REYNOLDS v. UNITED STATES: THE HISTORICAL CONSTRUCTION OF CONSTITUTIONAL REALITY

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In the Supreme Court's first case interpreting the Constitution's free exercise clause, Chief Justice Morrison Waite endowed the next two centuries of religion clause jurisprudence with a generous legacy of constitutional history. In that 1879 case, *Reynolds v. United States*, the Chief Justice called upon the founding fathers to decide whether polygamous Mormons in the Territory of Utah were immunized by their faith from prosecution under a federal statute outlawing bigamy.[1] The Court's ruling offered Mr. Reynolds, a minor Mormon official, no hope of sanctuary within the First Amendment. More important than this specific decision, however, was the historical approach to interpreting the religion clauses adopted by the Chief Justice, which has had the effect of essentially writing Thomas Jefferson and James Madison directly into the First Amendment. Not just any aspects of these two influential framers were incorporated into constitutional doctrine, but their writings that have come to stand for the principle of a strict separation of church and state: Two documents from colonial Virginia—Madison's *Memorial and Remonstrance against Religious Assessments* and Jefferson's *Bill for Establishing Religious Freedom*—together with Jefferson's now-famous letter to a group of Danbury, Connecticut, Baptists, declaring that the First Amendment erected a "wall of separation between church and state."

The opinion's expansive language about "the true distinction between what properly belongs to the church and what to the State," and its striking assertion that Jefferson's 1802 letter

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1. Reynolds v. United States, 98 U.S. 145 (1878).

to the Danbury Baptists represents almost "an authoritative declaration of the scope and effect" of the First Amendment have created an enduring historical heritage not so much for the free exercise clause, but for the First Amendment's nonestablishment provision.[2] While the establishment clause itself does not make its Supreme Court debut for another fifty years or so, the legacy of *Reynolds* is the extent to which it has cast a strict separationist hue on the First Amendment in a manner that has colored church-state constitutional analysis ever since, much to the consternation of those who would prefer an interpretation allowing the government to provide at least nondenominational support for religion. This group, generally called non-preferentialists or accommodationists, has engaged the historical debate, often arguing that the historical premise in *Reynolds* was correct—i.e., that Jefferson and Madison can tell us what the religion clauses mean—but asserting that a focus solely on the specific documents unearthed by Chief Justice Waite tell only part of the story, since even those framers had a record of approving some state support for religion. Some have even argued that the concept of Madisonian authorship of the religion clauses is wrong-headed, and that other members of the first Congress, such as New Hampshire's Samuel Livermore, deserve the credit.

My goal is not to add yet another voice to this sometimes ferocious fray, especially since there is abundant scholarly literature and a lengthy series of judicial opinions all questing for the historical First Amendment. Instead, my aim is to address a very different question, *viz.*: In an era during which the Supreme Court rarely consulted the founding fathers on constitutional issues, where did the Chief Justice find the historical sources that led him to such interesting and, ultimately, influential writings? The answer is, briefly: He consulted the greatest American historian of the nineteenth century, George Bancroft. Once directed to Virginia by Dr. Bancroft, who probably focused on that state because he was a devoted admirer of Thomas Jefferson, the Chief Justice came under the direct influence of two native Virginian historians. These historians shared the view that the Old

2. The first modern establishment clause case, *Everson v. Board of Education of Ewing*, 330 U.S. 1 (1947), *reh'g denied*, 330 U.S. 855 (1947), reaffirmed the statements in Reynolds that the "provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and intended to provide the same protection against governmental intrusion on religious liberty as the Virginia [Bill of Religious Liberty]." 330 U.S. at 13.

Dominion was indeed the font of American freedoms. They also happened to be Baptist and Presbyterian ministers whose ardent opposition to ecclesiastical establishments was inspired by the dissenting churches' persecution at the hands of a legally established church, the "Nebuchadnezzars of the age."[3] And so, the Supreme Court's historical reading of the establishment clause owes as much to the Baptists' and Presbyterians' battles for religious freedom—and their historians' artful telling of that tale—as it does to the intellectual contributions of Jefferson and Madison.

Ever since *Reynolds*, a detailed discussion of constitutional history has frequently been a hallmark of church-state cases, leading advocates on all sides to cite those framers who appear to support their views and to criticize their opponents for misreading or misrepresenting the legislative history. Despite much of this modern commentary decrying the misuse of the historical record, however, what we are witnessing in *Reynolds* is not really "law office history," in the classic sense of a litigant (or judge) sifting through eighteenth-century documents to find historical nuggets in support of a favored outcome in a pending case. Chief Justice Waite was not searching for any particular position along the strict separationist-non-preferentialist axis, and none was needed to decide how to apply the free exercise clause to the case of a Mormon polygamist. Instead of law office history, what we see in *Reynolds* might better be termed the historical construction of constitutional reality. That is, Chief Justice Waite offered a good faith, but probably flawed (or at least oversimplified), rendition of the amendment's origins, and then the history he found became the relevant constitutional background for future cases not because it was an accurate picture of the establishment clause's original meaning, but because subsequent Supreme Court decisions said that it was. It was only later, in the wake of the Supreme Court's decisions applying the First Amendment to parochial school aid, school prayer and other state and local actions, that litigants, judges and even historians began to excavate the Jeffersonian-Madisonian landscape to unearth constitutional artifacts that might support their most desired results in hotly contested cases about public aid to religion.

3. ROBERT B. SEMPLE, A HISTORY OF THE RISE AND PROGRESS OF THE BAPTISTS IN VIRGINIA 11 (1810).

THE BACKGROUND

In the early 1860's, Congress passed the "Morrill Act for the Suppression of Polygamy," which went well beyond simply banning multiple spouses. The Morrill Act not only outlawed plural marriages in the territories, it also sought essentially to disestablish the Mormon Church and to divest it of its economic power.[4] Despite these aggressive provisions, the Act was declared a "dead letter" by a congressional committee five years later because it could not be enforced effectively at the Mormon-dominated local level.[5] Following the Civil War, Congressional attention was focused again on polygamy. In 1874, the federal Poland Act was adopted, and this law cleverly provided the prosecutorial mechanisms that were missing from the somnolent Morrill Act. The Poland Act allowed the U.S. Marshal in Utah to select jury pools that would not necessarily bow to the pressure of the Mormon Church, assigned jurisdiction of polygamy trials to federal territorial courts and provided for polygamy convictions to be appealable to the United States Supreme Court.[6]

Not long after Congress passed the Poland Act, several Mormon leaders were arrested by a federal prosecutor. They decided that a test case was necessary, preferably one involving someone with a relatively low profile in the community, a defendant who might present a more sympathetic image than one of the Church's elder statesmen with a bevy of young wives. And so, on October 16, 1874, 32 year old George Reynolds wrote in his diary that "it had been decided to bring a test case of the law of 1862 . . . before the court and . . . to present my name before the grand jury."[7] Reynolds, the private secretary to a series of Mormon presidents, and a polygamist for a grand total of two months at that time, did what he was asked. He was indicted by a grand jury for bigamy on the grounds that in 1865 he had married Mary Ann Tuddenham and then, in August of 1874, "did unlawfully marry and take to wife one Amelia Jane Schofield."[8]

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4. 12 Stat. 501–02 (1862). *See* SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA 81 (2002).

