INTRODUCTION

> How should a judge go about finding the law? The only legitimate way, in my opinion, is attempting to discern what those who made the law intended. The intentions of the lawmakers govern whether the lawmakers are the Congress of the United States enacting a statute or whether they are those who ratified our Constitution and It's various amendments.[1]

As this statement argues, Federal Judge Robert Bork believed that original intent was the *only* tool for constitutional adjudication. At this hearing, Judge Bork addressed the normative issue involving the proper uses of original intent in constitutional interpretation, whether original intent should be used at all in deciding constitutional issues. To be sure, the American judiciary often uses non-legal material including "original intent" to support legal decisions.[2]

The scholarship on the judicial uses of extrinsic aids (non-legal materials including "history" and "original intent") has so far been interested in only two issues: the normative issue of whether original intent should be used at all in reaching constitutional controversies; or the search for the truths of history, what is it?[3]

Rather than testing the truths of the histories that the judiciary has invoked, this study will examine the empirical question--how have the judiciary used "history" or histories in reaching legal conclusions. Others have examined the uses of history by the judiciary, namely, Jacobus tenBroek, Charles A. Miller, John G. Wofford, Alfred H. Kelly, and in the English legal context, J.G.A. Popock.[4] Primarily single case studies, few of the scholarship have led to the examination of actual judicial behavior.

This survey asks the empirical question, taking for its case study the promise of separation of church and state, i.e., the establishment clause of the First Amendment and corresponding state guarantees, of how the judiciary actually uses history.[5] This study examined the development of the establishment clause in constitutional adjudication, at the state and federal levels, with primary focus on the way judges have used "history" or founding eras (state and federal) to discover rationale and evolving principles. By examining the developing meaning of the establishment clause, this study found numerous deviations from common assumptions about the role of "historical" facts play in constitutional adjudication. In short, this study examined the uses, not the truths, of the meaning of separation of church and state.

This study posits that the uses of history, here the history of separation of church and state in America, in legal discourse has been relatively uninfluential in the legal reasoning of actual case law, that is, the actual resolution of the legal outcomes. "History" has been primarily "window dressing" in legal reasoning; when relevant, it has the effect of avoiding legal formalism of precedent and doctrine. At the very same time, "history" has been extremely significant in the development of historical eras in American legal history.

To be sure, others have examined the judicial uses of history, but none have examined one history across time or across jurisdictions. Locating judicial references to "original intent" "founders' intent" was not easy. There is no convenient way to locate judicial references, since there are no indexes. Both legal and social science indexes list only points of law, doctrine, case history, legislative history of a particular law in

question, or majority opinions. This was due to the legal community's overriding commitment to doctrine and principles of law. The legal indexes were of little value in locating historical references or *dicta*.[6] Judicial references to original intent, a concept that had to be expanded to include "histories," were found by reading all the case law. The best source was following opinions which went out of their way to list systematically judicial references to history (judges like to cite each other), and by *Shepardizing* U.S. Supreme Court opinions involving the establishment clause. SHEPARD'S legal index does not index references to history, and does not distinguish between the various liberties of the First Amendment, but lumps the First Amendment into one category.[7]

The reason that judicial uses of history are not indexed can be attributed to the American legal community's adoption of common law reasoning. The introduction of the "case law" method, ably documented by G. Edward White's examination of legal education in America, perpetuated an English common law bias against "legislative intent" and the use of "extrinsic aids" in legal reasoning.[8] This bias was reinforced in legal education, where lawyers are drilled in case law, not history books. Justice Frankfurter once reminded an audience that the great common law judges did not examine "legislative intent."[9] This also explains the rarity of historical references in establishment clause case law--only comprising eleven percent of the case law surveyed.

A reading of the case law (942 plus cases) involving separation of church and state, both state and federal, this survey found only 105 opinions invoking some type of reference to history. "History" is defined broadly to include: 1) state framers' intent, the debates and proceedings of state constitutional conventions, the Northwest Ordinance,

and the aspirations of the state settlers, and territorial histories. 2) General history of the times, which includes European, colonial, and English legal history (e.g., the English common law and William Blackstone). And 3) federal founders' intent, commonly known as "original intent" which includes the debates and proceedings of the Federal convention, the drafting of the First Amendment, actions of the First Congress, and the writings of both Thomas Jefferson and James Madison. Herein, "history" does not include the judicial opinion, judicial history (i.e., precedent) or the legal history of a particular case.

I. Some Findings.

Based on a reading of 942 appellate opinions gleaned from West's DECENNIAL DIGESTS, the *dicta* of precedent, and U.S. Supreme Court's references to the original intent of the establishment clause, this survey observed a curious pattern of judicial behavior.

A. The Rarity of History.

One, was its rarity.[10] Only 11 percent of the opinions surveyed invoked "history." The U.S. Supreme Court invoked history some 23 percent of the time; 19 percent of state opinions invoked it, only 7 percent of the lower federal courts opinions. This was surprising in light of the importance that separation of church and state principles have in American thought as the co-guarantor of religious liberty. Past religious persecutions and the evils of church-state unions are a recurring theme in American narratives. If any history should be dear to Americans, it is the history of separation of church and state. But it was rare.

The legal community's strong commitment to the tools of common law reasoning, those of precedent, law and doctrine can explain its rarity. This survey found not only a judicial hostility to the introduction of extrinsic aids (especially if counsel introduced it), but also a legal tension between historical intent and legalism. When law or legalism had an answer, the court's always abandoned "history" for law. This survey will show how in the area of guarantee of separation of church and state, legal positivism can defeat the introduction of "historical truths."

