. *Id.*
223. BRADLEY, *supra* note 83, at 90.
224. *Id.* at 94.

establishment of a generalized Christianity as the national religion.'"[225] Like Laycock, Levy emphasizes the three nonpreferentialist proposals rejected by the Senate, and argues the fourth version—the one very similar to the proposal sent over from the House—"prove[s] that the Senate intended something broader than merely a ban on preference to one sect."[226] The Senate muddied the water with its final version of the Establishment Clause. Levy asserts, however, that although the language appears to permit government accommodation, appearances can be deceiving.[227] A Baptist memorial in 1774 used similar language, and clearly the Baptists were separationists who opposed nondiscriminatory aid.[228]

4. *Did the Conference Committee Construct a Broad Version of the Establishment Clause?*

When analyzing the results of the Conference Committee, the experts disagree over two related points: first, the general interpretation they wish to give to the final draft of the Establishment Clause, and second, and more specifically, what did the Framers mean when they substituted in the phrase "no law respecting an establishment of religion"?

Laycock insists the Establishment Clause, as adopted, is very broad.[229] It not only forbids an establishment of religion, but disallows any laws respecting or relating to an establishment.[230] It not only precludes establishment of "a" religion, but it is a sweeping prohibition against an establishment of "religion" generally.[231] Further, because the Conference Committee clearly rejected the Senate's language, the Committee made it obvious establishing religion is different from preferring a single sect or denomination.[232] The clincher, argues Laycock, is in the Conference Committee's choice of the phrase "no law respecting an establishment of religion."[233] A nonpreferentialist interpretation cuts against the clear meaning of the word "an."[234] There is no evidence the conferees intended to mean "the establishment of religion."[235] Moreover, had the Conference Committee been of a mind to do so, they could have easily used the indefinite article "a" in

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225. DREISBACH, *supra* note 75, at 63-64 (quoting Rodney K. Smith, *Getting Off on the Wrong Foot and Back On Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the* Reynolds *and* Everson *Decisions*, 20 WAKE FOREST L. REV. 569, 614 (1984)).

226. LEVY, *supra* note 82, at 82.

227. *Id.*

228. *Id.*

229. Laycock, *supra* note 74, at 881.

230. *Id.*

231. *Id.*

232. *Id.* at 882.

233. *Id.* at 881-82.

234. *Id.* at 884-85.

235. *Id.*

front of "religion."[236] Again, there is no historical evidence to suggest the conferees seriously considered this alternative.[237]

Dreisbach does not see anything dramatic in the Conference Committee's choice of language in the final draft. The phrase "no law respecting" is similar to the phrase "no law touching" proffered by Livermore in the House. The intent was to protect "the federal design of the Bill of Rights."[238] Thus, "respecting an establishment" means the federal government cannot pass laws establishing a religion or disestablishing those religions that exist at the state level.[239] The conferee's choice of the word "an" indicates a desire to disallow government support for a single sect in exclusion of all others.[240] Had the language of the Establishment Clause prohibited "the establishment of religion," then a plausible argument would exist that the Framers intended to proscribe any preference for "religion," even if this preference were applied nonpreferentially.[241] Dreisbach argues the Framers clearly intended to prohibit the establishment of a national church and to protect individual sects from discrimination resulting from preferential treatment by government.[242] This intention did not, however, foreclose governmental "nondiscriminatory assistance" to religion as long as it did not violate the free exercise of other religious groups.[243]

Dreisbach makes three additional points. First, it was assumed all governmental power is delegated and, therefore, "any nondiscriminatory assistance to religion must be incidental to the performance of a power specifically delegated to the national government."[244] Second, the Framers intended to protect states from "federal interference with existing church-state relationships."[245] Third, the Framers intended the religion clauses to protect individual citizens from activity by the federal government that undermined their free exercise of religion.[246] Given the "absolutist tenor of the language" of the First Amendment, it clearly placed "a far-reaching limitation on the federal regime's power to interfere with religious practices."[247]

Levy argues the Establishment Clause is consistent with the intent of the entire Bill of Rights: to limit the power of government and to make certain government could not use its extensive powers in some particular fields, including religion.[248] He notes the debates do not indicate what is meant by