5. GORDON, *supra* note 4, at 83 (quoting the Report From the Committee on the Judiciary, 28 February 1867, responding to the "Memorial of the Legislative Assembly of the Territory of Utah, Praying for the Repeal of [the 1862 Act]").

6. 18 Stat. 669–71. *See also* GORDON, *supra* note 4, at 113.

7. GORDON, *supra* note 4, at 114.

8. The indictment is reprinted in full in the *Brief for the United States, in* 8 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED

At trial, a parade of remarkably forgetful Mormon witnesses, upon being quizzed about Reynolds' alleged multiple marriages, displayed a level of collective amnesia that we have come to associate with events like the Watergate hearings, and denied any knowledge of the two marriages. He was nevertheless convicted on the testimony of his second wife, Amelia Jane Reynolds (neé Schofield), who had apparently not been expected to be called as a witness. Not knowing to follow the party line, she proceeded blithely to recall that she had, in fact, married George Reynolds on "the third day of August, 1874 . . . [i]n the Endowment House" in Salt Lake City.[9] Reynolds' conviction was reversed on appeal on procedural grounds, and he was tried again. At the new trial, Reynolds' second wife could not be found to give testimony, so her statements in the first trial were read into the record, and Reynolds was convicted again. With this background, his case reached the Supreme Court late in 1878.

THE CASE

The *Reynolds* case would take the Court into uncharted constitutional waters, since the federal government had not previously been involved in regulating either domestic relations or individuals' religious conduct, both of which had historically been the sole province of the state governments. Thirty years before, in the one early nineteenth century case in which the First Amendment's free exercise clause had been invoked, the Court made it clear that the states were not subject to the mandates of the First Amendment. This case, *Permoli v. New Orleans*, involved an ordinance stating that "it shall be unlawful to carry to, and expose in, any of the Catholic churches of this municipality, any corpse, under the penalty of a fine of fifty dollars." The Supreme Court dismissed a challenge to the ordinance on First Amendment grounds, decreeing that "[t]he Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states."[10] Nineteenth century Americans could therefore seek no recourse from the state

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STATES 71 (Philip B. Kurland & Gerhard Casper, eds., 1975).

9. *Id.* at 46.

10. Permoli v. Municipality No. 1 of the City of New Orleans, 44 U.S. 589, 609 (1845).

or federal courts via appeals to the First Amendment for protection from laws promulgated by the states.

In Mr. Reynolds' case, the situation was quite different. Utah was not a state at that time, and, in fact, Brigham Young had unsuccessfully petitioned for the Mormon homeland to become the state of Deseret. Utah was instead a territory of the United States, and subject to federal jurisdiction, thus putting Congress in the position usually occupied by state governments: it could freely legislate on marriage and other matters traditionally left to the states, as it did in the Morrill Act. But, at the same time, such legislation would need to conform to the mandates of the Constitution's limitations on federal power, thus potentially bringing to bear upon any convictions under the Morrill Act the untested provisions of the First Amendment's religion clauses. Accordingly, Chief Justice Waite identified as one of the six questions to be addressed by the Court: "Should the accused have been acquitted if he married the second time, because he believed it to be his religious duty?"

Chief Justice Waite began his analysis by observing that the First Amendment is in fact implicated by Mr. Reynolds' appeal: "Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The First Amendment to the Constitution expressly forbids such legislation."[11] The question before the Court, then, was "whether the law now under consideration comes within this prohibition."[12] To answer this constitutional question of first impression, the Chief Justice turned to a historical analysis of the origins of the religion clauses. He launched this discussion with the following rationale: "The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted."[13]

Why did Chief Justice Waite elect to employ a "history of the times" methodology to interpret the First Amendment? It was certainly not a necessary component of First Amendment analysis at that point in constitutional history. In dealing with free speech cases of first impression, the Waite court did not seek out the framers' views or intentions,[14] and, when Justice

11. *Reynolds*, 98 U.S. 143, 160 (1878).
12. *Id.*
13. *Id.*
14. See *Ex parte* Jackson, 96 U.S. 727 (1877), involving mail restrictions on circulars relating to lotteries. See also *Ex parte* Curtis, 106 U.S. 371 (1882) where neither Waite's

Bradley referenced the "views of the first congress" in an 1886 search and seizure case, a concurring opinion joined by Chief Justice Waite made only a vague reference to what was "obvious" that the framers intended without citing any historical evidence.[15] And so, the degree to which the Chief Justice delved into a detailed analysis of the historical background of the religion clauses is quite unusual.

Although we do not know why Chief Justice Waite elected to make a foray into constitutional history in *Reynolds*, we do know where he went to seek out the information he needed—he went next door. Or, more precisely, he went to his former next-door neighbor from his first year on the Court: seventy-eight year old George Bancroft, an elder statesman of formidable influence and, more importantly, probably the most distinguished, and almost certainly the most productive, historian of his generation.[16] Bancroft, who attended Harvard and received a Ph.D. from the University of Gottingen, published a ten volume *History of the United States from the Discovery of the Continent*; served as Secretary of the Navy and Secretary of War; was appointed minister to Great Britain and Prussia; and, at the time of the *Reynolds* case, made his home in Washington where he had dedicated himself to writing what would become a two volume *History of the Formation of the Constitution of the United States of America*, a work that was completed just three years after the *Reynolds* case was decided.[17] Waite's most recent biographer, C. Peter Magrath, describes the politically connected historian as a "nineteenth-century Arthur Schlesinger, Jr.," but even that distinction probably understates the impressive degree of Bancroft's stature and the extent of his political influence. In 1879, for example, he was given the unprecedented honor of being granted "the full privileges of the Senate floor."[18] George Ban-

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opinion nor Bradley's dissenting opinion referenced the framers in a case involving political contributions; in fact, Waite overlooked the potential first amendment issue altogether.

15. Boyd v. United States, 116 U.S. 616 (1886).

16. Bruce Trimble seems to be the first to pick up on Bancroft's influence on the *Reynolds* opinion. *See* BRUCE R. TRIMBLE, CHIEF JUSTICE WAITE: DEFENDER OF THE PUBIC INTEREST 244–45 (1938). But the relationship is described in substantially greater detail in C. Peter Magrath, *"Chief Justice Waite and the Twin Relic: Reynolds v. United States,"* 18 VAND. L. REV. 507 (1965).

17. *See* GEORGE BANCROFT, HISTORY OF THE UNITED STATES FROM THE DISCOVERY OF THE CONTINENT (1834-1875) (ten volumes); GEORGE BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES (1882).

