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THE QUALITIES OF COMPLETENESS: MORE? OR LESS?

Mark R. Killenbeck*

THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, & ORIGINS. Edited by *Neil H. Cogan*. New York: Oxford University Press. 1997. Pp. lx, 708. \$95.

On January 14, 1983, Chief Judge W. Brevard Hand announced what he knew would be widely regarded as a rather startling proposition. Believing that "[t]he first amendment in large part was a guarantee to the *states* which insured that the *states* would be able to continue whatever church-state relationship existed in 1791,"¹ Judge Hand held that the people of Alabama were perfectly free to "establish[] a religion," in this instance by allowing public school teachers to begin the school day with prayer.² The ruling reversed an earlier decision in the same case, which characterized the statutory provision at issue as "state involvement respecting an establishment of religion" that was barred by "binding precedent which this Court is under a duty to follow[.]"³ On further reflection, however, Judge Hand concluded that the decisions commanding that result had, "in fact, amended the Constitution to the consternation of the republic."⁴ That, Judge Hand believed, led ineluctably to a sense of "justice [that] is myopic, obtuse, and janus-like,"⁵ a jurisprudential world he no longer wished to inhabit.

Predictably, those enamored of the idea of formal prayer in public school classrooms praised the decision as "historic," a ruling that "breathes new life into the Constitution of these United States."⁶ Those inclined to take seriously the Court's rulings, in

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1. *Jaffree v. Board of Sch. Comms.*, 554 F. Supp. 1104, 1115 (S.D. Ala. 1983) (emphasis added).

2. *See Jaffree*, 554 F. Supp. at 1128.

3. *Jaffree v. James*, 544 F. Supp. 727, 732 (S.D. Ala. 1982) (citing *Engel v. Vitale*, 370 U.S. 421, 430 (1962)).

4. *Jaffree*, 554 F. Supp. at 1128.

5. *Jaffree*, 554 F. Supp. at 1129.

6. Bill Prochnau, *Judge Hands High Court a 'Reversal'*, WASH. POST, Jan. 15, 1983, at A1 (quoting Governor Fob James). This is, of course, the same Fob James whose runoff win in the Alabama gubernatorial primary was characterized as "a convincing victory for religious conservatives," Kevin Sack, *Alabama Governor Wins Runoff in Triumph for the Right*, N.Y. TIMES, July 1, 1998, at A18, and whose eventual loss in the general election was "a stunning setback for the Christian right," Steven A. Holmes, *The 1998 Elections: State By State* —

turn, characterized it as "an act of anarchy,"⁷ a direct assault on settled precedent declaring that "[t]he 'establishment of religion' clause of the First Amendment means at least this: Neither a *state* nor the Federal Government can set up a church."⁸ Indeed, Judge Hand himself admitted that his was "a voice crying in the wilderness[, an] attempt to right that which the Court is persuaded is a misreading of history," and predicted that his decision would likely "come to nothing more than blowing in the hurricane[.]"⁹ On that score at least, he was certainly correct. The winds of reversal arose quickly and swept away his constitutional heresies. On February 11, Justice Powell, sitting as Circuit Justice, entered an order staying the judgment, observing that there was "little doubt . . . that conducting prayers as part of a school program is unconstitutional under this Court's decisions."¹⁰ Three months later, a panel of the Court of Appeals for the Eleventh Circuit reversed that portion of Judge Hand's ruling allowing for state establishment, stressing that "[t]he Supreme Court . . . has carefully considered [Judge Hand's] arguments and rejected them."¹¹ And in June 1985, in a ruling focusing on the related question of whether the state could call for a moment of silence, the Court itself administered the *coup de grace*, stressing that "it [is] unnecessary to comment at length on the District Court's remarkable conclusion that the Federal Constitution imposes no obstacle to Alabama's establishment of a state religion," and reminding one and all "how firmly embedded in our constitutional jurisprudence is the proposition that the several States have no greater power to restrain individual freedoms pro-

South; Alabama, N.Y. TIMES, Nov. 5, 1998, at B5. He is also the individual who threatened to call out the state police and National Guard to defend the right of a state judge to post the Ten Commandments in his courtroom and commence jury selection with prayers, see Rick Bragg, *Judge Allows God's Law to Mix With Alabama's*, N.Y. TIMES, Feb. 13, 1997, at A14, and promised to resist the federal district court decision enjoining enforcement of Alabama's most recent school prayer measure, see *Chandler v. James*, 998 F. Supp. 1255 (M.D. Ala. 1997), "by every legal and political means, with every ounce of strength I possess," Kevin Sack, *In South, Prayer Is a Form of Protest*, N.Y. TIMES, Nov. 8, 1997, at A9 (quoting Governor Fob James). And he is the same Fob James who apparently realizes that much of this is a charade. See Editorial, *Bama's Governor Tells All*, N.Y. TIMES, May 4, 1998, at A18 (noting that in a moment of candor, when he did not know a microphone could catch his words, James informed the sponsor of a bill allowing a moment of silence in public schools that "You ain't going to require [expletive] until you get some relief from the U.S. Congress. . . . Y'all are just going through the motions, and I'm going along with you. That's the bad part of it.").

7. Rod Griffith, *Regional News: Alabama*, U.P.I., Jan. 15, 1983 (quoting Professor Benno Schmidt), available in LEXIS, News; Arcnws Library.

8. *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947) (emphasis added).

9. *Jaffree v. Board of Sch. Commrs.*, 554 F. Supp. 1104, 1128 (S.D. Ala. 1983).

10. *Jaffree v. Board of Sch. Commrs.*, 459 U.S. 1314, 1315 (Powell, Circuit Justice 1983).

11. *Jaffree v. Wallace*, 705 F.2d 1526, 1530 (11th Cir. 1983).

tected by the First Amendment than does the Congress of the United States.”¹²

Judge Hand’s opinion is, I suspect, not much read today. Indeed, the Supreme Court’s repudiation of his views is itself largely absent from the major texts used to instruct the next generation of lawyers, generally appearing, if at all, as a short extract used to illustrate the nature and scope of what are now perceived to be more important decisions.¹³ And while the Court’s Establishment Clause jurisprudence is itself in disarray, there is little doubt that formal prayers, organized by a state official and recited as a part of a mandatory public school exercise, are unconstitutional as matters stand today.¹⁴ Little doubt, that is, unless one is inclined to take liberties with the Court’s holdings by going to elaborate lengths to ground the decision in notions that the particular prayers it seeks to sustain are “permi[ssive],” “passive,” and “the result of student, not government choice.”¹⁵ Or unless one takes seriously the originalist enterprise and realizes, as did Judge Hand, that many of the practices he was asked to condemn in *Jaffree* were routinely embraced by virtually every member of the founding generation who had occasion to pass judgment on them.¹⁶

The issue, for purposes of this review, is not whether the Bill of Rights should somehow have been understood in 1791 to limit the power of the states to engage in or support a variety of religious

12. *Wallace v. Jaffree*, 472 U.S. 38, 48-49 (1985). This was not the end of the litigation. Making good on an earlier threat to consider whether certain textbooks advancing the “religion” of “secular humanism” should also be barred, *see Jaffree*, 554 F. Supp. at 1129 n.41, Judge Hand so found, and so enjoined, when the case returned to him on remand — he was again emphatically reversed. *See Smith v. Board of Sch. Commrs.*, 655 F. Supp. 939 (S.D. Ala.), *rev’d*, 827 F.2d 684 (11th Cir. 1987).

13. An unscientific survey of my own bookshelves reveals, for example, that *Wallace* is used as a major case in only one of the “major” Constitutional Law and First Amendment casebooks, *see* STEVEN H. SHIFFRIN & JESSE H. CHOPER, *THE FIRST AMENDMENT: CASES — COMMENTS — QUESTIONS* 620 (2d ed. 1996). It is quoted briefly twice in GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 1464, 1506 (13th ed. 1997), quoted, again, briefly, in GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1573-74 (3d ed. 1996), is relegated to footnote mention in WILLIAM W. VAN ALSTYNE, *FIRST AMENDMENT: CASES AND MATERIALS* 855 n.19 (2d ed. 1995), and has disappeared entirely from the pages of WILLIAM COHEN & JONATHAN VARAT, *CONSTITUTIONAL LAW: CASES AND MATERIALS* (10th ed., 1997). And, ironically, in the one avowedly “historical” casebook, *Wallace* is discussed briefly and the Rehnquist dissent simply characterized as “disput[ing] the majority’s historical analysis.” PAUL BREST & SANFORD LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 1425 (2d ed. 1992). This is a shame, for Justice Rehnquist’s dissent offers a splendid vehicle for confronting many of the issues posed by originalism.