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236. *Id.* at 884.
237. *Id.*
238. DREISBACH, *supra* note 75, at 65.
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.* at 65-66.
245. *Id.* at 66.
246. *Id.*
247. *Id.*
248. LEVY, *supra* note 82, at 84.

the phrase "no law respecting an establishment of religion."[249] If one assumes, along with the nonpreferentialists, it permitted congressional aid if given without discrimination, then it actually adds to Congress's power.[250] The First Amendment, like the other provisions of the Bill of Rights, was intended to limit Congress to its enumerated powers.[251] Because Congress had no power to touch religion before the inception of the First Amendment, a law saying it can support religion, if support is given nonpreferentially, actually increases congressional power.[252] Levy concludes:

> The one fact that stands out is that Congress very carefully considered and rejected the wording that seems to imply the narrow interpretation. The House's rejection of the Senate's version of the amendment shows that the House did not intend to frame an amendment that banned only congressional support for one sect, church, denomination, or religion. The Senate three times defeated versions of the amendment embodying that narrow interpretation, on the fourth vote adopted such a version, and finally abandoned it in the face of uncompromising hostility by the House. The amendment's framers definitely intended something broader than the narrow interpretation which some judges and scholars have given it.[253]

Bradley's assessment of the actions taken by the Conference Committee could not be more at odds with Levy's interpretation. First, Bradley argues the Senate refused to budge on the religion clauses.[254] The senators did not, as Levy suggests, completely capitulate to the House.[255] Second, the new language, "no law respecting an establishment of religion," simply indicates the close linkage between the final language and the previous language in both houses.[256] The Court's interpretation of the phrase, more than 150 years later, discounted the Framer's basic beliefs.[257] The Court interpreted the phrase to mean "tending toward," "anything like," or "touching" religion.[258] What the phrase, in its context, actually commands is "that the government may neither effect an establishment nor interfere with states that do."[259] Thus, a better interpretation of the phrase is "in regard to," "with reference to," or "interfering with."[260] This interpretation protects the states from fed-

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249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.* at 83-84.
254. BRADLEY, *supra* note 83, at 94.
255. *Id.*
256. *Id.*
257. *Id.* at 95.
258. *Id.*
259. *Id.*
260. *Id.*

eral establishments or interference.[261] Further, if the clause does mean "touching" religion, that simply vindicates Livermore's proposal, one that was acceptable to the anti-Federalists in the House.[262] Third, Levy's argument that a nonpreferentialist interpretation would give, then limit, powers to the national government it did not previously possess is simply wrong.[263] The national government always had power over religion.[264] It had power over religion in the territories, in the military, on Indian reservations, and the like.[265] Further, the national government theoretically had power to legislate regarding religion in the states, through the "Necessary and Proper" Clause if nowhere else.[266] The states had a very legitimate fear of intrusion by the national government, even if the fears were not so genuine. Bradley concludes:

> What matters is this: this First Amendment is simply inexplicable except against a background in which the federal government is *believed* to have power over religious practices in the states. Further, it was the joint accomplishment of both federalists and antifederalists to finally convince the ratifying generation that this was the case.[267]

5. *What of the Actions Taken by the First Congress Simultaneously With the Crafting the Establishment Clause?*

One final area of comparison is the reaction by the four authorities to contemporaneous acts of Congress: the actions undertaken by the First Congress that would provide insight into how these "Framers" interpreted the Establishment Clause. For example, shortly after Congress convened, chaplains were elected to open each legislative session in prayer.[268] The day after Congress adopted the Establishment Clause, the legislature passed a resolution directing President Washington to recommend a national day of thanksgiving and prayer acknowledging Almighty God.[269] Treaties were signed and portions of federal territories were set aside to provide direct support to religious groups in order to educate and "civilize" Native Americans.[270] What do these activities reveal? Not surprisingly, there is substantial disagreement among the four authorities.