18. Magrath, *supra* note 16, at 526.

croft could, perhaps, be better imagined as Arthur Schlesinger, Jr. and Henry Kissinger combined into one august and politically hot-wired personage. It would be hard to imagine a more knowledgeable or reputable source for constitutional history than Morrison Waite's erstwhile next-door neighbor, who described himself as being on "the most friendly terms" with the Chief Justice.[19]

In a brief letter, Bancroft referred the Chief Justice to Thomas Jefferson's Virginia Statute on Religious Freedom as follows: "The Virginia law, which guided the Virginia members of the [constitutional ratifying] convention, shows the opinion of the leading American Statesmen in 1785.... It was accepted alike by the friends of Jefferson, and the Presbyterians of Virginia."[20] Following Bancroft's clue that the meaning of the First Amendment lay in Virginia's efforts to establish religious freedom, Waite dug deeply into a study of the history of Virginia at that time. Such an ambitious and time-consuming approach to legal research was not uncommon for the Yale-educated jurist. Magrath points out that "Waite characteristically sought assistance from any possibly useful source. Thus, in preparing an opinion in a case involving matters of international law, he asked questions ... of [a State Department official], examined twenty-two scholarly authorities, and looked at twenty United States treaties with foreign nations."[21] In fact, Magrath goes on to note that when, late in his Supreme Court career, Chief Justice Waite presided over The Telephone Cases, "which dealt with the exceedingly complex and technical questions raised by the suits over the infringements of the Bell telephone patents," he dedicated several months to becoming "educated... on the principles of electricity."[22]

We do not know all the sources Waite may have consulted to form his opinion about the Virginia antecedents of the First Amendment, but his historical research must have represented a significant amount of effort over the Christmas holidays, since Bancroft's advice came on December 2 and the Chief Justice's docket book shows that the Supreme Court approved his opinion in the *Reynolds* case one month later on January 4, just prior

19. *Id.*
20. *Id.* at 527 (quoting Letter from George Bancroft to Chief Justice Waite (Dec. 2, 1878)).
21. *Id.*
22. *Id.*

to its announcement on January 6.[23] On January 4, presumably shortly after the Court approved the opinion, Waite wrote to Bancroft thanking him "again" for "the information given as to the history of the free religion clause in the constitution. . . . With your assistance, I have been able to set forth, somewhat clearly, I hope, the scope and effect of that provision."[24]

Based on his research into the First Amendment's antecedents, Waite's majority opinion in the *Reynolds* case launched into a relatively detailed discussion of those aspects of pre-constitutional history to which he had been referred by Bancroft. In particular, the Chief Justice addressed the time when "attempts were made in some of the colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well."[25] He noted that people were taxed to raise money for the support of churches other than their own and that "[p]unishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions."[26] Ultimately, he observed that "controversy upon this general subject was animated in many of the States, but seemed at last to culminate in Virginia," where, in 1784, the legislature first considered "a bill establishing provision for teachers of the Christian religion. . . ."[27] The bill, known as a General Assessment, was postponed and copies were distributed so that people could "signify their opinion" at the next session.[28] In response, there was, according to Waite, a "determined opposition" that included what would become a very famous Memorial and Remonstrance by James Madison "in which he demonstrated 'that religion, or the duty we owe the Creator,' was not within the cognizance of civil government."[29] Here Waite cited the Appendix to Semple's *Virginia Baptists*, which contains a complete copy of Madison's Memorial. He then noted not only that the General Assessment Bill was, in fact, defeated, "but another, 'for establishing religious freedom,' drafted by Mr. Jefferson, was passed."[30] At this point, Waite cited both Jefferson's

23. *Id.* at 523.
24. Letter from Chief Justice Waite to George Bancroft (Jan. 4, 1879), *quoted in id.* at 527.
25. *Reynolds*, 98 U.S. 145, 162 (1878).
26. *Id.*
27. *Id.* at 163.
28. *Id.*
29. *Id.*
30. *Id.*

collected works and Howison's *History of Virginia*.[31] Then Waite quoted directly from the preamble to Jefferson's Virginia statute, boldly stating that in "these two sentences is found the true distinction between what properly belongs to the church and what to the State."[32] His description of Jefferson's preamble reads as follows:

> After a recital 'that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty,' it is declared 'that *it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.*'[33]

Waite later returned to the topic of what to do when religious actions, in Jefferson's words, "break out into overt acts against peace and good order," but first he needed to establish a link between the efforts to secure religious freedom in Virginia and the mandates of the First Amendment to the United States Constitution. Bancroft's correspondence had only mentioned that Jefferson's statute "guided the Virginia members of the [constitutional ratifying] convention [and] shows the opinion of the leading American Statesmen in 1785. . . ."[34] The first link proffered by Waite picked up on Bancroft's reference to ratification. The Constitutional Convention, Waite commented, occurred "a little more than a year after the passage of this [Virginia] statute."[35] Then, noting that Thomas Jefferson was minister to France at that time, and therefore unavailable to play a direct role in the creation of the Constitution, Waite observed that as soon as Jefferson "saw the draft of the Constitution proposed for adoption, he, in a letter to a friend, expressed his disappointment at the absence of an express declaration insuring the freedom of religion."[36] Nevertheless, Jefferson was willing to support the Constitution, "trusting that the good sense and honest intentions of the people would bring about the necessary al-

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31. ROBERT HOWISON, HISTORY OF VIRGINIA FROM ITS DISCOVERY AND SETTLEMENT BY EUROPEANS TO THE PRESENT TIME (1848) (2 volumes).

32. *Reynolds*, 98 U.S. at 163.

33. *Id.* (emphasis added).

34. Letter from George Bancroft to Chief Justice Waite (Dec. 2, 1878), *quoted in* Magrath, *supra* note 16, at 527.

35. *Reynolds*, 98 U.S. at 163.

36. *Id.*

terations."[37] Waite then stated that five states proposed adding amendments to the Constitution, and that three of them—New Hampshire, New York and Virginia—"included in one form or another a declaration of religious freedom in the changes they desired to have made, as did also North Carolina, where the convention at first declined to ratify the Constitution until the proposed amendments were acted upon."[38]

Amendments were indeed proposed during the first session of Congress, and "the amendment now under consideration," according to the Chief Justice, "was proposed with others by Mr. Madison."[39] This amendment "met the views of the advocates of religious freedom, and was adopted."[40] And then, following this brief summary of the actions of the first Congress, Waite returned to Jefferson, and, in particular, to a letter written to the Danbury Baptist Association of Connecticut. The letter, which contains Jefferson's oft-quoted statement that the First Amendment built "a wall of separation between church and state," was penned in 1802, more than a decade after the adoption and ratification of the First Amendment, but in it Waite finds the heart and soul of the religion clauses.[41] Quoting at length from the letter, the Chief Justice proclaimed that "[c]oming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured."[42] Waite's extensive quotation of Jefferson's letter is as follows:

> Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposi-

37. *Id.*
38. *Id.* at 164
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*

tion to his social duties.[43]

With this long quotation, and the pronouncement that it stands as "almost an authoritative declaration of the scope and effect of the [first] amendment," Waite effectively wrote Jefferson's 1802 "wall of separation" language directly into the religion clauses, an emanation that has survived throughout many subsequent cases.

Since Jefferson's letter to the Danbury Baptists appears not to be mentioned in the histories cited by Waite (i.e., Howison and Semple), nor is it mentioned in Bancroft's letter, an interesting question is where did the Chief Justice find it.[44] The most likely source is the Index to the edition of Jefferson's papers employed by Waite, that is, the nine volume compilation edited in the mid-nineteenth century by Professor H. A. Washington of the College of William and Mary. In Washington's Index, there is a heading for "Religion," under which there is a subheading titled "Religion Should be Free"; and appearing as the first of three letters listed under that highly relevant subheading is a reference to the "wall of separation" letter to the Danbury Baptists.[45] And thus entered into the First Amendment lexicon Jefferson's elegant but enigmatic phrase.