14. *See, e.g., Lee v. Weisman*, 505 U.S. 577 (1992).

15. *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 968-69 (5th Cir. 1993), *cert. denied*, 508 U.S. 967 (1993).

16. I discuss these matters at greater length at *infra* text accompanying notes 164-201.

practices.¹⁷ As Chief Justice Marshall would subsequently affirm, the clear understanding was that “[t]hese amendments demanded security against the apprehended encroachments of the general government — not against those of the local governments.”¹⁸ Rather, the question is how we are to understand the prohibition on the *establishment* of religion. For Judge Hand, “[a]nything short of the outright establishment of a national religion,” even if undertaken by Congress, would not violate the First Amendment.¹⁹ Congress, after all, concluded its first session with a joint resolution calling on the President to “recommend to the people of the United States a day of public thanksgiving and prayer, to be observed, by acknowledging, with grateful hearts, the many and signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a constitution of government for their safety and happiness.”²⁰ Why, then, were the people of Alabama forbidden to enact a measure calling for an announcement, at the beginning of the school day, of “a period of silence, not to exceed one minute in duration . . . for meditation or voluntary prayer”?²¹

Dean Neil Cogan’s *The Complete Bill of Rights*²² is, by any reasonable standard of measurement, a magnificent accomplishment. Cited by the Court while still in galleys,²³ *The Complete Bill of Rights* is likely to become the standard source book for those seeking to ground their examination of the issues posed by the first ten amendments in the original source materials describing their drafting, discussion, and ratification. Cogan’s work is, by design, intended to be more comprehensive and more definitive than previously available compilations.²⁴ There is, he informs us, “no satisfactory set of texts,” no set that is “complete, accurate, and ac-

17. For his part, Judge Hand thought that in incorporating the First Amendment against the states, the judiciary had illegitimately “amended the Constitution to the consternation of the republic.” *Jaffree v. Board of Sch. Commrs.*, 554 F. Supp. 1104, 1128 (S.D. Ala. 1983).

18. *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (9 Pet.) 243, 250 (1833).

19. *See Jaffree*, 554 F. Supp. at 1115.

20. 1 ANNALS OF CONG. 92 (Joseph Gales ed., 1789).

21. ALA. CODE § 16-1-20.1 (Supp. 1984), *quoted in* *Wallace v. Jaffree*, 472 U.S. 38, 40 n.2 (1985).

22. Neil Cogan is Dean of Quinipiac College School of Law.

23. *See City of Boerne v. Flores*, 117 S. Ct. 2157, 2180 (1997) (O’Connor, J., dissenting).

24. These include, for example, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (Bernard Schwartz ed., 1971); CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS (Helen E. Veit et al. eds., 1991); THE ESSENTIAL BILL OF RIGHTS: ORIGINAL ARGUMENTS AND FUNDAMENTAL DOCUMENTS (Gordon Lloyd & Margie Lloyd eds., 1998); and 5 THE FOUNDERS’ CONSTITUTION (Phillip B. Kurland & Ralph Lerner eds., 1987). One might also consult both the standard source for state constitutional materials, the seven volume THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS (Francis Newton Thorpe ed., Scholarly Press 1977) (1909) [hereinafter Thorpe], and various volumes in SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS (William F. Swindler ed., 2d series 1982).

cessible" (p. lvii). And by most reasonable standards, he succeeds admirably. An individual interested, for example, in examining the antecedents of a given amendment in the many state and colonial constitutions, charters, and laws finds each provision set forth sequentially, by amendment, rather than, as is the case in other works, scattered throughout several volumes and then provided only as a sometimes difficult-to-find part of a more extensive document.²⁵ This does not mean that the execution is perfect or that one is likely to find everything one might seek or believe to be important. As Cogan himself acknowledges, "there have been choices and difficulties," and the work itself is, accordingly, only "reasonably complete" (p. lviii).

That is not, however, the only problem. For example, were the only possible quarrel one about the decision to limit discussions taken from treatises to those found in Blackstone's *Commentaries* there would be little to argue about.²⁶ In these, as in so many other matters editorial, decisions reflect tastes and perspectives. There is, then, little to be gained by disputing individual choices, although, as I will make clear in Part I of this review, I have my reservations about some of the decisions Dean Cogan has made. My major concerns, however, deal with much more fundamental matters. For as Cogan himself makes entirely clear, *The Complete Bill of Rights* is arguably the *complete* record only if one believes, as Dean Cogan apparently does, that what is needed are those "materials . . . that are of significant use and value to originalists and the many non-originalists who include originalist texts in their interpretations and other work" (pp. lvii-lviii). And even then, it is complete only if the version of originalism one accepts confines itself to the meanings and inferences that may be gleaned from the words of a rather limited number of individuals and entities, speaking over a very limited period of time.

There is nothing necessarily wrong with either of these propositions, although, as I will explain in Parts II and III of this review, I have substantial reservations about the originalist enterprise as it is commonly practiced and will illustrate those concerns by examining two issues of particular interest. The first, the nature of the relationship between the federal and state governments, is a matter of

25. Compare, for example, Cogan's treatment of the state and colonial antecedents to the Grand Jury Clause of the Fifth Amendment (pp. 279-81), with the treatment in Thorpe, *supra* note 24. Someone wishing to read the provisions Cogan identifies in two pages would be required to search two of Thorpe's seven volumes, a happy coincidence made possible only because the constitutions and charters of four of the five states Cogan identifies fall in volume 5 of Thorpe, *supra* note 24.

26. Although, for reasons I explain at *infra* text accompanying note 200, there might well be a very good argument for including within this volume extracts not just from the first English edition of Blackstone, but also from the first annotated American edition prepared by St. George Tucker.

some concern given the language and import of the Tenth Amendment. The second, in turn, while not "perhaps our oldest question of constitutional law"²⁷ — a description aptly applied to the sovereignty concerns I address in Part II — is nevertheless a matter of extraordinary contemporary interest: the extent to which the Establishment Clause commands that there must be "a wall of separation between Church and State."²⁸

In particular, I am concerned about any originalist inquiry that believes it appropriate to assume that a compilation that places an outer limit of September 2, 1790, on the materials it collects is, in any meaningful sense, "complete."²⁹ And I suspect that the individuals who drafted, debated, and ratified the proposals that became the Bill of Rights would agree. This does not mean that an argument cannot be made that Madison, for example, embraced what might be characterized as a form of originalism, although as Jack Rakove has demonstrated far more ably than I might, it is essential that we recognize that Madison's views in these matters are nuanced and complex.³⁰ Rather, I believe it important to recognize that even if we accept many of the assumptions that animate the originalist enterprise, a collection predicated on the choices Dean Cogan has made cannot, by its very nature, be "the most complete, accurate, and accessible set of texts available for interpreting the Bill of Rights" (p. lv; capitalization removed). Indeed, one of the virtues and ironies of *The Complete Bill of Rights* is that it vindicates Judge Hand, for one cannot find within its pages any of the materials required to sustain the proposition that the Framers and Founders in fact intended to deny to each state the power to "establish a constitution for itself, and, in that constitution, provide such limitations and restrictions on the powers of its particular government as its judgment dictated."³¹

27. *New York v. United States*, 505 U.S. 144, 149 (1992).

28. Letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A Committee of the Danbury Baptist Association, in the State of Connecticut (Jan. 1, 1802) [hereinafter *Danbury Baptist Letter*], in 15 *THE WRITINGS OF THOMAS JEFFERSON* 281, 282 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905) [hereinafter *JEFFERSON'S WRITINGS*].

29. That is the date on which the new Pennsylvania Constitution was "formally proclaimed," see 5 Thorpe, *supra* note 24, at 3092 n.a., and provisions from that Constitution mark the outer limits, chronologically, of the materials Cogan compiles.

30. For an extended discussion of these matters, see JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996). For a shorter treatment, see Jack N. Rakove, *Mr. Meese, Meet Mr. Madison*, in *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* 179 (Jack N. Rakove ed., 1990).