History books were rarely consulted, in fact, this survey found several instances of the misuses of secondary historical texts (e.g., reliance on the historian Leonard Levy, a separationist, utilized by accommodationists, discussed in **Chapter 4** below). Academia has had no influence on the legal community's development of the establishment clause. In fact, historical books on the establishment clause only became prominent in the 1960's, long after the judiciary had developed the central principles of separation and invoked local histories. This survey of the case law found that the constraints of common law reasoning shapes "history," in that, both judges and historians look to *legal history*--past laws and legal actions to write historical accounts of the past not social history.

B. When it was found--more likely in a Dissenting or Concurring Opinion.

The historian William Weicek has remarked on the simple observation that references to history are more likely to be found in dissenting or concurring opinions.[11] Dissents invoke "history" because they can--their opinion does not govern and they are free to criticize. As Professor tenBroek noted, dissents primarily use original intent as a critique of majority reasoning.[12] The majority may fear getting overturned by a higher

court--which gives incentive to stick to the facts and doctrine. Nor was it true that the first case in an area of litigation produces the first examination of the "history" of that litigation. More often, it is a later court, wishing to change the precedent, which invokes "history."

C. The Use of History was Irrelevant to the Legal Outcomes of Most Cases.

Of the 87 of the 105 opinions which invoked federal founders intent, fifteen invoked a separationist history (that the founders wished to separate church and state), yet reached an accommodationist result (sanctioning state aid to religion); eight opinions invoked accommodationist history (that the founders wished to aid religion) and reached separationist results (striking down the state action).[13] This survey of the case law found too many mismatches between the histories and the legal conclusions--begging the question of why bother to invoke history at all? References to history were primarily "window dressing," rarely, did they lead to the legal result. If not supportive, why bother?--especially if that history did not match the conclusion. This study will show how history had various uses, other than supportive of the legal reasoning--to scold counsel, to scold lower courts, to limit the ruling to the case at hand. In the case of accommodationist history (that the founders wished to aid religion). This study will show how even when history appears to be supportive of the legal outcome, on closer inspection it was not supportive at all.

History was relevant in avoiding legal formalism, e.g., precedent, or doctrine. Law always has answer, be it a separationist one in the area of establishment clause litigation. This study found that accommodationist history, when relevant, was relevant in

avoiding the legal formalism of precedent or of doctrinal tests. Only in four cases did "history" determine the legal outcomes. two were lower court opinions overturned on appeal. and two are U.S. Supreme Court opinions which still stand as precedent.[14] These cases will be examined in chapter below.

D. If Unpredictable--History Has Not Restrained the Judiciary as Judge Bork had Hoped.

The judiciary has not been consistent in its uses of history. No jurist has proven to be a consistent originalist concerning the meaning of the establishment clause. The use of "history" did not "check" the judges at all. Indeed, the use of "history," in the area of the history of separation, was dangerous to the guarantees of separation of church and state and those of religious liberty when judges to justify the argument that religion was necessary for civic virtue. This civic virtue argument (that government needs religion to keep the peace) is part of a popular and recurring argument in American politics.[15] Both state and federal courts have rejected the argument. This survey will show that throughout American legal history, American judges have consistently rejected English-style religious toleration, e.g., the state can aid and accommodate the religion of the majority and at the same time tolerate dissenters. Religious liberty has never been treated by the American judiciary as mere privileges or indulgences granted by one group to another, forever subject to the whim of popular majorities. Principles, not history, have protected religious minorities.

E. The Changing Social and Historical Contexts of the Uses of History.

The most significant finding was there exists clearly defined shifts in the judicial

uses of history. Three eras or shifts can be observed (discussed II below). There is no one "truths" of the original intent of separation but rather, different historical contexts in which different interpretations are made. Differing founding points in state and federal histories created multiple "original intents." Thus, federalism has had the single most important impact on the evolution of the meaning of the establishment clause. This study will illustrate that the state courts have been the leaders, not the followers, of the application and development of separationist principles and histories.

II. The Social and Historical Contexts of the Uses of Original Intent.

The case law illustrates that there have been three identifiable eras in the American legal history of the guarantee of separation of church and state: 1) The era of the early Republic, where English history and common law dominated; 2) The era of the state framers' intent, where state framers and aspirations of the western settlers dominated; and 3) The modern era, where federal founders' intent dominates.

A. The Era of the Early Republic.

The first observable era comprises the years after the ratification of the U.S. Constitution, the era of the early Republic. The litigation was typically based on the remaining controversies in English law involving glebe or state church lands, taxes in support of the parish ministers, blasphemy laws, Sunday closing laws, and inter-church disputes. This first era was composed of state case law, as the First Amendment did not apply to the states until it was incorporated in 1947.

The first state-level church-state litigation involved the status of the former English state-church properties. After the American Revolution, several states transferred

property ownership of the "glebe lands," the land where the English state-church sat, from the towns, which had owned the lands under English law, to the newly voluntary and non-state churches. However, in the state of Virginia, a campaign by Baptists and others forced the state legislature to confiscate the glebe lands and auction off the properties to raise money for a fund for the poor.[16] Two landmark cases, examined in this study, involving the confiscation of the former state-church properties, relied upon English history and colonial practices to resolve the disputes. In one, which reached the U.S. Supreme Court, Justice Story scolded the state of Virginia for confiscating the glebes, arguing that the principles of religious liberty and no establishment were not violated when the state turned over private property to a church.[17]

The "establishment" of a state church in the American context is usually understood to mean state taxation in support of the town or parish minister. There existed no aristocracy in the colonies to support, without taxation of all, the salary of the parish minister. After the Revolution, all colonial states, except Massachusetts (by state constitutional provision) and New Hampshire (by statute), prohibited the municipal power of towns to tax in support of the town minister in the writing of the first state constitutions guaranteeing freedom from taxation in support of the parish minister. **Chapter 1** examines the leading challenges to the constitutionality of Massachusetts' authorization, and litigation which arose from New Hampshire legislation. Both Massachusetts and New Hampshire courts sustained the taxation on the grounds that taxation did not violate religious liberty (e.g., no coercion of opinion).[18] Paradoxically, the same state judges who sustained the authorization, recognized the need to relieve non-

members of the parish church from this taxation and also viewed separation as the legal status quo in their states. This early view of taxation in support of the parish minister eventually gave way once the notion that a church is a voluntary society was accepted by the legal establishment, and after the authorization to tax in support of parish ministers was repealed by referendum or the drafting of a new state constitution.

