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Book Reviews

***God and the Founders: Madison, Washington, and Jefferson*. By Vincent Philip Muñoz. New York, NY: Cambridge University Press, 2009. 252 pp. $92.00 Cloth, $26.99 Paper**

***Church, State, and Original Intent*. By Donald L. Drakeman. New York, NY: Cambridge University Press, 2009. 297 pp. $93.00 Cloth, $29.99 Paper**

***The Sacred Rights of Conscience: Selected Readings on Religious Liberty and Church-State Relations in the American Founding*. Edited By Daniel Dreisbach and Mark David Hall. Indianapolis, IN: Liberty Fund, 2010. 560 pp. $30.00 Cloth, $14.50 Paper**

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Virtually all interpreters of the United States Constitution's stance on religion have been originalists. So, at least, two recent studies claim. While Vincent Philip Muñoz's *God and the Founders* contends that the Founders' intentions with regard to the religion clauses diverged too extensively to ascertain one "original meaning," however, Donald Drakeman's *Church, State, and Original Intent* argues that the relative lack of controversy around the Establishment Clause at the time of ratification indicates that the provision simply stood for the basic proposition that the federal government could not create a national church. Common to both authors is the abandonment of originalism as it has been practiced so far.

According to Muñoz, "[b]ecause the leading Founders disagreed, no one Founder can be cited to represent 'the Founders' position" (4). Analyzing the political theory of particular members of the Founding generation remains a crucial and relevant enterprise, however, because these theories endow the Constitution not simply with legal authority but with moral purchase as well (5). It is "the profundity of their thought" (7), and, in particular, the profundity of their thought about natural rights that allows these individuals' views to retain persuasive authority. From

this methodological vantage point, Muñoz furnishes a detailed analysis of the thought of James Madison, George Washington, and Thomas Jefferson. He then examines how their approaches to religious liberty might map onto the analysis of a variety of issues that have confronted courts, including the treatments of burdens on free exercise, religion in public schools, and religion in the public square.

God and the Founders presents a polemical reinterpretation of several Founders' thought. Madison, on Muñoz's account, insisted that religion preceded civil society and that entrance into the social contract failed to extinguish the natural liberty of religious belief. Disagreeing with scholars like Michael McConnell, Muñoz claims that this understanding of the relationship between religion and society did not lead Madison to favor religiously based exemptions from secular laws. Instead, with few exceptions, he argues, Madison insisted that "the state must remain noncognizant of religion" (20) and "lacks jurisdiction over religion" (26). Unlike Madison, Washington's practice suggested that "Religious liberty does not require governmental neutrality toward religion" (56). Instead, "[h]e believed that republican government ought to favor religion and discourage irreligion because religion favors republican government" (56).

Finally, Muñoz argues that Jefferson neither endorsed a complete wall of separation between religion and the state nor maintained an entirely coherent theory of religious liberty. According to Muñoz, "Jefferson did seek to establish a wall of separation. He intended that wall, however, not to separate religion from government generally, but rather to impede a specific type of religious belief and to suppress a particular type of religious influence," that of "ecclesiastical clergy who preached traditional Christian dogmas" (72). Furthermore, Jefferson's belief in the necessity of freedom from clerical religious influence sometimes conflicted with his view that "religious freedom meant that individuals should not be punished for their religious beliefs and that civil rights should not be affected by individuals' religious opinions" (72).

Although Muñoz's analyses are admirably thorough and detailed, on some points he is not entirely convincing. With respect to Madison, as Muñoz acknowledges, several exceptions to the governmental noncognizance position appear. Most notably, in his original proposal for the Second Amendment, Madison included language providing that "no person religiously scrupulous of bearing arms shall be compelled to render military service in person" (37). While Muñoz reads this as departing from Madison's general views, it is difficult not to consider the draft Second Amendment language as supporting at least some level of religion-based

exemptions from the requirements of the state. Likewise, with regard to Jefferson, Muñoz argues that the terms of his draft Preamble to the Virginia Statute for Religious Freedom—beginning "Well aware that the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds" (85)—are inconsistent with his efforts to inculcate and shape reason through public education and his endeavors to rationalize religious beliefs. Although today we might not follow the Enlightenment distinction between opinion and reason, this differentiation appears to have undergirded the passages that Muñoz cites from Jefferson and rendered the latter's efforts to inculcate reason consistent — at least within the context of eighteenth-century thought — with his sense of the involuntary nature of opinion.