31. *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833). *Barron*, of course, stands for the proposition that the Bill of Rights was neither intended to be nor should be interpreted as binding upon the states, a ruling undermined by the subsequent ratification of the Fourteenth Amendment and the Court's adoption of the principle of selective incorporation. Arguably, *Barron's* demise makes the rejection of Judge Hand's arguments a relatively simple matter. Nevertheless, while the Court as a whole shows no sign

This is, admittedly, a single example of what I believe to be a fundamental flaw in any vision of this work that views it as *complete*. And that flaw does not, in itself, deny the volume its rightful place as an "invaluable resource for constitutional scholars, teachers, litigators, and judges alike."³² It does, however, counsel that this book, and the interpretive view it seems to support, be approached cautiously and on its own terms. I will, accordingly, undertake this review of *The Complete Bill of Rights* in stages, first examining its structure and claims on their own terms, and then exploring two of the reasons why I believe it important to consider carefully the nature and implications of originalism as a means of giving life and meaning to a document that, while a "paper barrier," nevertheless articulated a fundamental national commitment to the protection of what Madison himself characterized as "the great rights of mankind."³³

I. HOW COMPLETE IS "COMPLETE"?

Dean Cogan concedes, presumably cheerfully, that his is, in both form and intention, an originalist enterprise. This undertaking is consistent with the spirit of his earlier work, which tends to be intensely historical.³⁴ It is also an enterprise within which, as Dean Cogan notes, both interpretation and disagreement are inevitable (pp. lv-lvi), especially where, as is so often the case when it is the

of retreating from incorporation, Justice Thomas may well have that doctrine in his "revisionist" sights. In *McIntyre v. Ohio Elections Commn.*, 514 U.S. 334 (1995), for example, Justice Thomas's rather curious formulation of the scope of the First Amendment, *see McIntyre*, 514 U.S. at 359 ("The First Amendment states that the government 'shall make no law.'"), seems to have provoked a pointed footnote in the majority opinion stressing that "[a]lthough the text of the First Amendment" speaks only of "*Congress* . . . Justice Brandeis' view [on incorporation] has been embedded in our law ever since," *McIntyre*, 514 U.S. at 336 n.1 (citations omitted). And there are any number of scholars who continue to insist that there is no constitutional justification for incorporation, the most notable being the prolific originalist Raoul Berger. *See, e.g.,* RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977). Judge Hand, by the way, cited Berger's work extensively. *See Jaffree v. Board of Sch. Commrs.*, 554 F. Supp. 1104, 1106, 1119 n.26, 1120 n.27, 1121 n.29, 1122, 1128 (S.D. Ala. 1983).

32. Anthony G. Amsterdam, quoted on jacket.

33. 1 ANNALS OF CONG. 449 (Joseph Gales ed., 1789) (statement of James Madison). This observation fell in Madison's opening remarks, explaining why he wished the House to indulge him and consider the people's "wishes, and expressly declare the great rights of mankind secured under this constitution." Cogan does not include this portion of the speech, or much of the debate it precipitated. That decision reflects, presumably, his judgment that this sort of context is not needed in a work that probes the drafts, debates, sources, and origins of specific provisions. I disagree, but opt not to pick that particular nit at any length.

34. *See, e.g.,* Neil H. Cogan, *Juvenile Law, Before and After the Entrance of "Parens Patriae,"* 22 S.C. L. REV. 147 (1970); Neil Howard Cogan, *Section 1985(3)'s Restructuring of Equality: An Essay on Texts, History, Progress, and Cynicism*, 39 RUTGERS L. REV. 515 (1987). For a work less historical, but fascinating for its insights into the paradigms that ought to guide the allocation of authority between the federal and state governments, see Neil H. Cogan, *The Rules of Everyday Life*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 97 (1996).

Constitution about which we are concerned, the text “uses words that are not specific but invitingly — or irritatingly — open-ended.”³⁵

The Complete Bill of Rights itself, Dean Cogan tells us, grows out of “The Need for a Set of Originalist Texts” (p. lvii), there being, for example, no single place “where one can read all the drafts of the provisions” and “no single source that provides all the pertinent constitutional and statutory sources for the Bill of Rights” (p. lvii). And while the volume strives to be complete, Cogan recognizes that

inevitably, even persons who agree that the task is simply to apply a provision engage in interpretation by their selection process, that is, by the dictionaries or treatises or cases they choose to read in order to learn the meaning of a provision, not to mention the personal experiences they bring to the reading process. [p. lvi]

These statements require careful examination.

For example, Cogan tells us little about the individuals who will, presumably, find this work of value. He does, in a discussion aptly labeled “The Importance of Originalism, More or Less” (pp. lvi-lvii), offer thumbnail sketches of the four main variations on the originalist theme, approaches that seek only, or in combination, the “meaning of the applicable provision,” the “original intention” of those who drafted that provision, the “original understanding” of those who ratified the provision, or the “principles” for which that and related provisions might stand (p. lvi). Cogan does not identify individual originalists or illustrate the implications of their interpretive regime with citations to or discussions of particular doctrines or cases. Of course, the failure to do so is arguably beside the point. *The Complete Bill of Rights* is not a treatise on originalism, or even a treatise on the Bill of Rights. It is, rather, an attempt to provide the “materials” that originalists need to practice their particular interpretive art. Viewed in that light, his failure to assuage any concerns the reader might have about the nature and practice of originalism are, at best, quibbles.³⁶

More telling, I believe, are the qualifiers Cogan injects into his various descriptions of the scope of the collected materials. *The Complete Bill of Rights* will provide originalists, he tells us, with the “pertinent constitutional and statutory sources” and those materials that are of “significant use and value” (p. lvii). Cogan’s use of the qualifiers “pertinent” and “significant” is, well, pertinent and signif-

35. Neil H. Cogan, *Moses and Modernism*, 92 MICH. L. REV. 1347, 1352 (1994) (footnote omitted).

36. This does not mean that the work would not have benefitted from a slightly more elaborate discussion, suitably supported by references to the primary practitioners and examples of the sorts of decisions in which the materials Cogan collects might prove especially relevant.

icant. Consider, for example, the question of "pertinent sources." Dean Cogan indicates that he

sought out materials that would have been available to the members of the First Congress or with which they would have been familiar. With just a few exceptions, these consist of collections of constitutions, statutes, laws, and charters published before 1789 and available in libraries in New York and other important cities. In addition, these materials include such widely known and widely held texts as the basic English constitutional materials, Blackstone's *Commentaries on the Laws of England*, and American and English caselaw. [p. lviii]

These are reasonable limitations. Cogan's decision to confine treatise citations to Blackstone, for example, might simply reflect a personal predilection, but more likely acknowledges the fact that the *Commentaries* were the most widely available and, in many respects, most influential legal resource in the various colonies and states prior to ratification. Be that as it may, many of the choices he has made are nevertheless curious and worthy of examination.

In the section of the work dealing with the search and seizure provisions of the Fourth Amendment, for example, Dean Cogan offers nine "pertinent" secondary sources: Blackstone's discussion of arrest, and eight cases, seven from England and one, the Writs of Assistance controversy, from Massachusetts (pp. 242-63). Many of these are indeed "standard" sources. The Court has stressed, for example, that "[t]he writs of assistance . . . were the principle grievance against which the fourth amendment was directed,"³⁷ and has described *Entick v. Carrington* (p. 257) as "a 'monument of English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted, and considered to be 'the true and ultimate expression of constitutional law.'"³⁸ Even *The King v. Dr. Purnell*,³⁹ cited only infrequently by the Court itself, might nevertheless properly be described as one of the "'common law and British institutions'" that factored into the general understanding "'when the instrument was framed and adopted.'"⁴⁰

Absent from these pages, however, are many other primary source materials that have substantially influenced the Court's interpretation of core Fourth Amendment issues. Recently, for example, the Court considered both whether the common law "'knock and announce' principle forms a part of the reasonableness

37. *Brower v. County of Inyo*, 489 U.S. 593, 596 (1988) (citing *Boyd v. United States*, 116 U.S. 616, 624-25 (1886); THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS *301-02).

38. *Brower*, 489 U.S. at 596 (quoting *Boyd*, 116 U.S. at 626).

39. 95 Eng. Rep. 595 (K.B. 1748). This case is included at p. 245.