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261. *Id.*
262. *Id.*
263. *Id.* at 96-97.
264. *Id.* at 96.
265. *Id.*
266. *Id.*
267. *Id.*
268. DREISBACH, *supra* note 75, at 67.
269. *Id.* at 66-67.
270. BRADLEY, *supra* note 83, at 99-100. For a more complete discussion of the actions taken by the First Congress, see BRADLEY, *supra* note 83, at 97-104; DREISBACH, *supra* note 75, at 66-68; LEVY, *supra* note 82, at 92-119, 181-85; Laycock, *supra* note 74, at 913-19.

After discussing the chaplaincy programs and the proclamations for prayer and thanksgiving, Dreisbach argues they cast a substantial amount of light on the original meaning and purpose of the First Amendment.[271] He concludes:

> The actions of the First Congress surely strengthen the conclusion that public manifestations and state-sponsored expressions of religious devotion were not proscribed by the constitutional draftsmen. These are but two illustrations of acts undertaken by the First Congress contemporaneously with the drafting of the First Amendment which reveal that the historical understanding of the religion clauses did not countenance a rigid and unyielding wall of separation between church and state.[272]

Bradley is also certain these contemporaneous acts of Congress reveal the intentions of the authors of the Establishment Clause.[273] He cites Chief Justice Taft who argued, in *Hampton v. United States*,[274] that "a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixes the construction to be given its provision."[275] Bradley maintains the record is clear and supported by the proclamations, the thanksgiving message, congressional chaplaincy programs, and congressional support for military chaplain's systems.[276] The most compelling evidence is Congress's treatment of the federal territories.[277] In Orleans territory, religious property was exempted from taxation, Sabbath observances were enjoined, lotteries were conducted for church construction, and the chief of the Catholic Church was appointed as a co-superintendent (along with the territorial governor) of New Orleans' charity hospital.[278] With regard to the Northwest territories, Congress updated the provisions of the Northwest Ordinances in 1789.[279] Not only did the charter contain the famous passage that recognized religion as necessary for good government, Congress continually supplied land and financial grants to sectarian missionaries.[280] Bradley argues these authorizations indicate a collective body aiding religion and yet conscientiously averting constitutional prohibitions:

> That each of the first four presidents and a majority of the first ten Congresses should specifically reenact a 1787 ordinance that harmonized

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271. DREISBACH, *supra* note 75, at 67.
272. *Id.* at 67-68.
273. BRADLEY, *supra* note 83, at 103.
274. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928).
275. *Id.* at 412, *cited in* BRADLEY, *supra* note 83, at 97.
276. BRADLEY, *supra* note 83, at 97-98.
277. *Id.* at 98-103.
278. *Id.* at 101-02.
279. *Id.* at 98-99, 101.
280. *Id.*

> religious liberty with the necessity of promoting religion and morality reveals that the First Amendment was, in their understanding of it, in harmony with the 1787 ordinance. What should establish beyond doubt that these federal actors—Jefferson and Madison among them—viewed aid, encouragement, and support of religion as consistent with the religion clauses are the territorial regimes themselves. The frontier lawmakers, subject to federal constitutional restraints, took the necessity of religion and morality to heart and established a legal panoply of public supports of religious institutions and Christian morality.[281]

Levy is not impressed, however, with the litany of examples typically offered by nonpreferentialists. "Nonpreferentialists convert every exception to an absolute separation of church and state ('In God We Trust' or Thanksgiving Day) into a triumphal archway through the wall of separation. They want to bulldoze that wall so that it cannot impede a variety of nonpreferential aids to religion."[282] Levy advances several arguments. First, nonpreferentialists will never successfully mold Madison and Jefferson into supporters of accommodation.[283] Second, although a nonpreferential interpretation seems persuasive, it misses the larger picture: "[T]he First Amendment was framed to deny power, not to vest it."[284] Levy argues, "The fundamental defect of the nonpreferential interpretation is that it results in the unhistorical contention that the First Amendment augmented a nonexistent congressional power to legislate in the field of religion."[285] Third, even if these activities discussed above indicate support by the members of the First Congress for religion, they were often later repudiated.[286]