Two remaining English colonial laws survived into the modern era--blasphemy and Sunday closing laws. State judges debated whether "Christianity was part of the common law" during the era of the early Republic, and, following English law, sustained blasphemy and Sunday closing laws as legitimate public peace measures not constituting aid to religion. Blasphemy laws were upheld as necessary regulations of "fighting words," as the English judges had treated such laws. Likewise, Sunday laws were treated as they had been by English judges, justified by the sovereign's power to regulate labor. Paradoxically, while sustaining state laws that aided the Christian religion, state judges invoked separationist dicta, maintaining that separation of church and state was in fact the status quo in American law. In the area of contracts, state judges argued that "Christianity was not part of the common law," and upheld the validity of contracts made on Sunday.

The era of the Early Republic was characterized largely by property disputes and challenges to preferential treatment of the Christian religion. Judges referred to English legal history, English common law (i.e., case law), and European histories of religious persecution. The use of English common law principles was significant because it had the effect of *secularizing* and sustaining what appeared to be state practices which aided

Christian practices and thereby narrowed the early definition of separation of church and state to mean freedom of opinion (i.e., no coercion of religious thought). In this early case law, references to American histories, including the colonial variety, were surprisingly absent. The early judges did not want the great common law to be held responsible for religious persecutions in Europe or in the colonies (e.g. Salem witch trials). There seemed to be a conscious decision not to invoke American colonial experiences, even in areas such as Sunday closing laws, where a clear legal history was available, because the American colonial past was one of English oppression, not fitting to discuss or cite as distain for color law has been attributed to the early Republican fervor that followed the American Revolution.[19]

The dominance of English common law and principle to resolve church-state controversies in the early Republic can be attributed to the nature of early American legal education, where the works of William Blackstone, Lord Mansfield, and the English case law comprised the focus of legal learning. The later introduction of the case law method in legal education reinforced this bias toward English law and history.[20]

The reception and application of English common law in American law carried with it a curious legacy of English law—the legacy of the tension between two distinct jurisdictions, the ecclesiastical courts and the King's civil courts.[21] Central to English civil law was the idea of "jurisdictional separation," that is, the belief that civil courts were incompetent to decide religious truths because there was another jurisdiction (the ecclesiastical courts) that was competent. In the American context, this became the principle that government (including the judiciary) was incompetent to decide religious

truths and led to state judges' conclusion that "Christianity was not part of the common law," an argument adopted in American state-church property disputes. State judges saw themselves as protecting common law reasoning from the perils of religious conflicts which had plagued Europe. **Chapter 4** examines this root of separation doctrine—protecting the secular courts at a time in the early Republic when religious upheavals and backlashes to the secularization of American society were occurring, in the name of protecting contract and property, not protecting individual rights.

To be sure, the era of the early Republic was characterized by both separationist dicta, e.g., "Christianity was not part of the common law", and accommodationist dicta, e.g., "We are a Christian nation." It is of interest to note that the phrase "We are a Christian nation" appeared only in blasphemy or Sunday law opinions, which involved free exercise concerns, and were absent when contracts or property rights were in jeopardy. Unfortunately, modern era judges would later cite the "We are a Christian nation" as if the phrase were the "law" of the case, ignoring the context of sustaining blasphemy or Sunday laws as secular measures.

It was during the era of the early Republic that the first references to Thomas Jefferson appear.[22] It was not until the twentieth century, coinciding with the growth of the welfare state, that Jefferson became important. **Chapter 4** examines both the early and modern uses of Thomas Jefferson in the separation of church and state debate.

B. The Second Era: State Framers' Intent.

The first major shift from English common law to American law became evident in the late ninetieth century challenges to the practices of Bible reading and prayers in the

free public schools. To be sure, English principles continued to survive in cases involving the validity of Sunday contracts and Sunday closing laws for some time. The change would be evident in challenges to religious practices in the public schools.

Chapter 2 examines the ten leading state court opinions involving challenges to Bible reading in the public schools which occurred prior to the modern era--these cases comprise a second distinct era of American legal history involving separation of church and state. Challenges to Bible reading in the public schools offered a distinctly American problem where no English case law or principle could be found. The early cases from New England had seen no violation of freedom of conscience in the practice; however, in 1872, a new judicial view of separation of church and state appeared. For the first time, American experiences and histories were invoked. A truly American "separation of church and state" (as opposed to jurisdictional separation that appeared in church property dispute litigation) would emerge.

Beginning in *Board of Education v. Minor (1872)*, counsel had supported the constitutionality of Bible reading in the public schools by arguing that the federal founders wanted to aid the Christian religion and religious instruction, giving evidence of this intent the wording of the Northwest Ordinance of 1787.[23] The Ordinance read: "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[24] The Ohio court, relying on legal positivism, rejected the argument on the grounds that the Northwest Ordinance was not "law" in the states once a state constitution was adopted, and that, in any event, the word "Christianity" did not appear in the

ordinance. The Ohio court argued that Bible reading in the public schools violated the principle of separation of church and state guaranteed by their state constitutions because the practice violated the guarantee of equality among religions and between religion and non religion (i.e., no preference principle) by forcing government agents to chose a "Bible" (thus violating the principle that government was incompetent to determine religious "truths"), and the principle of equal treatment of all children in the public schools. The Ohio court's decision soon became cited as precedent by other state courts.