40. *Fisher v. United States*, 425 U.S. 391, 418 n.4 (1976) (Brennan, J., concurring) (quoting *Ex parte Grossman*, 267 U.S. 87, 108-09 (1925) and citing *Purnell*, 95 Eng. Rep. at 597). But see *Wilson v. United States*, 221 U.S. 361, 385-86 (1911) (noting that *Purnell* had been called to the attention of the Court but deeming it not controlling).

inquiry under the Fourth Amendment"⁴¹ and what, if any, exceptions to knock and announce might be constitutionally permissible.⁴² Writing for a unanimous Court in the first of these cases, Justice Thomas undertook a decidedly originalist analysis, premised on the assumption that the Court should ground its understanding in "the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing."⁴³ As part of that process, Justice Thomas traced both the common law origins of the knock and announce requirement and the various constitutional, statutory, and common law treatments of this issue in England and the United States prior to ratification.

It is hardly surprising that Justice Thomas begins this analysis with Blackstone, and that the particular doctrine he cites, that "the common law generally protected a man's house as 'his castle of defence and asylum,'"⁴⁴ is found in *The Complete Bill of Rights* (pp. 242-43). And given Cogan's decision to limit citations from treatises to Blackstone, and his apology for excluding Hale (p. lix), it is arguably appropriate that *The Complete Bill of Rights* does not include materials from either that individual or from William Hawkins, authorities whose eighteenth century treatments of the knock and announce doctrine Justice Thomas found especially valuable.⁴⁵ What is surprising, at least to me, is that Cogan chooses not to provide the extracts from any of the major English and colonial cases articulating the knock and announce exception, especially in the light of the fact that one, *Semayne's Case*, offers an extended discussion of the English common law understanding of the King's power to "break the party's house, either to arrest him, or to do other execution of the K.'s process, if otherwise he cannot enter."⁴⁶

Is this an unfair criticism? It is, after all, far easier to identify what is missing, as opposed to undertaking the onerous task of ascertaining and finding *everything* necessary to make a work com-

41. *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995).

42. See *United States v. Ramirez*, 118 S. Ct. 992, 995 (1998) (holding that the lawfulness of a "no knock" entry does not depend on whether property is broken during the course of the entry); *Richards v. Wisconsin*, 520 U.S. 385, 394-95 (1997) (rejecting a blanket exception to the knock and announce requirement for drug investigations in favor of a requirement that there be a "reasonable suspicion" that knock and announce would prove dangerous or render the search futile).

43. *Wilson*, 514 U.S. at 931 (citations omitted).

44. *Wilson*, 514 U.S. at 931 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *288).

45. *Wilson*, 514 U.S. at 932 (quoting 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN *582 and 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 138 (6th ed. 1788)).

46. 77 Eng. Rep. 94, 95 (K.B. 1603). Perhaps this omission reflects the case's age, although Dean Cogan does cite some cases from the 17th century, notably *Sir John Knight's Case*, 87 Eng. Rep. 75 (K.B. 1686) (p. 204), *Titus Oates' Case*, 10 Howell's State Trials 1079 (K.B. 1685) (Eng.) (p. 624), and the *Earl of Shaftesbury's Case and Trial*, 8 Howell's State Trials 759 (1681) (Eng.) (pp. 293 & 489).

plete. The principal case in the recent knock and announce trilogy, *Wilson*, is nevertheless a fairly significant decision of the Court, given the intensity with which law enforcement agencies have pursued exceptions to knock and announce as part of the "war" on drugs.⁴⁷ And the absence from the pages of *The Complete Bill of Rights* of the materials central to that opinion is, I suspect, an omission of some consequence.

The same can be said of Dean Cogan's failure to draw on a second body of materials that he himself intimates are of considerable interest: dictionaries. More than once, Cogan tells us that contemporary dictionaries are an appropriate means for ascertaining what the Framers meant when they crafted the Bill of Rights. His discussion of the quest for "the original meaning of the applicable provision," for example, notes that "[t]his might require learning the meaning of words from contemporaneous dictionaries" (p. lvi). And, as I have already noted, he recognizes that the interpreter's choice of the "dictionaries . . . they chose to read in order to learn the meaning of a provision" is of some consequence (p. lvi). Nevertheless, he chooses not to include any dictionary citations in his collection.

This is surprising, given the extent to which recourse to the lexicographer's art has factored in many of the Court's more intriguing "originalist" discussions.⁴⁸ This is especially the case when one considers the Eighth Amendment, a provision for which the Court's occasional focus on "evolving standards of human decency" stands in stark contrast to its avowal, in numerous other contexts, of the need for close attention to what the Framers and Founders had in mind.⁴⁹

47. It is worth noting that there was no resort to common law materials in either *Richards* or *Ramirez*, even though the latter turned on whether the federal statute authorizing an officer to break into a dwelling while executing a warrant, 18 U.S.C. § 3109 (1994), "codifies the exceptions to the common-law announce requirement." *Ramirez*, 118 S. Ct. at 997. Chief Justice Rehnquist, who expresses an occasional devotion to a jurisprudence of original intent, nevertheless declined the opportunity to engage in that practice here, writing simply for a unanimous Court "that § 3109 includes an exigent circumstances exception and that the exception's applicability in a given instance is measured by the same standard we articulated in *Richards*." *Id.* at 998. *Richards*, in turn, another unanimous opinion, this time by Justice Stevens, is equally devoid of originalist analysis. See *Richards*, 520 U.S. 385 (1997).

48. For an interesting discussion of the issues posed by resort to dictionaries, and its abuses, see Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275 (1998).

49. One can, for example, compare *Farmer v. Brennan*, 511 U.S. 825, 833-34 (1994) (noting that "gratuitously allowing the beating or rape of one prisoner by another" cannot be squared "with 'evolving standards of decency'" (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)), with the Court's narrower view in *Austin v. United States*, 509 U.S. 602, 611-18 (1993) (grounding its view of forfeiture and the Excessive Fines Clause in the understanding of the Framers), and especially with the opinion that earned Justice Thomas the sobriquet "The Youngest, Cruellest Justice," see N.Y. TIMES, Feb. 27, 1992, at A24, his dissent in *Hudson v. McMillian*, 503 U.S. 1, 17 (1992) (Thomas, J., dissenting) (grounding his objection to the expansion of the Cruel and Unusual Punishments Clause in a historical context).

For example, in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,⁵⁰ both Justice Blackmun, speaking for the Court, and Justice O'Connor, in dissent, devote considerable time and energy to an exploration of what the Framers of the Bill of Rights had in mind when they included the Excessive Fines Clause in the Eighth Amendment.⁵¹ As part of that process, each found it necessary and appropriate to consult contemporary law dictionaries to determine what meaning individuals at the time might have ascribed to the word "fine," and whether that term might have included civil damages within its ambit.⁵² In *Farmer v. Brennan*, Justice Thomas resorted to dictionaries, contemporaneous and modern, to bolster his argument that "[c]onditions of confinement are not punishment in any recognized sense of the term, unless imposed as part of a sentence."⁵³ And in its recent decision finding that a forfeiture levied for attempting to leave the country with over ten thousand dollars of currency was "grossly disproportionate," the Court found it appropriate to consult Dr. Johnson in an attempt to discern what the Framers might have understood the word "excessive" to mean.⁵⁴

The astute reader will recall Cogan's concession that choices needed to be made, and one might well believe that the decisions Cogan made are entirely reasonable. There are, I suspect, any number of English and colonial cases that might usefully be cited on the general question of search and seizure. Is it possible to include them all, or even simply every one that various critics might find meaningful? And, once one begins the process of offering dictionary definitions, where does one stop? Indeed, why might one begin at all given the availability of an alternative work, which, while not itself offering dictionary definitions, strives to provide "an alphabetical index to contemporaneous and antecedent sources ex-

50. 492 U.S. 257 (1989).

51. See *Browning-Ferris*, 492 U.S. at 264-76; 492 U.S. at 286-97 (O'Connor, J., concurring in part and dissenting in part). The issue in *Browning-Ferris* was whether the Excessive Fines Clause applied to punitive damages awards in civil cases, a question the Court examined in the light of "the purposes and concerns of the Amendment, as illuminated by its history." 492 U.S. at 264. The Court held that it did not.

52. See 492 U.S. at 265 n.6 (quoting the definition of "fines for offences" from 2 T. CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY (1765)); 492 U.S. at 265 n.7 (indicating that "[p]etitioners have come forward with no evidence, or argument, which convinces us that the word 'fine,' as used in the late 18th century, would have encompassed private civil damages of any kind"); see also 492 U.S. at 292 (O'Connor, J., concurring in part and dissenting in part) (discussing *Lord Townsend v. Hughes*, 86 Eng. Rep. 994 (C.P. 1677), and quoting the definition of "fine" from a contemporaneous source, T. BLOUNT, LAW DICTIONARY (1670)).