With this enduring contribution to constitutional history, the Chief Justice commenced a relatively detailed discussion of the history of laws against polygamy, dating back to the common law (for which he cites Kent's Commentaries) and the "earliest history of England."[46] But he was not finished with his invocation of the history of Virginia. "It is a significant fact," he noted,

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43. *Id.* Justice Waite's opinion inaccurately transcribes one word of Jefferson's letter. *See* DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 181 n.71 (2002), where he notes that "[m]ost published collections of Jefferson's writings incorrectly transcribe ["legitimate"] as 'legislative.'"

44. Neither Magrath, who has studied Waite extensively, nor Dreisbach, who has scrutinized the heritage of the Danbury letter with care, has identified a source who may have brought the letter to Waite's attention. Dreisbach notes, "Neither the Danbury letter in general nor the 'wall' metaphor in particular appeared in the formal record before The Court, including lower court rulings and the parties' legal briefs." DREISBACH, *supra* note 43, at 98. Magrath comments as follows: "Exactly how Waite came across the letter to the Danbury Baptists is not clear. Bancroft may have referred him to it in a conversation, or Waite, who worked very systematically, may have decided to track down Jefferson's later statements on the first amendment once he had looked at the Virginia Statute on Religious Freedom." Magrath, *supra* note 16 at 530 n.111.

45. THE WORKS OF THOMAS JEFFERSON: PUBLISHED BY ORDER OF CONGRESS FROM THE ORIGINAL MANUSCRIPTS DEPOSITED IN THE DEPARTMENT OF STATE (H.A. Washington ed., 1853-1856) (9 volumes); the reference is found at 8 *id.* at 113.

46. *Reynolds*, 98 U.S. at 164 (citing JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 79 (1851)).

"that . . . after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution . . . the declaration in a bill of rights that 'all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience,' the [Virginia] legislature substantially enacted the [anti-polygamy] statute of James I., death penalty included," there being apparently some doubt "whether bigamy or polygamy be punishable by the laws" of Virginia.[47] Based on the fact that Virginia's great leaders of religious freedom passed such a draconian anti-polygamy law, Waite concluded that "we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society. . . . In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life."[48] Waite then reflected on the nature of marriage, which is both a "sacred obligation" and a "civil contract," and "[u]pon it society may be said to be built."[49] Moreover, Waite noted that polygamy "leads to the patriarchal principle . . . which, when applied to large communities, fetters the people in stationary despotism," citing Professor Francis Lieber, whose comments on polygamy he found strongly endorsed in Kent's Commentaries.[50] Ultimately, Waite concluded that "there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion."[51]

Since the United States thus has the power to outlaw polygamy, according to Chief Justice Waite, "the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute."[52] The possibility of creating an exemption to the criminal laws for religiously inspired conduct "would be introducing a new element into criminal law," which Waite was unprepared to do.[53] "Laws," he wrote, "are made for the government of actions, and while

47. *Id.* at 165.
48. *Id.*
49. *Id.*
50. *Id.* at 166 (citing JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 81 n.(e) (1851)) (Kent quotes Lieber).
51. *Id.*
52. *Id.*
53. *Id.*

they cannot interfere with mere religious belief and opinions, they may with practices."[54] Waite then reviewed the parade of potential outrageous results that could flow from allowing religious exemptions to otherwise valid criminal laws: "suppose one believed that human sacrifices were a necessary part of religious worship . . . [o]r if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent" these beliefs to be carried out into practice, he asked.[55] No, he concluded, to permit "a man to excuse his practices" contrary to the laws "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."[56] And so, despite Waite's thoughtful analysis of the efforts of Madison and Jefferson to establish religious freedom first in Virginia and subsequently in the United States of America, George Reynolds lost his case. He did not receive an exemption from the federal laws criminalizing bigamy in the territories, and the Mormon's test case was lost.

THE HISTORY

There is little doubt that Bancroft provided the springboard for Waite's plunge into Virginia's history. Following Bancroft's reference to Virginia's history and its legal protection of religious freedom in particular, Waite undoubtedly sought a detailed and reliable historical review of the passage of Jefferson's bill. Based on the books cited in the *Reynolds* opinion, the most influential work he consulted was written by Robert Reid Howison, described by a recent biographer as "a nineteenth-century lawyer, minister, historian and author . . .."[57]

In Howison's *History of Virginia from its Discovery and Settlement by Europeans to the Present Time*, Chief Justice Waite found a relatively recent and generally well regarded source (it was published just thirty years earlier in 1848) to provide the historical background of Virginia's disestablishment of the Episco-

54. *Id.*
55. *Id.*
56. *Id.* at 166–67.
57. Trina A. Stephens, Abstract, Twice Forty Years of Learning: An Educational Biography of Robert Reid Howison (1820-1906) (1998), (unpublished Ph.D. dissertation, Virginia Tech.).

pal Church and its statutory protection of religious freedom. *The Princeton Review* called it "incomparably the best history of Virginia that has ever been written," and the Richmond, Virginia, based *Southern Literary Messenger* opined that "[a]s to the perspicuity of arrangement, the harmony of proportion between the parts, and the accuracy of facts, of Mr. Howison's history, there can be but one opinion. In these particulars he has performed his task in a manner altogether unexceptionable."[58] At the same time, Waite came into contact with the work of an able historian, an ardent admirer and native son of the Commonwealth of Virginia, and an advocate of the disestablishmentarian view that "liberty is weakened by any contact between church and state."[59]

Howison clearly shared Bancroft's opinion that Jefferson's statute was a profound statement following "the highest reason," and further believed that, in pressing for amendments to the federal constitution, Virginia was "instrumental in securing liberty for America."[60] Unlike Bancroft, however, Howison did not read this history as necessarily reflecting a personal triumph of Thomas Jefferson himself, or even the preeminence of Jeffersonian republicanism, but, rather, the contribution of Virginia to the new nation. Howison, a devout Presbyterian minister, kept some distance from Jefferson, whose relationship with religion was controversial at best within the evangelical community. Howison observed that "Thomas Jefferson was not a believer in Christianity as divine, or in Christ as God. It is doubtful whether he was a simple Deist or a Unitarian."[61] Nevertheless, Jefferson, "though infidel in his opinions," had applied sound reason to the question of religious liberty, and "[t]hus may it happen that the most learned of infidels, and the most enlightened of Christians, may attain to the same conclusions as to religious liberty."[62] As Howison tells the story, even while "Jefferson was embodying his views in definite form [in the Statute for Religious Freedom], a number of consecrated minds were at work on the same subject."[63] In fact, the Virginia Presbyterians to whom Bancroft had referred in his letter to Waite (Bancroft had said that the Statute for Religious Freedom was "accepted alike by the friends of Jefferson, and the Presbyterians of Virginia") had been inspired to