The Wisconsin Supreme Court, following the Ohio court, argued the thesis that the Western settlers had sought to escape the oppressions of the East Coast states by securing strict separation between church and state in the emerging Western states.[25] The court adopted a view of pluralism in which all denominations comprised a new society that sought equality. The adoption of this distinctly American view of separation, that separation is the guarantee of equality, marked a turning point in American legal thought and the development of separationist doctrine. In the era of the early Republic, "separation" was narrowed to mean freedom of opinion (treated as free speech) or jurisdictional separation (treated as jurisdictional competency). However, the principles invoked in striking down the practice of Bible reading in the public schools represents a complete break with English law and the English view of religious toleration (i.e., an official religion exists, but the dissenters may not be coerced), expanding separation to mean "no preference" of one religion over another or religion over non religion, and the guarantee of equality.

The second era of American legal thought on separation was innovative. It was

the first time that federal founders were invoked (citing the Northwest Ordinance), although in a losing clause. "Separationist" state framers' intent was applied instead. In addition, other changes were taking place, Lord Mansfield was replaced by Judge Thomas Cooley, a Michigan judge and law professor, whose CONSTITUTIONAL LIMITATIONS (1878) was cited as the authority on the meaning of the state's prohibitions of aid to sectarian schools and sectarian instruction in the public schools.[26] No doubt the state judges viewed public education in terms of the most democratic principles and saw their role as one of protecting the free public schools from sectarianism or the preference of one religion, (including the Protestant religion) over another.

The shift from the dominance of English common law to state framers' intent can be attributed to a number of developments. The advent of the free public schools movement, which began before the American Civil War, played a large part in the ideology of the democratic mission of the public schools, which were to be free from sectarianism. Also, the drafting of state constitutions, where states adopted strict "Blaine" amendment clauses--named after Senator Blaine's proposed amendment to the Federal constitution prohibiting state aid to sectarian schools and sectarian instruction in the public schools. Although the Blaine amendment failed at the federal level, such prohibitions were eagerly adopted by many states.[27] Historians have attributed the strictness of the state clauses to anti-Catholic and anti-Mormon sentiments, and to Congressional mandates, which required after 1870 a "Blaine" clause in the constitution of all entering states as a price of admission to the Union.[28] Without English law to

apply. state judges had to turn to their respective constitutional texts mandating "no aid" to religion. and literally applied "separationist" dicta from intra-church dispute principles and Sunday contract cases.

C. The Modern Era: Federal Founders' Intent.

Although often associated with the separationist ideas of both Thomas Jefferson and James Madison, federal founders' intent has come in two varieties: accommodationist and separationist. Beginning in the 1920's the "accommodationist" variety of federal founders' intent - that the founders wished to aid religion--supported by citing actions of the First Congress, can be observed in majority state appellate opinions sustaining a state blasphemy law, a state Sunday law conviction, and Bible reading in the public schools.[29] As **Chapter 2** illustrates, accommodationist federal founders' intent first appeared in counsel's arguments in support of the practice of Bible reading in the public school, but was rejected by Western state judges. **Chapters 3** examines the case law, which demonstrates an evolution of accommodationist federal founders' intent from the adoption of the "accommodationist" variety of federal founders' intent, which had first appeared in counsel's arguments in the Bible reading cases, to its rejection. **Chapter 4** examines the evolution of a "separationist" federal founders' intent--that the founders wished to separate church and state. The 1920's represent a time of change and conflict, with the advent of World War I, American values and governmental principles were re examined against the threat of communism. State judges who invoked the accommodationist variety of founders' intent wanted to depict a Christian community.

In the 1940's, another great shift occurs. A "separationist" variety of founders'

intent--that the founders wished to separate church and state-- appeared in the free exercise case law, both state and federal, in cases involving Jehovah's Witnesses and other religious minorities. The separationist dicta of *Board of Education v. Minor* was cited as authority, reinforcing the view that separation of church and state was the status quo in American law and meant freedom *from* religion.[30] This borrowing of separationist dicta from *Minor* was later seen in free exercise cases of the 1940's.[31]

The modern era of the original intent of the Establishment Clause begins in the late 1940's, when Thomas Jefferson's and James Madison's separationist ideas were finally linked to the meaning of the First Amendment.[32] This first occurred in a state opinion, where Justice Riley of the Oklahoma Supreme Court, in a dissent, arguing against monetary aid to a sectarian orphanage which took care of wards of the state, linked Thomas Jefferson to the First Amendment. One year later, the U.S. Supreme Court, echoing Justice Riley's position that no establishment means no aid to any or all religion, handed down its first modern Establishment Clause opinion in *Everson v. Board of Education (1947).*[33] The 1940's mark the dominance of the separationist variety of federal founders' intent. The shift to federal founders' intent was due to the U.S. Supreme Court's incorporation of the First Amendment's religious clauses in the 1940's, that meant church-state issues would be handled by federal courts as well as state. The incorporation of the First Amendment's religious clauses reflected the increasing importance of First Amendment freedoms in American society in the wake of the World War II.[34]

By the 1960's, two contending and differing interpretations of the original intent of the Establishment Clause--accommodationist and separationist--vied in both state and

federal courts. Both varieties of founders' intent continue to appear in case law involving challenges to the remaining state Sunday laws, state aid to parochial schools, and religious displays on public property. In the modern era, once again, religious practices in the public schools were challenged, and again, separationist histories were reaffirmed.[35] Litigation also shifted to the federal courts, due to relaxed rules of standing and the expanding application of First Amendment freedoms.