53. 511 U.S. 825, 859 (1994) (quoting BLACK'S LAW DICTIONARY 1234 (6th ed. 1990) and 2 T. SHERIDAN, A GENERAL DICTIONARY OF THE ENGLISH LANGUAGE (1780)).

54. See *United States v. Bajakajian*, 118 S. Ct. 2028, 2037 (1998) (citing 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 680 (4th ed. 1773)).

panded to such an extent that a lexicographer could use them to create a dictionary, without going further afield"?⁵⁵ The answer to the first of these questions, of course, is that some omissions are potentially significant, especially where, as is the case with the knock and announce materials, those cases have factored into significant, recent originalist decisions. The response to the second is that the Court does in fact resort to contemporaneous dictionaries in its attempt to discern what the Framers and Founders meant by a given word, or might have understood it to mean. And that while the number of words the Bill of Rights uses is substantial, those whose meaning has proven critical, and obscure, consists of a finite universe that Cogan tells us is of some consequence and might easily have been compiled.

The gaps I identify are not, in any meaningful sense, a criticism of the enterprise itself. Individuals seeking the deeper, originalist meanings of the Fourth and Eighth Amendments will find considerable grist for their analytic mills in the materials Cogan collects. They will not, however, find *all* that might prove valuable, especially if, as is so often the case, their ultimate objective is to convince the Court that their views are the correct ones. They will, obviously, have the benefit of a research tool that is clear, well-executed, and user friendly. What they will not have, however, is a text that is complete in a truly meaningful sense, and that, I believe, is a point worth making.

It is not, however, the most important objection that might be raised, for the real issue posed by *The Complete Bill of Rights* is the extent to which one is inclined to accept originalism as an appropriate means for giving meaning to a *constitution*, a text that does not "partake of the prolixity of a legal code," but by its very nature "requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."⁵⁶ Chief Justice Marshall's cautionary note is not, in and of itself, a rejection of the originalist enterprise. Indeed, Marshall himself observed that "the great duty of a judge who construes an instrument, is to find the intention of its makers."⁵⁷ Nevertheless, Marshall himself did not confine his version of an originalist inquiry to that practiced by Dean Cogan.⁵⁸ Nor, for that matter, did James

55. THURSTON GREENE, *THE LANGUAGE OF THE CONSTITUTION: A SOURCEBOOK AND GUIDE TO THE IDEAS, TERMS, AND VOCABULARY USED BY THE FRAMERS OF THE UNITED STATES CONSTITUTION* xv (1991).

56. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

57. John Marshall, 3 *A Friend of the Constitution*, ALEXANDRIA GAZETTE, July 2, 1819, reprinted in JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 167, 168-69 (Gerald Gunther ed., 1969).

58. See *infra* text accompanying notes 128-32.

Madison, arguably the author of the Bill of Rights and certainly, given the resolve with which he pursued that enterprise, the Framers most responsible for its existence.⁵⁹ Both understood and appreciated the extent to which the Constitution's meaning, while grounded in the "language" of the instrument,⁶⁰ nevertheless required the interpreter to consider carefully words and events far beyond the limited framework proposed by Cogan and, in particular, by many of the members of the Court who undertake an originalist inquiry. It is to that aspect of Cogan's work that I now turn.

II. AN ORIGINALIST APPROACH TO COMPLETENESS

Dean Neil Cogan did not give us originalism. Arguably, Edwin Meese and Robert Bork did, at least in the sense that they are perhaps most responsible for propelling originalism to the forefront, rekindling a debate about a particular approach to constitutional interpretation that is as old as the document itself.

The touchstones in the modern embrace of originalism as a central tenet of an arguably "conservative" approach to matters constitutional are familiar ones. There are, for example, Mr. Bork's various sallies, in which he maintains that it is necessary to "interpret the document's words according to the intentions of those who drafted, proposed, and ratified its provisions and its various amendments."⁶¹ There are the various speeches and articles by Mr. Meese, in which he argues for "a jurisprudence that seeks to be faithful to our Constitution — a jurisprudence of original intention[.]"⁶² There are the many, often eloquent pleas for a jurisprudence of original intent lodged by Professor Raoul Berger, whose adherence to this approach is premised on the "common sense" notion that "who better than the writer knows what the writer means — certainly not the reader."⁶³ And there is the rich literature that these and similar paeans have spawned, an active and longstanding scholarly debate that shows no signs of slackening.⁶⁴

59. For an interesting discussion of Madison's role, see Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301.

60. See, e.g., *M'Culloch*, 17 U.S. (4 Wheat.) at 407.

61. Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 826 (1986).

62. Edwin Meese III, *Construing the Constitution*, 19 U.C. DAVIS L. REV. 22, 26 (1985).

63. Raoul Berger, *The "Original Intent" — As Perceived by Michael McConnell*, 91 NW. U. L. REV. 242, 243 (1996).

64. The literature is too extensive to list. Individuals seeking an initial understanding might profitably consult Jack Rakove's splendid compilation of many of the standard treatments, *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* (Jack N. Rakove ed., 1990). For an extended historical treatment, see LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* (1988). A short "primer," in turn, is provided by

These devotees do not, as Dean Cogan notes, offer a single or even a dominant mode of analysis. One might, for example, profitably compare the approaches adopted by Professor Berger and Mr. Meese. Berger, for example, insists that the only proper way to "secure the cherished 'rights of Englishmen'" is to "adher[e] to the words in which they were enshrined[.]"⁶⁵ Mr. Meese's approach is, however, arguably softer: "Where the language of the Constitution is specific," he tells us, "it must be obeyed."⁶⁶ And where there is "a demonstrable consensus among the Framers and ratifiers as to a principle stated or implied by the Constitution, it should be followed."⁶⁷ But "where there is ambiguity as to the precise meaning or reach of a constitutional provision," he concedes, "it should be interpreted and applied in a manner so as to at least not contradict the text of the Constitution itself."⁶⁸

Various members of the Court have embraced albeit with varying degrees of consistency, an originalist approach in their work. In some, but by no means in all, of the cases where the opportunity for originalist inquiry has been presented,⁶⁹ these Justices have argued that the interpretive process is, in effect, a relatively simple matter of returning to "first principles" that "every schoolchild learns."⁷⁰ One recent, and notable, instance is found in a series of decisions articulating the "new federalism," a doctrine that might be loosely described as the principle that state sovereignty is entitled to considerably more respect than heretofore afforded.⁷¹ In the various decisions articulating this premise, Justices practicing the art and science of originalism examined the implications of the Tenth Amendment and characterized the interpretive process as a

Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989).

65. Raoul Berger, *Jack Rakove's Rendition of Original Meaning*, 72 IND. L.J. 619, 622 (1997) (citing RAKOVE, *supra* note 30, at 290-92).

66. Meese, *supra* note 62, at 26.

67. *Id.*

68. *Id.*

69. In *United States v. Ramirez*, 118 S. Ct. 992 (1998), for example, one might profitably have inquired how the Framers and Founders viewed destruction of property as an element of entry to enforce a warrant, especially given the language found in *Semayne's Case*, 77 Eng. Rep. 194 (K.B. 1603), the English case central to Justice Thomas's analysis of the knock and announce rule in *Wilson v. Arkansas*, 514 U.S. 927 (1995). See *supra* text accompanying notes 41-46.

70. Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) ("As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government."); see also *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 846 (1995) (Thomas, J., dissenting) ("Because the majority fundamentally misunderstands the notion of 'reserved' powers, I start with some first principles."); *United States v. Lopez*, 514 U.S. 549, 552 (1995) ("We start with first principles.").

71. See *Printz v. United States*, 117 S. Ct. 2365 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

straightforward exercise in identifying the "federal balance the Framers designed . . . that this Court is obliged to enforce."⁷² And they insisted that the conclusions they reached were driven, not by ideological perspectives or individual preferences, but rather by the need for steadfast adherence to "truths . . . so basic that, like the air around us, they are easily overlooked."⁷³

Closer to home, when exploring issues posed by provisions more commonly associated with the protection of individual rights than is the Tenth Amendment, many of these same Justices argued for an interpretive regime in which the analytic touchstone is the "original meaning, for 'the Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now.'"⁷⁴ That approach might, as it did for Justice Thomas in *McIntyre*, mean that "the Framers understood the First Amendment to protect an author's right to express his thoughts on political candidates in an anonymous fashion."⁷⁵ Or, given that the First Amendment does not in fact state that "the government 'shall make no law . . . abridging the freedom of speech, or of the press,'"⁷⁶ but rather speaks of "Congress," it might mean that what really matters, as Justice Scalia noted in that same decision, is "further evidence of common practice in 1868, since I doubt that the Fourteenth Amendment time-warped the post-Civil War States back to the Revolution."⁷⁷ In each instance, the task is to give effect to "the Court's (and the society's) traditional view that the Constitution bears its original meaning and is unchanging."⁷⁸

The members of the Court who embrace this approach stress that it is imposed on them by the Framers and Founders themselves. In *McIntyre*, for example, Justice Scalia reminds us that Thomas Jefferson admonished that

[o]n every question of construction, [we should] carry ourselves back to the time when the Constitution was adopted; recollect the spirit manifested in the debates; and instead of trying [to find] what mean-

72. See *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring); see also *New York v. United States*, 505 U.S. at 157 (declaring that the Court's task "consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution").