Although they agree the Framers created the Establishment Clause to do much more than squelch the emergence of a single sect or denomination, Laycock parts company with Levy over what to make of the early acts of Congress. Laycock holds when the Framers spoke of "establishment" they were thinking of financial aid; they did not consider those issues in connection with nonfinancial aid.[287] Their primary resistance to establishment focused on tax support for churches.[288] Thus, treaties, prayer and thanksgiving pronouncements, and government sponsored chaplains, although they constitute government support for religion and are clearly preferential—most favoring a broad-based Protestantism—they were not thought by the Framers to be unconstitutional.[289] Laycock notes:

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281. *Id.* at 101.
282. LEVY, *supra* note 82, at 92.
283. *Id.*
284. *Id.* at 93.
285. *Id.*
286. *Id.* at 93-99.
287. Laycock, *supra* note 74, at 923.
288. *Id.* at 916-17.
289. *Id.* at 918-19.

> In 1791, almost no one thought that government support of Protestantism was inconsistent with religious liberty, because almost no one could imagine a more broadly pluralist state. Protestantism ran so deep among such overwhelming numbers of people that almost no one could see that his principles on church taxes might have implications for other kinds of government support for religion. The exclusion of non-Protestants from pronouncements of religious liberty was not nearly so thorough or cruel as the exclusion of slaves from pronouncements that all men were created equal, but both blind spots were species of the same genus.[290]

Although Laycock acknowledges the Framers did not have a constitutional problem with nonfinancial aid to religious institutions and in support of religious activities, he does not endorse their actions.[291] Laycock notes, "In short, the appeal to the Framers' practice of nonfinancial aid to religion is an appeal to unreflected bigotry."[292] That is why Laycock is very cautious when evaluating how to interpret the Framers' wishes.[293]

In the case of the Establishment Clause, Laycock argues their practice of supporting nonfinancial aid "does not show what the Framers meant by disestablishment; it shows what they did without thinking about establishment at all."[294] The intention they thought about was to forbid all financial aid whether preferential or not.[295] Thus, Laycock concludes, "I am not even suggesting that we modify the principle the Framers considered. I would apply uniformly the very principle the Framers considered and accepted: that aid to religion is not saved by making it nonpreferential."[296]

D. *Application to the Interpretive Debate*

After examining the reaction of the four authorities to the First Congress's treatment of the Establishment Clause, one can make some initial observations about the practicality of an original-intent-based jurisprudence. If the church-state test case provides an accurate empirical test, is originalism able to fulfill its promises? Is the practical critique of originalism particularly damaging to that interpretive method?

As indicated above,[297] proponents of originalism maintain their approach safeguards the legitimacy of judicial review. First, it prompts judges to begin the process of interpretation from the same base line. Second, it supplies judges with "core values" when interpreting cases. Third, it sets

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290. *Id.*
291. *Id.* at 918.
292. *Id.*
293. *Id.* at 912-13, 919.
294. *Id.* at 919.
295. *Id.*
296. *Id.*
297. *See supra* text accompanying notes 22-35.

boundaries on constitutional arguments. Finally, it fosters rules that are stable and objective. These factors work to reduce the personal and idiosyncratic aspects of an individual judge's personality.[298] Furthermore, originalists claim their method better protects republican government.[299] It protects the vision of republican government crafted by the Framers, it protects majority rule, and it better safeguards the authority of the Constitution.[300]

Opponents of originalism not only challenge the claims made by originalists on a philosophical level, but also challenge the workability of the interpretive method.[301] First, they argue it is difficult to know who the Framers are. Second, it is difficult to know exactly what is their intent. Third, contemporary scholars arrive at different conclusions when applying the method. Finally, the Framers could not anticipate everything that would become a constitutional issue.[302]

The "data" collected from the Bradley, Dreisbach, Laycock, and Levy pieces tends to bolster some of the claims made by the originalists. The four authorities did begin at the same base line. They also considered core values and set some boundaries on the range of possible solutions, albeit an enormously wide range.