This raises the additional question of why we should or should not deem the political theories of these members of the Founding generation persuasive for contemporary adjudication under the religion clauses. Our sense of agreement with Jefferson might depend on the extent to which we continue to endorse Enlightenment values. Even more importantly, our concurrence with Washington might reflect a generally shared attitude of political pragmatism reflective of the realities of government rather than an endorsement of the sophistication of his reasoning about religion, of which there is little evidence. Why, then, if the views of the Founders lack binding force, should we not simply side with Justice Breyer — whom Muñoz notes is the one Justice to ignore the Founders in a recent Establishment Clause case (1) — and identify the general principles behind the religion clauses through a combination of inquiring into overarching purposes, historical trajectory, and pragmatic consequences?

Drakeman's book does not attempt to answer that question, but it does indicate some sympathy with the approach adopted by Justice Breyer, whom he quotes on the final page of his book (345). Much of *Church, State, and Original Intent* is instead occupied in debunking the methodology of those justices whom Drakeman identifies as having adopted originalist approaches to the Establishment Clause, beginning with Chief Justice Waite in the nineteenth century and continuing with Justices Black and Rutledge and beyond. According to Drakeman's provocative opening sally, "Nowhere have the intentions of the American Constitution's framers been more important than in church-state cases" (vii). As he details, even at a moment when the Founders' intentions were rarely referenced in other cases, the 1879 decision in *Reynolds v. United States*—the Supreme Court's first foray into the religion clauses—extensively discussed Madison's and Jefferson's approaches to religious

liberty in both the areas of free exercise and establishment. As Drakeman also points out, rendering this premise more explicit than Muñoz does, a particular kind of originalism is at stake in these invocations, one reliant on the actual intent of specific Framers rather than the original meaning of the Constitution's terms at ratification.

In ascertaining the theories of these Framers, Chief Justice Waite, the author of the opinion in *Reynolds*, followed by Justices Black and Rutledge, who penned majority and dissent respectively in the Establishment Clause case *Everson v. Board of Education* (1947), ventriloquized the views of reigning historians of their era, some of whom were also their personal friends. On the one hand, Drakeman defends Chief Justice Waite from the charge of performing what historian John Reid and others have termed "law office history," explaining that, "to his credit, in a single holiday-filled month, he fashioned a plausible political and intellectual history of the religion clauses that has stood the test of time. And with respect to the establishment clause in particular, he did so with no apparent intentions other than to get it right" (72). On the other hand, in Drakeman's story, it is the historians who fall prey to ideological pressures and help to shape erroneous juridical accounts of the actual views of the members of the Founding generation.

The underlying point — that historians too, despite the claims to objectivity of their profession, may be influenced by political or religious views and particular presuppositions about the shape of history — is well taken. As historian Gordon Wood has persuasively pointed out in a recent collection of reviews, presentism can afflict historians doing history just as it can influence other disciplines' deployment of history. While "history writing is not mere antiquarianism," Wood acknowledges, he approvingly cites Bernard Bailyn's adjuration to avoid "indoctrination by historical example" through exercising "critical control" ("Presentism in History," in *The Purpose of the Past*, 293). "Getting it right" may prove an elusive goal, yet it does not necessarily follow that that aim should be abandoned.

A subsidiary point to be gleaned from Drakeman's book may be that the manner in which courts considers history matters. During much of the twentieth century, judges may have taken into account historical, as well as economic, medical and other expert evidence in a rather haphazard manner by extracting insights from books they encountered or friends they asked. The rise of expert amicus briefs — from even linguists, as well as historians — has altered the context in which courts draw conclusions about such areas. Presenting these materials explicitly as evidence to be debated during oral argument and, presumably, judicial conference might render

the resulting conclusions more reliable. At the same time, however, it could also suggest a vision of social science as well as science as more adversarially constructed and, hence, more transparently ideological.