73. *New York v. United States*, 505 U.S. at 187. Assuming for the sake of argument that the methodology is appropriate, there are nevertheless numerous reasons to question the conclusions reached. Such matters are, alas, far beyond the proper scope of this review.

74. *McIntyre v. Ohio Elections Commn.*, 514 U.S. 334, 359 (1995) (Thomas, J., concurring) (quoting *South Carolina v. United States*, 199 U.S. 437, 448 (1905)).

75. *McIntyre*, 514 U.S. at 371.

76. *McIntyre*, 514 U.S. at 359 (quoting U.S. CONST. amend. I).

77. *McIntyre*, 514 U.S. at 375 (Scalia, J., dissenting).

78. *McIntyre*, 514 U.S. at 371-72.

ing may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed.⁷⁹

And Justice Thomas notes that the Court itself has long recognized this approach, stressing that in 1838 Justice Baldwin maintained that “the meaning of the Constitution ‘must necessarily depend on the words of the constitution [and] the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions . . . in the several states.’”⁸⁰

This is all well and good. There is, for example, little doubt that Chief Justice Marshall espoused what might be characterized as a form of originalism when he observed that

the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubt respecting the extent of any given power, it is a well settled rule, that the objects for which it was given, especially when these objects are expressed in the instrument itself, should have great influence in the construction.⁸¹

But it is equally clear that Marshall did not believe the interpretive inquiry should be confined to the words and actions of, for example, the period between the convening of the Constitutional Convention in May 1787 and the formal notice of ratification on July 2, 1788, when Congress noted that New Hampshire had become the ninth state to ratify, satisfying the express terms of Article VII.⁸² Or that Madison, for example, would have found it appropriate to cut off an inquiry into the meaning of the Bill of Rights, as *The Complete Bill of Rights* would have us do, with the ratification of a new Constitution by the State of Pennsylvania in September 1790.

Indeed, virtually every member of the Founding generation whose thoughts and words figure most prominently in original intent jurisprudence understood that the Constitution they created sketched necessarily imprecise and frankly tentative parameters for a people and a nation that were embarking on a radical new course. For these individuals, ratification marked the first stages in a “great experiment,”⁸³ the creation of a new, Compound Republic whose

79. 514 U.S. at 372 (Scalia, J., dissenting) (quoting Letter from Thomas Jefferson to William Johnson (June 12, 1823), in 15 JEFFERSON'S WRITINGS, *supra* note 28, at 439, 449).

80. *McIntyre v. Ohio Elections Commn.*, 514 U.S. 334, 359 (1995) (Thomas, J., concurring) (quoting *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 721 (1838)).

81. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188-89 (1824).

82. See *Resolution of Congress, Dated July 2, 1788, Submitting Ratifications of the Constitution to a Committee*, reprinted in DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 1060 (Charles C. Tansill ed., 1927).

83. The allusion is taken from Jefferson, who spoke of complex and evolving questions to be “pursue[d] with temper and perseverance” as we continuously struggle to perfect “the great experiment which shall prove that man is capable of living in society, governing itself by

operational parameters would be ascertained only over time. This was especially the case when these individuals undertook the important yet delicate task of interpretation, for "[a]ll new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."⁸⁴ "[N]o language," Madison reminds us, "is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas."⁸⁵

This does not mean that an originalist cannot reach an appropriate conclusion regarding the precise meaning of a given provision. As indicated, an originalist concerned with the meaning of the various clauses of the Eighth Amendment might properly, and profitably, consult a variety of sources for the dictionary meaning of such terms as "punishment," "fines," and "excessive."⁸⁶ And someone might explore at length, as Justice Souter did in his dissent in *Printz*, the meanings and implications of a particular *Federalist Paper* in the quest for an understanding of what Hamilton had in mind when he declared that the national government could "employ the ordinary magistracy of each [State] in the execution of its laws."⁸⁷

Too often, however, individuals undertaking this sort of inquiry assume that the only materials that might properly be consulted are words written and spoken within a very short time span. As I have already noted, *The Complete Bill of Rights* proceeds on this assumption. Taken at face value, it postulates that the period that matters falls between the introduction of the measures that would

laws self-imposed, and securing to its' members the enjoyment of life, liberty, property and peace." Thomas Jefferson, *The solemn Declaration and Protest of the commonwealth of Virginia on the principles of the constitution of the U.S. of America and the violations of them* (enclosure in Dec. 24, 1825 letter to James Madison), in 3 *THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1826*, at 1944, 1946 (James Morton Smith ed., 1995). For other uses of this metaphor, see Letter from James Madison to John Adams (May 22, 1817), in 8 *THE WRITINGS OF JAMES MADISON* 390, 391 (Gaillard Hunt ed., 1908) [hereinafter *MADISON'S WRITINGS*] (the "proper division and distribution of power among different bodies" is a "great question" and "experiment"), and George Washington, Farewell Address (Sept. 17, 1796), in 1 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897*, at 213, 216 (James D. Richardson ed., 1896) ("It is well worth a fair and full experiment.").

84. *THE FEDERALIST* No. 37 (James Madison). It is in this particular sense that *M'Culloch* looms especially large; see *infra* text accompanying notes 128-32.

85. *THE FEDERALIST* No. 37 (James Madison).

86. See *supra* notes 48-54 and accompanying text.

87. *THE FEDERALIST* No. 27 (Alexander Hamilton), quoted in *Printz v. United States*, 117 S. Ct. 2365, 2402 (1997) (Souter, J., dissenting). For both a discussion of the general views on the authority of *The Federalist*, and a sense of how frequently the Court has resorted to this document, see Buckner F. Melton, Jr., *The Supreme Court and The Federalist: A Citation List and Analysis, 1789-1996*, 85 KY. L.J. 243 (1996-97).

become the Bill of Rights and the ratification of the ten amendments that would eventually form the Bill itself. With the appropriate exception of certain source materials (themselves, as I have indicated, arguably *incomplete*), Dean Cogan concentrates his collection efforts on "drafts, debates, and sources" from the date of Madison's initial proposals, June 8, 1789, through the final stages of the ratification process.

Many of the Justices pursuing the originalist approach embrace an equally constricted frame of reference. In his *Term Limits* dissent, for example, Justice Thomas concentrates virtually all of his time and energy on an explication of materials surrounding the framing and ratification.⁸⁸ As part of that analytic process, he places considerable store in the fact that at the time the Qualifications Clauses were ratified, several states had in force either constitutional or statutory provisions that imposed "qualifications" on members of Congress.⁸⁹ And he goes on to damn Justice Story with faint praise, observing that while he "was a brilliant and accomplished man, and one cannot casually dismiss his views[. . . he was not a member of the Founding generation, and his Commentaries on the Constitution were written a half century after the framing."⁹⁰

There is, of course, nothing wrong with stressing that the Framers and Founders acted in ways that cast doubt on the legitimacy of a particular interpretation of the Constitution rendered some two hundred years later. Of course, as Justice Stevens stressed for the majority in the *Term Limits* case, virtually all of the state-imposed "qualifications" were quickly abandoned in the wake of ratification.⁹¹ And while it is true that Justice Story was himself not a Framers or Founder, he lived, worked, and presumably conversed with many of the most important members of that generation. His views on what these individuals might have had in mind are, I suspect, worthy of greater respect than Justice Thomas seems to accord them, especially when these same individuals themselves spoke of a text that was both imprecise and to be used in circumstances never before experienced.⁹²

What I question then is whether this sort of interpretive approach offers *complete* answers. In particular, I question the extent to which it comports with the understanding of many, albeit per-

88. See *United States Term Limits, Inc., v. Thornton*, 514 U.S. 779, 867-916 (1995) (Thomas, J., dissenting).

89. See 514 U.S. at 901-03.

90. 514 U.S. at 856.