Another shift occurs in the 1980's, as the accommodationist founders intent was refashioned in the U.S. Supreme Court opinions of *Marsh v. Chambers* (1983, upholding legislative chaplains' salaries) and *Lynch v. Donnelly* (1984, upholding a city display of a nativity scene on private parkland).[36] Accommodationist founders' intent is more likely to appear in cases involving religious displays or ceremonies that involve little or no tax expenditures. In the 1990's, the accommodationist founders' intent appears in graduation school prayer controversies. Today, accommodationism is the type of intent most frequently cited by federal judges rather than state judges, and continues to be found primarily in dissenting opinions.

The accommodationism of both *Marsh* and *Lynch* were countered by the continued affirmation of both separationist principles and the separationist variety of original intent in *Wallace v. Jaffree* (1985,striking down the practice of a moment of silence in public schools of Alabama) and *Lee v. Wiseman* (1992, striking down the practice of clergy led graduation prayers in public schools).[37] Legal scholars were wrong to predict the demise of the strict separationism of the U.S. Supreme Court. Many state courts have declined to follow U.S. Supreme Court accommodationism--by relying upon

the doctrine of independent state grounds and state framers' intent to reject unwelcome Supreme Court opinions. or by rereading both *Marsh* and *Lynch* back into a separationist tradition as one state judge did.[38] Today the tension between accommodationism and separationist varieties of original intent of the establishment clause continues in religious displays on public property.[39]

In sum, the modern era is characterized by the contending accommodationist and separationist varieties of federal founders' intent, which can be observed since the 1920's. To a large extent, federal founders' intent is a modern lawyer's invention (appearing long before history books on the subject were published), and its use, especially the accommodationist variety, in constitutional debates is increasing. Surprisingly, the accommodationist variety of original intent was found to be the most frequent, occurs in dissenting opinions or in majority opinions sustaining state action, which appears to aid the Christian religion. Separationist history, on the other hand, supported by the ideas of Jefferson and Madison was not so frequent, and was frequently used to warn of the perils of religious conflict or to scold lower courts for utilizing religion as a standard in decision making. Today, accommodationist varieties of history are more likely to be found in cases involving religious symbols in public places, whereas separationist varieties appear in cases involving the expenditure of public funds. References to founders' intent is relatively absent, though, from most of the cases--especially litigation involving intra-church disputes and monetary aid to sectarian colleges--once doctrine (e.g., the *Lemon* test) had evolved.[40]

Clearly, the pattern of the varieties of original intent composes its own history--

there exists a history of the uses of the original intent involving the meaning of separation of church and state in American law where historical "truths" appear to reflect the social and legal context in which they were made.

History of Original Intent: Some Implications.

The existence of an observable pattern of eras defining the relationship between church and state in American legal thought suggests several things, namely, a developing meaning of separation within American legal thought. Current Hartzian debates in American political thought--is there one American culture or ideology?--raise interesting issues about the establishment clause. The debate over the establishment clause cases suggests a shared legal culture, one reinforced by both the uniformity of American legal education in the case law method, and the legal community's concern with protecting the rights of religious minorities. Throughout the legal history of the establishment clause and its state counterparts, the American legal community proved to be a "Whig," or liberal, community, in its consistent reaffirmation of the principles of separation of church and state as an aspect of a Millsian market place of ideas. The shared consensus in accepting "no coercion" of religious belief and "no monetary aid" to religion reflects a deliberate choice of central principles by the judges involved. However, the changing dicta and historical references suggest that there is no settled consensus about what is the "historical truth," reflecting an unfinished dialogue in American thought. An examination of case law does not reveal the "truth," but rather, the continuity or discontinuity in American legal thought.

A second implication suggested by the case law is that the legal community can

create "law" by citing the dicta from precedent. This is clearly evident in the few state judges who began to cite the "We are a Christian nation" dicta of early blasphemy opinions (notably not invoking the legal rationale of those opinions, where the offense of blasphemy was sustained as an exercise of the state's police power to regulate the public peace) in cases involving Sunday laws, religious bequests, and litigation unrelated to blasphemy. Eventually, the *dicta* became the law of the case.

The cases examined in this study also suggest the legal community's deep and continued commitment to the canons of legal reasoning--precedent, principles and doctrines. The continued commitment to the canons of legal reasoning are clear in the cases analyzed though-out this study. No doubt, this commitment to the canons of legal reasoning was not neutral. Legal formalism was manipulated, to defeat the introduction of accommodationist varieties of founders' intent, and to reinforce adherence to the literal text of a state's constitutional prohibitions. The judiciary has done that which no one believes, that is, to apply both text and principle to the cases before them.[41]

To be sure, a view of institutional competency has played a role in the uses of original intent. "Separation" was first applied when state courts wanted to protect themselves from deciding doctrinal conflicts in church property disputes. Separation was understood to mean jurisdictional competency. Only in the 1940's, would separationism become accepted as a means to protect the individual liberties of religious minorities.[42]

Finally, the disputes over the role of religion in American life reflect the tensions between the concepts of equality and liberty in American thought. The establishment cases show that the tensions began at the state level, where both accommodationist and

separationist varieties of founders' intent first appeared. Accommodationists used original intent in order to demonstrate a sensitivity to majority sentiment. Separationists used original intent to emphasize limited rule of government as a means to protect liberty.