58. 11 THE BIBLICAL REPERTORY AND PRINCETON REVIEW 187 (April 1848); 14 SOUTHERN LITERARY MESSENGER 342–43 (June 1848).
59. 2 HOWISON, *supra* note 31, at 298.
60. *Id.* at 299, 333.
61. *Id.* at 298–99.
62. *Id.* at 299.
63. *Id.*

send a series of five memorials to the General Assembly of Virginia between 1775 and 1786 concerning the proper relationship of church and state. According to Presbyterian Howison, "a careful analysis of these documents will draw from them every material argument and principle, that will be found embodied in the 'Act for Establishing Religious Freedom,' written by Mr. Jefferson."[64] Howison does not further explore whose ideas actually informed the drafting of the statute, be they inspired or infidel, but whatever their source, "all who love liberty have admired it, and will support it unto the end."[65]

Howison's description of the adoption of Jefferson's religious freedom bill in 1784 begins with a discussion of the legislative proposals for a general assessment, which was essentially a broad-based tax for the support of religion. According to Howison, the "bill required that all taxable persons should, at the time of giving in a list of their tithes, declare to what religious society they wished their assessments appropriated; and if they failed so to declare, the sums assessed on them were to be appropriated to seminaries of learning in their counties."[66] This bill had the blessing of the extremely influential Patrick Henry, who not only gave it his "cordial support," but also urged the "incorporation of all societies of the Christian religion," a legal device that would permit religious organizations themselves to hold title to property.[67] Until that point, the property of churches was subject either to legislative action, in the case of the legally established church, or to the whims of the lay leadership of any church not so established. Following its disestablishment, the Episcopal Church had applied to be incorporated. Howison describes the potential for abuse from incorporation as follows: "the Episcopal Church would now be confirmed by law in the possession of property, the great body of which had been taken from the people under the requirements of the old system [i.e., when it had been the legally established church]. And farther, its ministries and vestries were furnished with a *legal* energy which would incessantly prompt them to measures for acquiring property and gaining temporal power."[68]

In response, "[t]he friends of liberty took the alarm," including both the Presbyterians and the Baptists, especially as the

64. *Id.* at 299–300.
65. *Id.* at 301.
66. *Id.* at 296–97.
67. *Id.* at 294–95 (emphasis omitted).
68. *Id.* at 296.

"question of assessment had become prominent."[69] The legislature deferred the assessment bill "in order that by the next session, the popular feeling respecting it might be known," thus "[e]xciting debates" in many counties.[70] Amidst these debates came a "memorial against the bill prepared by James Madison," which, in Howison's estimation, is "one of the best compositions ever produced, even by his great mind."[71] Howison then goes on to summarize at some length Madison's memorial against the assessment, noting, in a footnote, that it could "be seen in Appendix to Semple's Va. Baptists. . . ."[72] This footnote is undoubtedly the source of Chief Justice Waite's reference in the *Reynolds* opinion that Madison's Memorial could be found in Semple's work since it is unlikely that Waite, having been directed by Bancroft to "the friends of Jefferson and the Presbyterians of Virginia," would have independently sought out a history of the Baptists. Ultimately, Howison extols Madison's document, showing an enthusiasm unrestrained by the concerns he expressed towards Jefferson's unconsecrated mind. Referring to Madison's memorial, he writes, "Transparent in style, moderate yet firm in temper, graceful in proportion, strong in argument, it treats its subject with a power not to be resisted."[73]

Later in the volume, Howison makes the case for Virginia's catalytic role in bringing about the Bill of Rights. His analysis begins with the 1788 debates in Virginia concerning the ratification of the Constitution, in which James Madison, "the successful champion of the Constitution," and others "who defended the Constitution, presented it as a system beautifully adapted to their wants, and well fitted to cover the chasm left by the Confederation," whereas "those who opposed it [most notably Patrick Henry] declaimed against it as a monster, dangerous in his single traits, and in his full development."[74] One of the principal objections to the Constitution by Patrick Henry and the Anti-Federalists was its lack of a Bill of Rights, which Howison notes, in a footnote, "was [also] Mr. Jefferson's leading objection. He was in Paris at the time, but he wrote a letter about the New Government to James Madison. . . ."[75] Some Virginians, such as

69. *Id.*
70. *Id.* at 296–97
71. *Id.* at 297.
72. *Id.* at n.(b). In fact, Howison cites Semple's volume three separate times in his two page description of the assessment controversy.
73. *Id.*
74. *Id.* at 321, 325.
75. *Id.* at 330 n.(b).

Patrick Henry and his followers, wanted their ratification of the Constitution to be conditioned upon the inclusion of certain amendments, whereas others favored amendments, but only as a recommendation for the future.

At this point, Howison makes a genuinely remarkable statement about Virginia's unique role in First Amendment history. He says that he does not have to comment at length on the specific elements of the Virginia proposals for a federal Bill of Rights because, in his view, they are "reflected in the Amendments to the Constitution, which Virginia advised. . . ."[76] A number of proposed amendments, which "were nearly identical with those previously offered by Patrick Henry," in his unsuccessful effort to obtain only a conditional ratification of the Constitution, "were assembled by a committee and proposed to the new government."[77] Ultimately, Howison concludes, "Nearly every material change suggested by Virginia was adopted. For, one article of amendment provided for freedom in religion, and of speech, and of the press. . . ."[78] Howison is so certain of the Virginia origins of this constitutional amendment that he urges his readers, in a footnote to the preceding sentence, to "Collate Amend. art. iii [that is, the provision adopted by the First Congress that becomes the First Amendment] with Virginia proposed Bill of Rights, art. 15, 16, 20."[79] Virginia's proposed amendment relating to religion (proposal number 20) began with a quotation from Virginia's 1776 bill of rights ("That religion or the duty that we owe to our creator . . . can be directed only by reason and conviction. . .") and ended as follows: "therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by law, in preference to others."[80] After linking Virginia's proposed amendment about religion directly to the First Amendment, Howison goes on to list the other elements of the Bill of Rights and likens them to their Virginia forebears.[81]

While there are certainly linguistic differences between the Virginia proposals and the final form of the Bill of Rights, espe-

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76. *Id.* at 331.
77. *Id.* at 332.
78. *Id.* at 333.
79. *Id.* at n.(a).
80. 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 842 (1971).
81. *See* HOWISON, *supra* note 31, at 333 nn.(b)–(d).

cially in the religion clauses, Howison looks past the semantic issues to the broader question that seemed also to be at the heart of Bancroft's advice to Waite—that is, what were the ideological or political origins of the provisions, rather than who wrote the specific language. In this regard, it is intriguing to follow the stream of Howison's commentary back to its source. For, in his view, the specific amendments proferred by Virginia emerged initially not from Jefferson or Madison, but from Patrick Henry, who had originally proposed them as part of an effort to bring about a conditional ratification. Since much of the modern research into the ideological pedigree of the First Amendment has been designed to determine whether there should either be a strict separation of church and state or a more accomodationist stance—in either case, based upon an analysis of the writings and actions of the most relevant framers—it is interesting to note here that Howison traces the lineage of the Virginia amendments back to Patrick Henry, who had championed the general assessment bill, which sounds, to modern ears, like a broadly non-preferential proposal. Virginia's proposed amendment ("no particular religious sect or society ought to be favored or established by law, in preference to others") certainly reads broadly enough on its face to permit the kind of non-denominational assessment that Henry had supported, but that Howison himself did not favor. Chief Justice Waite, of course, is searching for signs of Jefferson and Madison, so he overlooks Patrick Henry's contribution to the Virginia debate.