91. 514 U.S. at 823-25.

92. Certainly Justice Story's views are worthy of as much respect as those of someone looking back over the centuries in an attempt to probe the minds of individuals Story himself knew firsthand.

haps not most, of the individuals who participated in the creation of both the Constitution and the Bill of Rights.

Consider, for example, an issue of extraordinary importance to those concerned about the meaning and effect of the Tenth Amendment: the nature and scope of the power of Congress to regulate commerce. As Justice Thomas has reminded us, the modern "aggregation" doctrine characterized by decisions like *Wickard v. Filburn*,⁹³ "is clever, but has no stopping point."⁹⁴ More tellingly, if the commerce power includes within its ambit the authority to regulate matters understood at ratification to "belong" to the states — much less the power to regulate the affairs of the states themselves — there is something to be said for his desire to "be true to a Constitution that does not cede a police power to the Federal Government[.]"⁹⁵ There is, nevertheless, a great deal to be said for the Court's current views on matters commercial, and its implications for the Tenth Amendment — especially if we focus, as I suspect we must, not simply on what was said when the Commerce Clause was crafted and Tenth Amendment ratified, but on how the members of the Founding generation implemented that power and understood its limitations.⁹⁶

The federal power to regulate commerce was, by design, "complete"⁹⁷ and, of necessity, supreme.⁹⁸ It was also, as virtually everyone at the time understood, a textual grant of authority that was imprecise in its expression and about to be invoked in radically altered circumstances. James Wilson, addressing concerns raised in the Pennsylvania Convention about the scope of the powers granted, observed:

They have asserted that these powers are unlimited and undefined. These words are as easily pronounced as *limited* and *defined*. . . [I]t is not pretended that the line is drawn with mathematical precision; the

93. 317 U.S. 111 (1942).

94. *United States v. Lopez*, 514 U.S. 549, 600 (1995) (Thomas, J., concurring).

95. 514 U.S. at 602.

96. In Justice Thomas's defense, I must note that his *Lopez* concurrence is one isolated example where an originalist takes what might be fairly characterized as the sort of "longitudinal view" I espouse.

97. Charles Pinckney, *Observations on the Plan of Government Submitted to the Federal Convention* (May 28, 1787), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 106, 116 (Max Farrand ed., 1937) ("The 7th article invests the United States, with the complete power of regulating the trade of the Union, and levying such imposts and duties . . . as shall, in the opinion of Congress, be necessary and expedient."). Pinckney's characterization is especially interesting, since it pairs the positive power to regulate with the collateral power "to make all Laws which shall be necessary and proper."

98. See, e.g., Letter from James Madison to James Monroe (Aug. 7, 1785), in 8 THE PAPERS OF JAMES MADISON 333, 333 (Robert A. Rutland & William M.E. Rachal eds., 1973) [hereinafter MADISON'S PAPERS] (stating that the states "can no more exercise this power separately, than they could separately carry on war, or separately form treaties of alliance or Commerce").

inaccuracy of language must, to a certain degree, prevent the accomplishment of such a desire. Whoever views the matter in a true light, will see that the powers are as minutely enumerated and defined as was possible[.]⁹⁹

This meant, as Madison in particular subsequently emphasized, that those seeking an understanding of how that power might properly be exercised could not simply rely on the words and understandings during debate and ratification.

Madison stressed that “[i]t ought to have occurred that the Govt. of the U.S. being a novelty & a compound, had no technical terms or phrases appropriate to it, and that old terms were to be used in new senses, explained by the context or by the facts of the case.”¹⁰⁰ As a practical matter, it was incumbent on Congress to begin the process of assigning “new senses” to such “old terms” as the regulation of commerce, by enacting measures that transformed constitutional theory into republican reality. Thus, early in the first session, he wrote that “[a]mong other difficulties, the exposition of the Constitution is frequently a copious source, and must continue so until its meaning on all great points shall have been settled by precedents.”¹⁰¹ Thus, for example, the first Congress enacted numerous measures that did not regulate mere “selling, buying, and bartering, as well as transporting for these purposes,”¹⁰² but were rather considered constitutionally proper exercises of the enumerated power because Congress seemed to believe that the objects of regulation had what is now referred to as a “‘substantial effect’ on [interstate] commerce.”¹⁰³ One of these was *An Act for the government and regulation of Seamen in the merchants service*,¹⁰⁴ which, among other things, regulated numerous aspects of the day-to-day

99. James Wilson, Remarks at the Pennsylvania Ratifying Convention (Dec. 4, 1787), reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* note 24, at 400, 401; see also Letter from George Washington, President of the Convention, to the President of Congress (Sept. 17, 1787), in 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 305, 305 (Merrill Jensen ed., 1976) (“It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved[.]”).

100. Letter from James Madison to N.P. Trist (Dec., 1831), in 9 MADISON'S WRITINGS, *supra* note 83, at 471, 475. For an insightful discussion of this problem, see Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995).

101. Letter from James Madison to Samuel Johnston (June 21, 1789), in 12 MADISON'S PAPERS, *supra* note 98, at 250; see also 2 ANNALS OF CONG. 1912 (1791) (statement of Rep. Theodore Sedgwick) (“[T]he Constitution had expressly declared the ends of Legislation; but in almost every instance had left the means to the honest and sober discretion of the Legislature.”). For a discussion of how Congress handled these issues, and the significance of what it accomplished, see DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801 (1997), and Kent Greenfield, *Original Penumbra: Constitutional Interpretation in the First Year of Congress*, 26 CONN. L. REV. 79 (1993).

102. *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring).

103. 514 U.S. at 584.

104. Act of July 20, 1790, ch. 29, 1 Stat. 131.

working lives of ordinary seamen.¹⁰⁵ "Seamen or mariners" were obviously necessary participants in a continuum that would lead ultimately to an exchange of goods. However, it is difficult, if not impossible, to envision how Congress could require "an agreement in writing or in print, with every seaman or mariner on board" a ship "bound from a port in one state to a port in any other than an adjoining state,"¹⁰⁶ unless Congress believed the Commerce Clause authorized something more than simple regulation of "selling, buying, and bartering, as well as transporting for these purposes."¹⁰⁷ Indeed, two arguably essential elements of the Act pose fundamental concerns about the extent to which the First Congress shared Justice Thomas's concerns about the sanctity of state sovereignty. The first made penalties paid by delinquent seamen to ship owners "recoverable in any court, or before any justice or justices of any state, city, town or county within the United States" that had "cognizance of debts of equal value[.]"¹⁰⁸ The second "required" local justices of the peace to resolve controversies between owners and seamen over the seaworthiness of a vessel.¹⁰⁹

105. The Act regulates, *inter alia*, the penalty for a seaman neglecting to render himself on board at the agreed-upon time; the procedures a shipmaster must follow if his boat is leaky; and penalties for desertion. See Act of July 20, 1790, ch. 29, §§ 2, 3, 5, 1 Stat. 131. While not quite "federal regulation of the janitor of a State building," RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* 130 (1987), the measure is nevertheless far broader than any Mr. Berger or Justice Thomas would presumably tolerate if we take seriously the implications of their writings. The structuring of and strictures imposed upon the relationship between employer and employee, for example, represent precisely the sorts of regulations a Court intent on enforcing a narrow view of the proper scope of the term "commerce" would condemn. Indeed, the Court, speaking in ways that echo the approach taken by Justice Thomas, did exactly that in *Adair v. United States*, 208 U.S. 161, 179 (1908) (holding that because "interstate commerce" does not cover labor organizations, Congress had no power to prohibit the discharge of employees based on union membership), and *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330, 374 (1935) (holding that a pension plan is not a "regulation of the activity of interstate transportation"). These are, presumably, some of the decisions Justice Thomas had in mind when he condemned "the Court's dramatic departure in the 1930's from a century and a half of precedent." *Lopez*, 514 U.S. at 599 (Thomas, J., concurring).

106. § 1, 1 Stat. at 131. The stricture applied only to a "ship or vessel of the burthen of fifty tons or upwards," § 1, much like modern requirements that trigger regulation only when an enterprise employs a specified minimum number of people or engages in a specified level of commercial activity, see, e.g., 42 U.S.C. § 2000e(b) (1994) (defining an "employer" for the purposes of Title VII of the Civil Rights Act of 1964).