IV. The Plan of the Dissertation.

The analysis proceeds chronologically, subdivided into three dominant eras. **Chapter 1** examines the early American Republic, namely, where church-state litigation involved property, contract, and labor law. The dominant judicial references in that time period were primarily to English common law and European history, not American experiences. The reception of English common law was to secularize, and thereby sustain, state laws that appeared to aid the Christian religion. This was the era of the common law.

Chapter 2 examines the second era, that of state framers' intent. Ten appellate opinions are analyzed involving challenges to Bible reading in the public schools, where references to the history of separation of church and state appeared. Long before the incorporation of the First Amendment to the states, state judges were innovators in the development of separationist doctrine, namely, by treating the guarantee of separation of church and state as one of equality (e.g., the beginning of the "no preference' principles in American law), no longer religious liberty (e.g., freedom of opinion); they rejected the accommodationist interpretation of federal founders' intent supported by the wording of the Northwest Ordinance; and consistently applied the principle that government could not determine religious truths. The Bible reading cases represent a conceptual break with the English common law, the rejection of English toleration, and a turn to a truly

American doctrine of separation. State framers' intent, not federal founders,' was the first "original intent" involving separation of church and state in American legal thought.

Chapters 3 and 4 examine the evolving meaning of federal founders' intent. **Chapter 3** traces the evolution of "accommodationist" founders' intent (that the founders wished to aid the Christian religion) from its early presentation (and rejection by Western state judges) to its adoption in the 1920's, and its modern varieties. **Chapter 4** examines the evolution of the "separationist" variety of founders' intent (i.e., that the founders wished to separate church and state) from the church-property dispute litigation of the 1840's and free exercise cases of the 1940's, to the introduction and acceptance of the separationist ideas of James Madison and Thomas Jefferson in modern cases involving monetary aid for religious purposes. Surprisingly, it has been "accommodationist" varieties which have been the most frequently used, and when observed have been used to avoid separationist precedent. The use of original intent involving the Establishment Clause did not "expand" liberties as proponents of original intent have asserted, but rather, its use has had the effect of limiting and narrowing the definition of "no law" or "no aid" to religion in actual cases.

Chapter 5 Conclusions will make some observations about the judicial uses of history. This chapter will also note the significant impact of state courts on the developing meaning of separation. The state judges have been the leaders, not the followers in the development of establishment clause doctrines and histories, as evident from Western state judges' rejection of the accommodationist variety of federal founders' intent based on the wording the Northwest Ordinance in the 1890's, to the acceptance of

accommodationist intent in the 1920's: from the reception of state framers' intent to Thomas Jefferson as authority for the argument that separation means no fiancial alliance between church and state, to the rejection of the recent accommodationism of the U.S. Supreme Court. Second, it is of interest to note that, whereas the U.S. Supreme Court frequently exhibits historical disputes between justices, disputes have been much less frequent at the state court level. And finally, the state courts' continual reliance on the doctrine of independent state grounds, depending upon the strict "no support" language of their respective constitutions and unique state experiences to avoid unwelcome accommodationism of the federal courts, is evident. These tensions suggest another "era"--the impact of federalism in the establishment clause cases.

In sum, this study presents a case law examination of American legal history, examining some 105 appellate opinions where the American judiciary made reference to the original intent of the establishment clause and the history of separation of church and state.[43] Contrary to common and scholarly expectations involving the uses of history or the uses of original intent, the case law deviates from those expectations, namely, there was no one historical "truth," "history" did not control legal reasoning, and when observed, the use of history as original intent was used to avoid legal formalism. Why do judges use original intent? When doctrine and precedent provide an answer, they use original intent to avoid the strict language of separationism found in American constitutions.

1

U.S. Congress, Senate, Committee on the Judiciary, Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States, 100th Cong., 1st sess. 103 (1989) (statement of Federal Judge Robert Bork). *See* Robert Bork, *Original Intent: The Only Legitimate Basis for Constitutional Decision Making*, 26 JUDGES' J. 12 (1987).

2

See Near v. Minnesota 283 U.S. 697 (1931) [citing the English jurist William Blackstone to support the argument that freedom of the press meant no prior restraint (no prior censorship)]; I.N.S. v. Chadha 462 U.S. 919 (1983) (citing The Federalist Papers to explain the nature of the separation of powers); or Muller v. Oregon 208 U.S. 412 (1908)(examining statistics on the evils of long working hours in upholding Oregon's ten hour labor law for women).

3

See John T. Valauri, *Everson v. Brown: Hermeneutics, Framers' Intent, and the Establishment Clause*, 4 NOTRE DAME J. L. ETHICS & PUB. POL'Y 661 (1990).

4

See CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969); John G. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119; Jacobus tenBroek, *Use of the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 26 CAL. L. REV. 287, 26 CAL. L. REV. 437, 26 CAL. L. REV.664 (1938); 27 CAL. L. REV. 157, 27 CAL. L. REV. 399 (1939).

Recent contributions include: William M. Weicek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227 (1987); Peter Irons, *Clio on the Stand: The Promise and Perils of Historical Review*, 24 CAL. W. L. REV. 337 (1987); H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987); and GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY (1992). *See also* Clyde W. Summers, *Sources and Limits of Religious Freedom*, 41 ILL. L. REV. 53 (1946).

5

U.S. CONST. amend. I: "Congress shall make no law respecting an establishment of religion. . . ." State constitutions have similar provisions, *see* Linda S. Wendtland, *Beyond the Establishment Clause: Enforcing Separation of Church and*

State Through State Constitutional Provisions, 71 VA. L. REV. 625 (1985).