In the conclusion of Howison's two volume History of Virginia, when he seeks to encapsulate the contributions of the Old Dominion to the new nation, freedom of religion—and the transmission of that commitment to liberty of conscience from Virginia to the national government—again holds pride of place:

> We have seen that when she first became independent of the mother country, she adopted, with singular directness of purpose, measures necessary to secure civil and religious freedom within her own borders. We have seen that when the proposed union was presented, she . . . subjected it to the ordeal of minds keen, brilliant, learned, and ardently in love with liberty. . . . We have seen that even in the act of receiving it, she . . . sought with success, to infuse into its soul some of her own healthful qualities; that she procured amendments guarantying the natural rights and the first interests of man.[82]

82. *Id.* at 334.

Howison's two-volume history thus not only reinforced Bancroft's opinion that the ideological origins of the First Amendment's religion clause could be found in Virginia, but it also provided a wealth of impressively footnoted material locating Virginia as the wellspring of the Constitution's respect for individual rights. These rights were cast both in constitutional language and in the cadence and phrasings of the Baptists' and Presbyterians' enduring commitment to religious freedom and, in Howison's view, its necessary corollary, the complete separation of church and state.

While it is possible that Howison was Chief Justice Waite's sole published source for his historical background, it is likely that for the specific history of the development of religious freedom in that state, the jurist followed Howison's footnote trail to the work of a Baptist minister and native son who similarly found the inspiration for religious freedom and disestablishmentarianism in Virginia—Robert Semple, whose *Virginia Baptists*, contained a complete copy of Madison's Memorial and Remonstrance.

Semple's *Virginia Baptists* is a wonderfully engaging, learned and felicitously written 400-page chronicle of the exploits of the Baptists in Virginia, from their arrival early in the eighteenth century until the volume was published in 1810. While the thought of a lengthy church-by-church, county-by-county litany of preachers and penitents might seem soporific to all but the most dedicated church historians, Semple's warm and affectionate descriptions of his fellow Baptists, combined with his sharp and detailed analysis of the history of their persecution by Virginia and its established church, make for fascinating reading.

Semple's history begins with a brief discussion of the "Origin of the Separate Baptists," dating to 1714, with waves of Baptist immigration from England, Maryland and New England. In the middle of the eighteenth century, the evangelical efforts of numerous Baptist preachers—"[m]ost of them illiterate, yet illumined by the wisdom from above"[83]—led to the rapid growth of Baptists in the state. These successes brought unwanted attention from the "established religion: the Nebuchadnezzars of the age . . . ."[84] Chapter III of Semple's tome is then dedicated to a history of the Baptists from "the commencement of Legal Perse-

83. SEMPLE, *supra* note 3, at 11.
84. *Id.*

cution until the Abolition of the Established Church."[85] It is very likely that Chief Justice Waite concentrated on this chapter in his research into Virginia's pre-constitutional church-state battles; its discussion of the treatment of the Baptists and other dissenting groups, culminating in Madison's Memorial and Remonstrance, is neatly summarized in Waite's opinion.

While Semple sets out to write a history of the Baptists in Virginia, he makes sure to point out that other dissenting groups experienced similar forms of persecution. The Quakers, for example, suffered "the utmost degree of persecution"[86] from the time of their arrival many years before the Baptists. At the same time, as early as the seventeenth century, the State provided generous tax support for the established Anglican church, whose priests were well paid and whose churches amply supported by broad-based taxes. Additionally, by statute, only Anglican ministers could legally perform wedding ceremonies.[87]

Semple observes that, unlike the harsh treatment of the Quakers, there were no specific laws against the Baptists' evangelical efforts, but the "law for the preservation of peace . . . was so interpreted as to answer this purpose."[88] The first case reported by Semple was in June 1768, when several Baptist preachers were apprehended on the grounds that "they cannot meet a man upon the road, but they must ram a text of scripture down his throat."[89] They were imprisoned for several weeks, and commenced the practice of preaching through the bars to anyone who would gather near the jail, a practice that seemed to be especially effective, and perhaps increasingly necessary, as more and more Baptist preachers were incarcerated. In the face of harassment and increasing instances of imprisonment, the Baptists, writes Semple, "were unremitting in their exertions to obtain liberty of conscience," arguing "that they were entitled to the same privileges that were enjoyed by the dissenters in England." [90] Since they were not able to avoid these breach-of-the-peace detentions, they reluctantly sought preaching licenses from the state. But even success in securing some official preach-

85. *Id.* at 14.
86. *Id.* at 29.
87. *Id.* at 34.
88. *Id.* at 15.
89. *Id.*
90. *Id.* at 23–24.

ing licenses did not satisfy the Baptists who "thirsted for the liberty to preach the gospel to every creature."[91]

Despite imprisonment and harassment (or perhaps because of this attention), the Baptist ranks swelled so dramatically in the early 1770's that "they began to entertain serious hopes, not only of obtaining liberty of conscience, but, of actually overturning the church establishment, from whence, all their oppressions had arisen."[92] In support of this effort, petitions were circulated, and "[v]ast numbers readily, and indeed eagerly, subscribed to them."[93] The religious and political winds were inexorably shifting in favor of the Baptists and religious freedom. Semple the preacher wanted to be sure to give first credit to the "power of God," but, Semple *qua* historian made sure to present a more complex and realistic picture of the "subordinate and co-operating causes."[94] The main one, he posits, was the "loose and immoral deportment of the established clergy"[95] joined by a growing revolutionary spirit that was embraced by the Baptists, whereas the established church was seen as one of the "inseparable appendages of Monarchy."[96] Finally, whereas Bancroft and Howison award substantial credit to the Presbyterians, Semple observes that although the Baptists were not alone in effecting "this important ecclesiastical revolution," they were "certainly the most active; but they were also joined by other dissenters."[97]

Ultimately, following the presentation of numerous memorials from a variety of dissenting religious groups, in October 1776, Virginia passed a law "suspending the payment of salaries formerly allowed to the ministers of the church of England."[98] Semple writes that the memorials "formed the basis of the act," which exempted "the different societies of dissenters from contributing to the support and maintenance of the church. . . ."[99] By 1779, all statutes providing for the payment of Anglican salaries were repealed, and Semple recommends to his readers that the preamble of this law is especially "worthy of consideration, and was probably drawn by Mr. Jefferson. . . ."[100]

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91. *Id.* at 24.
92. *Id* at 25.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 26–27.
97. *Id.* at 26.
98. *Id.* at 32.
99. *Id.*
100. *Id.*

To be fair, Semple notes that "many of the Episcopalians, who voted for abolishing the establishment, did it, upon an expectation that it would be succeeded by a general assessment."[101] This was not to be the case in 1776: "the war now rising . . . they were in too much need of funds, to permit any of their resources, to be devoted to any other purpose . . . ."[102] Several years later, in 1784, the general assessment proposal returned, leading to a "bill, which had for its object the compelling of every person to contribute to some religious teacher . . . ."[103] This bill, referred to by Chief Justice Waite in *Reynolds*, "drew forth a number of able and animated memorials from religious societies of different denominations . . . ."[104] Among all of these documents, according to Semple, "a paper drawn up by Col. James Madison (now President of the United States), intituled [sic] 'A Memorial and Remonstrance,' will ever hold a most distinguished place. For elegance of style, strength of reasoning, and purity of principle, it has, perhaps, seldom been equaled; certainly never surpassed by anything in the English language."[105] He was so moved by Madison's Memorial that he attached a copy of the document as the only Appendix to the lengthy volume.