The data in this example effectively challenge some of the practical criticisms of the approach. For example, the four scholars, committed to discovering the Framers' intent, had no trouble identifying the Framers.[303] Although they took seriously what transpired as the First Amendment was ratified, they all understood the debate by the First Congress to be pivotal.[304] They looked at the available historical evidence, worked within the limitations of the materials available, and yet all four reached different conclusions. Generally, each found the language of the text acceptable—the Framers of the Establishment Clause were able to communicate conclusive meanings through the medium of language. They all operated under the assumption the Framers were able to provide a collective "intent"—at least working within the political process. For example, the Livermore proposal passed in the House by a vote of thirty-one to twenty.[305] Thus, the "intent" of the House was to accept the mandates contained within the proposal. They recognize that a collective "intent," however, does not preclude dissent.

Nonetheless, the data also vindicated some of the practical criticism leveled against originalism. First, substantial disagreement developed regarding some of the ideas communicated through the medium of lan-

298. *See supra* text accompanying notes 22-35.
299. *See supra* text accompanying notes 36-44.
300. *See supra* text accompanying notes 36-44.
301. *See supra* text accompanying notes 46-64.
302. *See supra* text accompanying notes 46-64.
303. *See supra* text accompanying notes 46-64.
304. *See supra* text accompanying notes 109-49.
305. *See supra* text accompanying note 121.

guage.[306] Two examples come to mind: the reaction to Livermore's "no law touching religion" phrase, and the final version of the Establishment Clause that included the phrase "no law respecting an establishment of religion."[307] Defining both of these controversial phrases proved problematic. Second, there was some difficulty in interpreting the collective intent of the "Framers." Bradley and Dreisbach looked carefully at those representatives who protested most loudly during the debates.[308] Their assumption was the amendments offered by Madison, Livermore, and Ames, and the corresponding votes taken by the House, were intended to placate the protesters, namely Sylvester and Huntington.[309] However, Laycock looked at the votes taken by the House, examined the language of frequently amended proposals, and decided the Committee of the Whole had rejected the arguments made by Sylvester and Huntington.[310]

Third, and most important, as Baer and Carter predict, even those constitutional interpreters who utilize original intent reach different conclusions.[311] The analysis discussed above reveals the diversity of conclusions reached by scholars who looked at exactly the same historical evidence. Bradley and Dreisbach believe the historical evidence will not support the separation doctrine articulated by the Court in 1947.[312] Levy and Laycock are just as passionate in their claim the Framers would not tolerate even nonpreferential financial support for religion.[313] Levy argues nonfinancial support is unacceptable.[314] Laycock argues it is unacceptable as a modern interpretation of the Establishment Clause.[315] It is likely one can employ original intent to reject nonfinancial aid, particularly if one looks at the well-defined, general principles pronounced by the Framers in the Establishment Clause debate. Laycock notes, however, the historical record unquestionably indicates the Framers provided nonfinancial support for religion.[316]

One might attribute the differences between the four authors to poor scholarship on the part of either the separationists or the nonpreferentialists. As indicated above, however, the four authors were selected because they are representative of a great many scholars and jurists who share their conclusions. Alternatively, the authors might be motivated by their own political predilections. These political preferences might render otherwise excellent

306. *See supra* text accompanying notes 208-39.
307. *See supra* text accompanying notes 117-35.
308. *See supra* text accompanying notes 174-93.
309. *See supra* text accompanying notes 158-63, 169-71.
310. *See supra* text accompanying notes 166-68.
311. *See* CARTER, *supra* note 1, at 53; Baer, *supra* note 13, at 75.
312. That is the conclusion they reach in their respective analyses of the historical data. *See supra* text accompanying notes 204-15.
313. *See supra* text accompanying notes 216-20.
314. *See supra* text accompanying notes 216-19.
315. *See supra* text accompanying notes 229-37.
316. *See supra* text accompanying notes 221-24.

scholars less than objective when interpreting the historical evidence. Even if biases do account for the myriad interpretations of the evidence, however, one must seriously question whether or not originalism can fulfill its promises.

The Appendix provides a summary of the promises and practical criticisms of originalism and how they fare when they are applied to the Establishment Clause debate.