6

Obiter dictum:

> Words, a remark made or opinion expressed, by a judge, in his decision upon a cause, 'by the way,' that is, incidentally or collaterally, and not directly upon the question before him, or upon a point not necessarily involved in the determination of the cause, or introduced by the way of illustrations, or analogy or argument. Such are not binding as precedent.

in BLACK'S LAW DICTIONARY (19TH ED).

7

The reader of the DECENNIAL DIGEST can identify the establishment clause at least four ways: 1) subject heading (e.g., aid to parochial schools); 2) holdings (e.g., a city had a secular purpose of recognizing its founders coat of arms when it adopted its city seal); 3) statement of principles (e.g., protection of free exercise extends to all sincere religious beliefs); or 4) direct citations to state or federal establishment clauses (e.g., U.S.C.A. Const. Amend. 1). The establishment clause does not have its own category in the legal indexes, but can generally be found under Constitutional Law Section 84.

8

EDWARD G. WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY (1985).

9

See, e.g., FELIX FRANKFURTER, *Some Reflections on the Reading of Statutes*, in THE BENJAMIN N. CARDOZO MEMORIAL LECTURES (1949).

10

Of some 942 cases (excluding church-property disputes), 105 were found to do "history" and "intent" from 1803 to 1993 (the first case appears in 1803). The U.S. Supreme Court invoked it 23 percent of the time (11 out of 50 cases); lower federal courts 7 percent (13 out of 175 cases); and state courts 19 percent (95 out of 495 state cases). Of the different varieties, state framers intent appeared 5 percent (50 out of 495 state cases); English history and general history of the times 4 percent (42 out of 942 cases); Federal founders intent involving the establishment clause 9 percent (87 out of 942 cases); Thomas Jefferson 4 percent (38 out of 942 cases); James Madison 2 percent (21 out of 942 cases); Separationist history 6 percent (53 opinions out of 942) and

Accommodationist history 5 percent (43 opinions out of 942). Historical critiques involving the establishment clause in the legal literature comprise 1 percent (10 out of 675 legal articles).

11
WEICEK, *supra* note 4.

12
TenBroek, *supra* note 4.

13
Separationist histories in cases which reached accommodationist results examined in **Chapter 4**: Everson v. Board of Education 330 U.S. 1 (1947); McGowan v. Maryland 366 U.S. 420 (1961); Horace Mann League of the U.S. v. Board of Public Works 242 Md. 645, 220 A. 2d 51 (1966); State v. Gamble 144 N.W. 2d 740 (1966); Fox v. Board of Education 93 N.J. Super. 544, 226 A. 2d 471 (1967); Americans United v. Independent School District 288 Minn. 196, 179 N.W. 2d 146 (1970); Americans United v. Bubb 379 F. Supp. 892 (1974); Colo v. Treasurer and Receiver General 378 Mass. 550, 392 N.E. 2d 1195 (1979); Bogen v. Doty 456 F. Supp. 983 (1978); see also Berger v. Rensselaer Central School Corp. 766 F. Supp. 696 (1991) [*rev'd* 982 F. 2d 1160].

Accommodationist histories found in cases which reached separationist results, also examined in **Chapter 3**: Herold v. Parish Board of School Directors 136 La. 1034, 68 S. 116 (1915); Carden v. Bland 198 Tenn. 665, 288 S.W. 718 (1956)[*rev'd*]; Synder v. Town of Newtown 147 Conn. 374, 161 A. 2d 77 (1960); Chamberlain v. Dade County Board of Public Instruction 143 S. 2d 21 (1962); School District of Abington Township v. Schempp 374 U.S. 203 (1963) (Brennan, J., concurring); Sheldon v. Fannon 221 F. Supp. 766 (1963); Calvary Bible v. Board of Regents 72 Wash. 2d 912, 436 P. 2d 189 (1967) [*cert. denied* 393 U.S. 960]; Lowe v. Eugene 254 Or. 518, 463 P. 2d 360 (1969); People v. Baldwin 112 Cal. Rptr. 290 (1974); Wiest v. Mt. Lebannon School District 475 Pa. 166, 320 A. 2d 362 (1974); Stein v. Plainwell Community Schools 822 F. 2d 1406 (1987); American Jewish Congress v. City of Chicago 827 F. 2d 120 (1987) (Easterbrook, J., dissenting).

14
See, e.g., Anderson v. Salt Lake City 348 F. Supp. 110 (1973) (striking down display of the ten commandments on a granite stone) *rev'd* 475 F. 2d 29 cert. denied 415 U.S. 879; and Jaffree v. Board of School Commissioners 554 F. Supp. 1104 (1983) (dismissing a challenge to Alabama's moment of silent prayers in the public schools) *rev'd* 705 F. 2d 1526, *aff'd* Wallace v. Jaffree 473 U.S. 38 (1985); Marsh v. Chambers 463 U.S. 783 (1983) (upholding state payment of legislative chaplain's salary); Lynch v. Donnelly 465 U.S. 688 (1984) (upholding city sponsorship of a creche display).

15

See, e.g.., Thomas E. Buckley, *Evangelicals Triumphant: The Baptist's Assault on the Virginia Glebes*, 1786-1801, 45 WM & MARY Q. 33 (1988).

16

See, e.g., Terret v. Taylor, 13 U.S. (9 Cranch) 43 (1815) discussed in **Chapter 1** *infra*. *See also* Turben v. Locket, 6 Call. (Va.) 133 (1804); Seldon v. Overseers of Poor of London, 11 Leigh (Va.) 127 (1840). For a modern case, *see, e.g.*, Mikell & Town of Williston, 285 A. 2d 713 (Sup. Ct. Vt. 1971).