Interestingly, Semple's chapter ends with no mention of Jefferson's religious freedom statute; instead, the dissenters, in combination with the persuasive power of Madison's Memorial and Remonstrance, were credited by Semple with securing the defeat of the general assessment bill, which appears to be the climax of the entire church-state discussion. It takes another forty pages, during a long and detailed discussion of the lobbying efforts of the General Association of the Baptists, before Semple reaches the bill for religious freedom. Noting that the general assessment law did not pass, Semple observes that "on the contrary, an act explaining the nature of religious liberty" was adopted.[106] This law, writes Semple, "so much admired for the lucid manner, in which it treats of, and explains religious liberty, was drawn by the venerable Mr. Thomas Jefferson."[107] With this much delayed coda about Jefferson's bill, Semple concludes his discussion of the battles for religious freedom and returns to the story of the Baptist churches and their leaders.

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101. *Id.* at 27.
102. *Id.*
103. *Id.* at 33.
104. *Id.*
105. *Id.*
106. *Id.* at 72.
107. *Id.*

WHICH HISTORY?

Thanks to Bancroft's advice to Waite that he follow the pathway to Thomas Jefferson and Virginia, the Chief Justice located the heart of the First Amendment's religion clauses in what we might now call the ardently strict separationist branch of the church-state debate. United in their disdain for the historically established Anglican Church and their belief in religious freedom as a natural right, "infidels" (mostly Jefferson) and the devoutly consecrated Presbyterians and Baptists—with perhaps Madison somewhere in between[108]—joined in a battle against a broad-based tax in support of religion that stimulated thoughtful and eminently quotable apologies for religious liberty and disestablishmentarianism. Their effect on the unfortunate Mr. Reynolds' religious freedom defense was marginal at best, but their influence on the future course of establishment clause jurisprudence is profound indeed.

For the Chief Justice to reach a decision in the *Reynolds* case—bearing in mind that his assignment was to craft an opinion for the majority who voted to sustain the conviction—he needed to work around the odes to religious liberty that he found in the words of Jefferson and Madison as well as in the writings of the Baptists and Presbyterians. Only by drawing on Jefferson's final qualifying phrases (e.g., when religious actions "break out into overt acts against peace and good order") in the Virginia Bill for Establishing Religious Freedom, and by citing Virginia's subsequent action making bigamy a capital offense, does Waite in effect rescue his opinion from the torrent of Virginia writings and history that could easily have pushed the decision in the opposite direction.

What is fascinating about the Chief Justice's opinion is the degree to which Waite's historical research drew him so deeply into the Virginia vortex as he searched for the inspiration for the religion clauses. The historians consulted by Waite were never shy about the Old Dominion's pivotal position in the development of religious freedom. In Bancroft, he found a Jeffersonian who believed, among other things, that the civil rights legislated in Virginia announced "principles for all peoples in all future time." Moving on to Howison, he encountered a Virginian who

108. There has been some controversy over the extent of Madison's personal religiosity. For a discussion of this topic, see Ralph L. Ketcham, *James Madison and Religion: A New Hypothesis*, *in* ROBERT S. ALLEY, JAMES MADISON ON RELIGIOUS LIBERTY 175–96 (1985).

believed that the Commonwealth "has exerted an influence upon the fate of America that may well draw to her progress that notice of all who hope to find in the past, lessons for future generations."[109] For Howison, the First Amendment was little more than a virtual reprinting of Virginia's proposals, which were born of the unhappy experiences of the Presbyterians, Baptists and other dissenting religious groups. Howison led Waite to Semple and his history of the Virginia Baptists, whose story would serve not only as a guidepost for the proper relation of church and state for what Howison called "future generations," but extended to eternal priorities as well. Semple believed that the "rise and rapid spread of the Baptists in Virginia were so remarkable, that there are but few, who do not believe that some historical relation of them will be productive of real advantage to true religion."[110] In light of the degree to which Bancroft, Howison and Semple link the Virginia experience to the development of civil rights generally, it is easy to see how Chief Justice Waite would become so focused on the Virginia origins of the First Amendment, especially since his entire research effort took place over a few weeks that included the Christmas holidays.

CONCLUSION

It is interesting to hypothesize about why Chief Justice Waite went so far out of his way to invoke the strict separationist language from Madison and Jefferson when little, if any, was needed to address Mr. Reynolds' religious freedom defense. We could, for example, speculate that Waite's opinion was designed not only to dash the Mormon hopes of a constitutional right to engage in religiously mandated polygamy, but also to send a message that the ecclesiastically dominated Territory of Utah would find the establishment clause to be an inhospitable environment for entry into statehood. In this connection, it is noteworthy that the 1888 Republican platform supported "appropriate legislation asserting the sovereignty of the nation in all territories where the same is questioned, and in furtherance of that end to place upon the statute-books legislation stringent enough to divorce the political from the ecclesiastical power, and thus stamp out the attendant wickedness of polygamy."[111] Yet

109. HOWISON *supra*, note 31, at 22.
110. SEMPLE, *supra* note 3, at v.
111. T.H. MCKEE, NATIONAL CONVENTIONS AND PLATFORMS OF ALL POLITICAL

there is no evidence that Waite had any intention of sending this type of message.

We could also posit that Waite had a personal commitment to a rigorous separation of church and state, and he seized the opportunity in *Reynolds* to endow those views with a constitutional mandate. It seems unlikely that Waite was a dogmatic strict separationist, however. In his capacity as chancellor of the Smithsonian Institution, he wrote a note on the subject of whether it would be appropriate to open the museum on Sundays. The correspondence shows more of a pragmatic view than a strictly principled one:

> I will go as far as anyone to promote the observance of the Sabbath, and to make it a day of holy thoughts, but I am by no means certain that the opening of the . . . Smithsonian . . . may not conduce to that end. . . . My idea is, if you can't make people as good as you wish, make them as good as you can. Education at the Smithsonian may send some to church. At any rate it is not likely to make anyone who wants to go there worse.[112]

Biographer Magrath, noting that Waite was a life-long "low-church Episcopalian" and church leader, sees Waite's position here as very much in keeping with his "great practicality."[113]

Alternatively, we could imagine that the Chief Justice simply wanted to do his friend Bancroft a favor by following his Jeffersonian predilections. But Waite did not always follow Bancroft's advice or his research into constitutional history. Bancroft strongly opposed paper money, which the Waite court permitted in *Julliard v. Greenman*. Knowing Bancroft's views on the subject, Waite invited him to attend the session of the Supreme Court when the decision was being announced. Shocked that the Court had not followed his guidance, Bancroft wrote the following to Waite afterwards: "I never in my life have been so surprised as when I caught the nature of the decision of the Court. I had before its delivery given the most full attention to the subject and had expressed in my History of the Formation of the Constitution the conclusion at which I arrived. I have again ex-

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PARTIES, 1789-1905: CONVENTION, POPULAR AND ELECTORAL VOTE 242 (1972).