One of the most fascinating suggestions of Drakeman's book is that at least one version of originalism — attention to the conceptions of particular Founders — arose with greater insistence at an early point in the area of the religion clauses than in other contexts of constitutional interpretation. Although more comparative analysis of religion clause adjudication and the approaches to history in different kinds of constitutional cases would have to be done to demonstrate this link, the fact that *Reynolds* and *Everson* cite extensively to the Founders' views about religious liberty raise a number of questions about why this occurred specifically with respect to the Constitution's treatment of religion. Was the long stretch of time between ratification of the Constitution and adjudication under the religion clauses a factor? Is there something about the relation between church and state that seems so fundamental to a polity that investigating the premises on which the state was first organized becomes crucial?

By attributing an originalist methodology to the earliest opinions on the religion clauses, Drakeman's book implicitly raises the question of what distinguishes originalist from non-originalist uses of history. Even referring to Chief Justice Waite's nineteenth-century approach as originalist may not be uncontroversial. Robert Post and Reva Siegel's genealogy of originalism, for example, traces a much more recent heritage of the practice connected with a conservative social movement that embraced originalism as its mantra (Robert Post & Reva Siegel, "Originalism as a Political Practice: The Right's Living Constitution," 75 *Fordham L. Rev.* 545 (2006)). At the same time, scholars and judges across the political spectrum have increasingly self-identified as originalists, thereby potentially diluting the significance of the label.

The broad following that originalism has garnered suggests the need for sourcebooks that might furnish materials for this variety of interpretation. The readings in *The Sacred Rights of Conscience* provide a new means of pursuing investigations of original meaning. The editors, Daniel Dreisbach and Mark David Hall, have compiled not only materials from the Founding Era, covering the general context as well as specific constitutional provisions, but have also included Biblical and European documents on church-state relations and religious liberty as well as some treatments of these areas from the decades following constitutional ratification. The texts collated under several of the rubrics would furnish excellent teaching materials, including, for example, the set of documents labeled

"Christianity, the Common Law, and the American Order." The collection of documents from the Biblical and European traditions though are necessarily incomplete given the constraints of space; while it is laudable to attempt to cover such a vast historical scope, the selectivity of presentation renders the results perhaps more misleading than informative.

Given the drawbacks to existing modes of relying on the Founders' views in religion clause adjudication that Muñoz and Drakeman identify, how should we proceed? Although both Muñoz and Drakeman maintain that originalist interpretation cannot support the "wall of separation" approach to issues of establishment that has been an active possibility at least since *Everson v. Board of Education*, they derive disparate conclusions from that premise. The persuasive authority that Muñoz finds in members of the Founding generation leads him to advocate adopting a modified version of the position he attributes to James Madison — one of state noncognizance of religion (7). By contrast, for Drakeman, the minimalist conception of the Establishment Clause should prevail and, apart from disallowing a national church, the courts should leave determinations about religion to the political branches. Both thereby indicate that originalist interpretation alone could not lead to the results of the Establishment Clause cases that the Supreme Court adjudicated in the twentieth century and beyond, but that historical materials might well retain value as furnishing insight into church-state relations. This sounds very much like a return to a pre-Bork and pre-Scalia vision of the utility of history, and one that could easily be shared by a pragmatist such as Justice Breyer. Strikingly, those opposed to a separationist or even nonpreferentialist position with regard to the Establishment Clause have now abandoned originalism and adopted a more eclectic vision of constitutional adjudication.

The Political Influence of Churches. By Paul A. Djupe and Christopher P. Gilbert. Cambridge, UK: Cambridge University Press, 2009. x + 294 pp. $80.00 cloth, $22.99 paper

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Paul A. Djupe and Christopher P. Gilbert have produced a theoretically rich and (mostly) empirically satisfying account of the various ways that