17

See, e.g., Muzzy v. Wilkins, 1 Smith (N.H.) 11 (1803); Barnes v. Falmouth, 6 Mass. 400 (1810) discussed in **Chapter 1** *infra*.

18

See, e.g., PERRY MILLER, THE LIFE OF THE MIND IN AMERICA (1965).

19

See, e.g., EDWARD G. WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY, *supra* note 8

20

See, e.g., RONALD G. USHER, THE RISE AND FALL OF THE HIGH COMMISSION (1913, reprinted 1968).

21

See Early Uses of Jefferson in **Chapter 4** *infra*.

22

See Board of Education v. Minor, 23 Ohio 211 (1872) discussed in **Chapter 2** *infra*.

23

Northwest Ordinance Art. III., 1 Stat. 50 (1787). For an examination, *see, e.g.*, Ronald A. Smith, *Freedom of Religion and the Land Ordinance of 1785*, 24 J. CHURCH AND STATE 589 (1982).

24

See, e.g., State v. District Board of School District no. 8 of Edgerton, 76 Wis. 177, 44 N.W. 967 (Sup. Ct. Wis. 1890) discussed in **Chapter 2** *infra*.

25

See, e.g., COOLEY, CONSTITUTIONAL LIMITATIONS (1878).

26

See, e.g., Linda Wendtland, *supra* note 5.

27

See, e.g., Stephen C. Veltri, *Nativism and Nonpreferentialism: A Historical Critique of the Current Church and State Theme*, 13 DAYTON L REV. 229 (1988). *See also* Frank J. Conklin & James M. Vache, *The Establishment Clause and the Free Exercise Clause of the Washington Constitution--A Proposal to the Supreme Court*, 8 U. PUGENT SOUND L. REV. 411 (1985).

28

See, e.g., State v. Mockus, 120 Me. 84, 113 A. 39 (1921) (upholding Maine's blasphemy law); Pirkey Bros. v. Commonwealth, 134 Va. 713, 114 S.E. 765 (1922) (upholding a Sunday law conviction); Wilkerson v. City of Rome, 152 Ga. 66, 110 S.E. 895 (1922) (upholding the practice of Bible reading in the public schools of Georgia); Kaplan v. Independent School District, 171 Minn. 142, 214 N.W. 18 (1927) (upholding the practice of Bible reading in the public schools of Minnesota). These cases are discussed in **Chapter 3** *infra*.

29

See, e.g., Miami Military Institute v. Leff, 220 N.Y.S. 799 (1926) discussed in **Chapter 4** *infra*.

30

See, e.g., Reynolds v. Rayborn, 116 S.W. 2d 836 (Civ. App. Tex. 1938); Board of Education v. Barnette, 319 U.S. 624 (1943); Cory v. Cory, 70 Cal. App. 2d 563, 161 P. 2d 385 (1945) discussed in **Chapter 4** *infra*.

31

See, e.g., Justice Riley's dissent in Murrow Indian Orphan Home v. Childers, 197 Okla. 249, 171 P. 2d 600 (1946) (Riley, J., dissenting). This opinion is discussed in **Chapter 4** *infra*.

32

See, e.g., Everson v. Board of Education, 330 U.S. 1 (1947). This case is discussed in **Chapter 4** *infra*.

33

See, e.g., Cantwell v. Connecticut, 310 U.S. 296 (1940) (incorporating the First Amendment's free exercise clause); Everson v. Board of Education, 330 U.S. 1 (1947) (incorporating the First Amendment's establishment clause). It is of interest to note that judges cite Cantwell as the case that incorporated the establishment clause on the states.

34

See, e.g., Engel v. Vitale, 10 N.Y. 174, 218 N.Y.S. 2d 659, 176 N.E. 2d 579 (1961), *rev'd*, 370 U.S. 421 (striking down prayers in public schools); Wallace v. Jaffree, 472 U.S. 38 (1985) (striking down silent prayers in public schools). These cases are discussed in **Chapters 3** and **4** *infra*.

35

See, e.g., Marsh v. Chambers, 463 U.S. 783 (1983) (upholding state legislative chaplains' salary); Lynch v. Donnelly, 465 U.S. 688 (1984) (upholding city expenditure and participation in a display of a nativity scene). These cases are discussed in **Chapter 3** *infra*.

36

See, e.g., Wallace v. Jaffree, 472 U.S. 38 (1985) (striking down moment of silence in the public schools of Alabama); and Lee v. Wiseman, 505 U.S. 577 (1992) (striking down the use of clergy led benedictions at a public high school graduation ceremony). These cases are discussed in **Chapter 4** *infra*.

37

See, e.g., Bennet v. Livermore Unified School District, 193 Cal. App. 3d 1012 (1987) discussed in **Chapter 4** *infra*.

38

See, e.g., A.C.L.U. v. Allegheny County, 842 F. 2d 671 (1988) (Weis, J., dissenting), *rev'd in part, aff'd in part*, Allegheny County v. Pittsburgh. A.C.L.U. 492 U.S. 573 (1989) (Kennedy, J., dissenting). *See also* Doe v. Village of Crestwood, 917 F. 2d 1476 (1990) (Coffey, J., dissenting). These cases discussed **Chapter 4** *infra*.

39

See, e.g., the *Lemon* test, in Lemon v. Kurtzman, 403 U.S. at 612-613 (1970): requiring, 1) governmental action must have a secular purpose; 2) a primary effect must be one that neither advances nor inhibits religion; and 3) action must not result in excessive entanglements, either administrative or political. The existence of this doctrinal test means "doing" original intent is unnecessary

40

See, e.g., RONALD DWORKIN, THE LAW'S EMPIRE (1986).

41

See, e.g., Board of Education v. Barnette, *supra* note 30.