112. C. PETER MAGRATH, MORRISON R .WAITE; THE TRIUMPH OF CHARACTER 305–06 (1963).

113. *Id.*

amined the question and have been perfectly reassured that the historical statement I had published is entirely correct . . . ."[114]

There may be numerous explanations for why Waite wrote the *Reynolds* opinion the way he did, but there is scant evidence to support any but the most simple and straightforward: he believed that he had accurately captured the spirit of the religion clauses through his historical research. As his biographer Peter Magrath has documented, Chief Justice Waite felt that he, as Chief Justice, had a special responsibility for constitutional cases, and it appears that he switched his vote in *Reynolds* specifically to be able to write the majority opinion. The religion clauses being virgin constitutional territory, he did a reasonable thing and asked George Bancroft, an eminent historian of America and the American constitution (who happened to be a friend as well), to give him insight into the background of the First Amendment. Bancroft obliged by providing Waite with a reference to Jefferson and Virginia. Once on the path to Virginia, Waite not only happened upon the works of Jefferson and Madison but he also fell under the influence of minister-historians Howison and Semple, who placed Virginia disestablishmentarianism at the center of American freedoms. While Bancroft sought to award the historical accolades to Jefferson, Howison and Semple claimed the operational credit for the Presbyterians and the Baptists but were perfectly happy to embrace Jefferson's and Madison's writings because they persuasively and felicitously made the case for the dissenting churches' approach to religious liberty and disestablishment. It is hard to know whether the writings of these two Virginia historians influenced Bancroft's views but, ultimately, it was the combined power of a consistent historical message from all three historians that provided Chief Justice Waite with a full-fledged theory of the Virginia disestablishmentarian origins of the religion clauses of the First Amendment. And there is little doubt that this theory meshed well with prevailing opinions on the subject in the late 1870s when the *Reynolds* case was decided.

As Philip Hamburger demonstrates in his recent book, *Separation of Church and State*, the strict separationist view that was adopted by Chief Justice Waite in *Reynolds* had settled into American *zeitgeist* by the latter portion of the nineteenth century.[115] A combination of liberal secularism, "traditional fears

114. TRIMBLE, *supra* note 16, at 288. *See* Julliard v. Greenman, 110 U.S. 421 (1884).
115. PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 191–284 (2002). *See*

about the anti-Christian character of Catholicism and its union of church and state"[116] and a host of other factors contributed to a widespread belief by people inhabiting an impressive range of other positions on the political spectrum that the separation of church and state was one of the cornerstones of American democracy. For example, historian Philip Schaff observed in an influential 1888 essay titled, "Church and State in the United States," that "Liberty, both civil and religious, is an American instinct . . . . Such liberty is impossible on the basis of a union of church and state . . . . It requires a friendly separation, where each is entirely independent in its own sphere."[117] As Hamburger puts it, by the 1870s, "the separation of church and state had become an almost irresistible dogma of Americanism . . . ."[118] In this environment, it is hardly surprising that Justice Waite found the Virginia disestablishmentarian history of the First Amendment so convincing or that he found Jefferson's "wall of separation" language so compelling.

Hamburger's analysis suggests that a considerable amount of strict separationist doctrine was espoused by those geographically or politically close to Waite, but there seems to be no evidence that Waite himself had strong views on the subject. President Grant, who was at one time a member of the Know Nothings, proposed in 1875 "a constitutional amendment separating church from state—particularly, the Catholic Church from the American states."[119] Meanwhile, at the opposite end of the political spectrum, the Toledo Liberal Alliance, which became a national movement, made the separation of church and state its unifying theme in the early 1870s, at a time when Waite was living in Toledo.[120] By the 1870s and 1880s both liberals and nativists began to shift their strategy from securing a constitutional amendment mandating the separation of church and state to making arguments that "this ideal had been secured in the U.S. Constitution and even the First Amendment."[121] At the same time, Protestant leaders sought ways to claim historical credit for

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also JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925 (1973), and JOAN DELFATTORE, THE FOURTH R: CONFLICTS OVER RELIGION IN AMERICA'S PUBLIC SCHOOLS (2004).

116. HAMBURGER, *supra* note 115, at 202.

117. Philip Schaff, *Church and State in the United States*, *in* 2 PAPERS OF THE AMERICAN HISTORICAL ASSOCIATION 10 (1888).

118. HAMBURGER *supra* note 115, at 270–71.

119. *Id.* at 322. *See also* 4 CONG. REC. 175, 181 (1875).

120. *Id.* at 289–96.

121. *Id.* at 342.

their respective churches for the principle of the separation of church and state, and, in Hamburger's words, "this seemed to confirm that separation had been guaranteed in American constitutions."[122] Of course, Waite's own Episcopal denomination—heir to the Anglican Church that had been disestablished in Virginia—was unlikely to compete for these honors. But there can be little doubt that separation was "in the air" during the time the *Reynolds* case was decided.

While the *Reynolds* opinion undoubtedly captured the spirit of its era, much could be critiqued in Chief Justice Waite's rendition of the history of the separation of church and state. In his historical summary of the origins of the religious clauses, he left out the enigmatic debates of the first Congress, the state ratifying debates, any hint of a role played by the Anti-Federalists, the contributions to American church-state thinking from people like John Winthrop, William Penn, Roger Williams, Isaac Backus, John Witherspoon and others, widely read constitutional commentaries from nineteenth-century luminaries like Story and Cooley, the tax-supported churches in New England that endured well into the nineteenth century, and a host of other documents and events that could potentially be relevant to a comprehensive treatment of the subject. But 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. In doing so, he ultimately fell under the influence of disestablishmentarian historians whose fellow Baptists and Presbyterians, to gain political advantage in their battles against Virginia's establishment, embraced the bills of the "infidel" Jefferson and rescued Madison's Memorial and Remembrance from relative political obscurity (since other petitions on the subject had attracted far more signatures).

In the end of Chief Justice Waite's version of the history, the evangelicals who won the political victories—and whose historians told the tale—fall from view, but their commitment to disestablishment endures through the lingering effects of a Madisonian-Jeffersonian interpretation of the establishment clause. It is perhaps ironic that what we now tend to see as the Enlightenment-inspired doctrine of non-establishment heralded in the Virginia Statute for Religious Freedom and Madison's

122. *Id.* at 352.

Memorial and Remonstrance was in fact not only made politically possible by the active campaigns of evangelical protestants highly distrustful of Enlightenment thinking, but was shepherded into constitutional doctrine by deeply devout Baptist and Presbyterian historians proudly claiming credit for a First Amendment whose origins were undoubtedly much more complex and variegated than local Virginia battles over a weak and unpopular Anglican establishment.

In summary, it would be unfair to accuse Chief Justice Waite of engaging in the law office history of twentieth century establishment clause controversies. To the contrary, what we see in *Reynolds* is a case study of constitutional creation *ex nihilo*. It is the historians Waite consulted who took the church-state question down a somewhat more narrow path than it deserved, not in hopes of influencing constitutional interpretation in the future but simply to tell the story in a fashion that provided maximum credit to those whom—they believed—most deserved it. And in viewing Waite's interpolation of that history into the Court's first foray into the religion clauses, we can see the historical construction of what has become constitutional reality.