IV. CONCLUSION

Whether or not constitutional interpreters should take the original intentions of the constitutional Framers seriously, or even as authoritative, is not merely a question to be pondered in academic circles. Public policy makers and jurists now take an active part in the controversy.

Proponents of an original-intent-based jurisprudence argue the interpretive method effectuates several promises. First, it better protects judicial review. Second, it effectively safeguards our republican form of government. Opponents challenge the validity of these claims on both a "philosophical" level and a "practical" level. The latter area of criticism intimates that even if originalism were desirable philosophically, it simply cannot work as an interpretive tool. It is difficult to know who the Framers are, much less identify their "intent." Further, they did not anticipate constitutional questions that arise today. Finally, interpreters will often disagree markedly when articulating the Framers' intent.

One way to test the promises and practical criticisms of originalism is to find an area in constitutional law in which the Framers' intent seems to matter to the interpreters and in which there is an abundance of historical evidence. The debate over the specific requirements of the First Amendment's Establishment Clause offers such a test case. The two competing sides, the separationists and nonpreferentialists-accommodationists, are often in search of the original intent of the Framers, and originalist arguments, even if only for strategic reasons, are repeatedly proffered by Justices on the Supreme Court.

This Article attempts to test, empirically, many of the claims advanced by proponents and opponents of an original-intent-based jurisprudence. The Article examined four writings, two by separationists and two by accommodationists, that make an effort to discover and interpret the intentions of the First Congress when the legislators authored, debated, and accepted the Establishment Clause. Although this is a very modest look at their claims, it is clear the authors differ in several areas. The conclusions of the separationists and accommodationists, though they are looking at exactly the same historical evidence, are often 180 degrees apart.

There may be several reasons for the disagreement between the authors studied in this project. With the possible exception of poor scholarship on the part of one group of scholars or the other, all of the reasons would tend to mitigate against the promises offered by the originalists.

The situation is analogous to two theologians who are engaged in an ongoing and heated exchange about the nature of God. One of the theologians, miffed at the interpretation offered by his colleague, says, "I will only accept an argument about God that is based upon biblical evidence." The other theologian can reject or accept the imposition of a biblical framework around their discussion. She chooses to accept the Bible as a legitimate starting point and, after careful study, comes back to the discussion armed with those passages that might support her position. The first theologian can recoil at her interpretation of Scripture, but can no longer complain she is outside of an acceptable interpretive framework. After all of this, they will still disagree as to their respective views of God.

Similarly, a jurist can embrace originalism as his or her interpretive method and can, by simply proposing a different interpretation of the historical evidence, still justify myriad judicial decisions with a multitude of policy consequences. No originalist can promise otherwise. If originalism is to be a successful (much less the dominant) interpretive approach, then this deficiency must be fully addressed.

APPENDIX

APPLICATION OF THE CHURCH-STATE TEST CASE

Originalism—Promises and Practical Critique	
Originalism—Promises and Practical Critique	**Analysis of the "Data:"**
Originalism—Promises:	
1. Better protects judicial review:	
A. Provides a common base line.	Y: Tends to vindicate the originalists' claim.
B. Provides core values—a major premise.	Y: Tends to vindicate the originalists' claim.
C. Sets boundaries for constitutional interpretation.	N/Y: Tends to vindicate, in part, both the promises and criticisms of originalism.
D. Establishes rules and reduces judicial discretion.	Unclear: Hinges on the validity of the practical critique.
2. Safeguards republican government:	
Protects the vision and ideals of republican government and safeguards majority rule.	Unclear: Depends on the validity of the practical critique.
Originalism—Practical Critique	
1. Who are the Framers?	
	Y: Tends to vindicate the originalists' claim.
2. What is their intent?	
A. Absence of records.	Y/N: Tends to vindicate, in part, both the promises and criticisms.
B. Cannot identify "group" intent.	Y/N: Tends to vindicate, in part, both the promises and criticisms.
C. Cannot communicate intent through language.	Y: Tends to vindicate the originalists' claim.
3. Interpreters arrive at different conclusions.	N: Tends to vindicate this practical criticism.
4. Framers cannot anticipate all constitutional issues.	Not applicable in this example