107. *Lopez*, 514 U.S. at 585 (Thomas, J., concurring). The Act also regulated numerous other matters that arguably fall outside the narrow strictures Justice Thomas proposes, including such matters as the requirement that ships bound overseas carry "a chest of medicines, put up by some apothecary of known reputation, and accompanied by directions for administering the same," § 8, 1 Stat. at 134, and that there be, "well secured under deck, at least sixty gallons of water, one hundred pounds of salted flesh meat, and one hundred pounds of wholesome ship-bread" for each person aboard, § 9, 1 Stat. at 135.

108. § 2, 1 Stat. at 132.

109. See § 3, 1 Stat. at 132-33. The majority in *Printz* rejected the argument that this provision reflected an assumption by the First Congress that it was free to "commandeer" the states. See *Printz v. United States*, 117 S. Ct. 2365, 2371 n.2 (1997). The Court found the provision unremarkable, believing the functions it imposed on state judges were not "execu-

This is, I submit, an example of the process of "liquidating and ascertaining" the meaning of the original text, which Madison described in *Federalist No. 37* and which the Framers and Founders found both necessary and proper. It is also, in many important respects, an interpretive enterprise that casts originalism in a somewhat different light, making it a matter of meaning *over*, rather than simply *within*, time.

That was, I suspect, the understanding of both the states, as states, and the people to whom the task of ratification fell. Consider, for example, the text and implications of the formal letter transmitting the Constitution to the Confederation Congress, which stated, "[i]t is obviously impracticable in the foederal government of these States; to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all — Individuals entering into society, must give up a share of liberty to preserve the rest."¹¹⁰ The powers of "the general government of the Union" were to be "fully and effectually vested" in that entity, consistent with "that which appears to us the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety, perhaps our national existence[.]"¹¹¹ This does not mean that the document forwarded to the people for their consideration answered every possible question with absolute clarity and precision. As I have already noted, those portions of the text describing the proposed division of authority were, both of ne-

ative" in nature, as were the tasks at issue in the case before it. See *Printz*, 117 S. Ct. at 2371 n.2. It is difficult, however, to understand why that distinction matters if the core concern is for state sovereignty. It is one thing to provide, in the Constitution itself, that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land[.]" U.S. CONST. art. VI, cl. 2, and to expect state judges to enforce federal statutes in cases otherwise within their jurisdiction. It is quite another to posit that Congress may command state judges to entertain federally created causes of action.

110. Letter from George Washington, President of the Convention, to the President of Congress (Sept. 17, 1787), in 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 99, at 305. For a detailed and insightful discussion of the letter and its significance, see Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615 (1995). The Convention unanimously approved the letter and included it with the text of the Constitution when it was "transmitted to the several [state] legislatures in order to be submitted to a convention of delegates chosen in each state by the people thereof[.]" Resolution of the Confederation Congress (Sept. 28, 1787), in 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra*, at 340. One of the interesting side issues presented by this is, of course, the strict "legality" of what transpired. For a "dialogue" on the issues, compare Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475 (1995), with Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994), and Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988).

111. Letter from George Washington, President of the Convention, to the President of Congress, in 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 99, at 305.

cessity and by design, unclear. Indeed, the letter itself stressed that "[i]t is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved," a task made especially tenuous in this instance "by a difference among the several States as to their situation, extent, habits, and particular interests."¹¹²

A second example of this phenomenon is found in the events and circumstances leading to what has aptly been described as the Court's "most influential opinion,"¹¹³ *M'Culloch v. Maryland*.¹¹⁴ Once again, the focus is on the ultimate implications of the Tenth Amendment and on the particular views of James Madison, who expressed considerable reservations about the power of Congress to create the Bank of the United States when that entity was first proposed by Alexander Hamilton. These qualms arose from a matter on which he presumed to speak with considerable authority, the argument that the government lacked the power to incorporate. During the Convention, Franklin had moved to amend the "post roads" clause to include "a power to provide for cutting canals where deemed necessary."¹¹⁵ Responding, Madison had

suggested an enlargement of the motion into a power "to grant characters of incorporation where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent." His primary object, however, was to secure an easy communication between the States, which the free intercourse now to be opened seemed to call for — The political obstacles being removed, a removal of the natural ones as far as possible ought to follow.¹¹⁶

Franklin's motion was so modified but ultimately failed, gaining the support of only three states, Pennsylvania, Georgia, and (ironically, as subsequent events would establish) Virginia. The accounts of this debate are sketchy. But, significantly, one factor in the negative decision was apparently the very issue Hamilton now broached, the spectre of "establishment of a Bank."¹¹⁷

112. *Id.*

113. Montgomery N. Kosma, *Measuring the Influence of Supreme Court Justices*, 27 J. LEGAL STUD. 333, 359 tbl.6 (1998).

114. 17 U.S. (4 Wheat.) 316 (1819).

115. 2 THE RECORDS OF THE FEDERAL CONVENTION 615 (Max Farrand ed., 1937) (Franklin's motion to amend Article I, § 8, cl. 7).

116. *Id.*

117. See *id.* at 616, where Rufus King of Massachusetts observed: "The states will be prejudiced and divided into parties by it — In Philada. & New York, It will be referred to the establishment of a Bank, which has been a subject of contention in those Cities."

Jefferson's Diary contained a similar observation. See 1 THE WRITINGS OF THOMAS JEFFERSON 278, 278 (Paul Leicester Ford ed., 1892) (recounting a conversation between Abraham Baldwin and James Wilson regarding the corporate power, and noting that banks in particular had been a politically divisive issue).

Madison believed there was no express power to incorporate, much less to incorporate a bank.¹¹⁸ Moreover, he could not find any clause that supported an inference that Congress had such power.¹¹⁹ This left the Necessary and Proper Clause, which Madison declared "must, according to the natural and obvious force of the terms and the context, be limited to means *necessary* to the end, and *incident* to the *nature* of the specified powers."¹²⁰ He averred that the establishment of a Bank would not be "direct and incidental," but instead simply "conducive to the successful conducting of the finances[.]"¹²¹ This went too far: "If implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy."¹²² Both the terms of the Constitution and the realities attendant to its ratification counseled against this course, which implicated the promise "that the powers not given were retained" and violated the "fundamental principle . . . that the terms necessary and proper gave no additional powers to those enumerated."¹²³

Madison's views did not prevail. The bill creating the First Bank was eventually signed by President Washington, and the Bank itself endured until its charter expired. Once past the dislocations caused by the War of 1812, national attention focused again on the need for, and constitutionality of, a federal bank. Madison's role and views during this protracted process are especially interesting. As President, it was Madison who vetoed the first serious attempt at renewal. In his Veto Message, however, he confined his observations on the issue of constitutionality of a Bank to a single, terse passage, in which he

[w]aiv[ed] the question of the constitutional authority of the Legislature to establish an incorporated bank as being precluded in my judgment by repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in

118. See 2 ANNALS OF CONG. 1896 (1791).

119. See *id.* at 1896-98.

120. *Id.* at 1898. The italicized words are as they appear in the version printed in *Madison's Papers*, which followed the original version printed in the *Gazette of the U.S.*, Feb. 23, 1791. See 13 MADISON'S PAPERS, *supra* note 98, at 372, 376.

121. 2 ANNALS OF CONG. 1898 (1791).

122. *Id.* at 1899.

123. *Id.* at 1901. Madison spoke again on February 8th, but that statement added little to this analysis. See *id.* at 1956-60. It was the final significant speech in the debate, for when Gerry "rose to reply . . . the House discovering an impatience to have the main question put, after a few remarks, he waived any further observations." *Id.* at 1960.

different modes, of a concurrence of the general will of the nation[.]¹²⁴

Madison would eventually concede the apparent inconsistency between his position in 1791 and the one he embraced as President.¹²⁵ His views were, however, more nuanced than his critics alleged. He adhered to his original view that, in *his* estimation, Congress did not have the authority to create a Bank. But that was, as a *constitutional* matter, secondary; there was "an evidence of the Public Judgment, necessarily superseding individual opinions."¹²⁶ This was not a new position, conjured up by an elder statesman looking back on his career and attempting to justify his actions. In his May 1821 letter to Spencer Roane, Madison had observed:

In resorting to legal precedents as sanctions to power, the distinctions should ever be strictly attended to, between such as take place under transitory impressions, or without full examination & deliberation, and such as pass with solemnities and repetitions sufficient to imply a concurrence of the judgment & the will of those, who having granted the power, have the ultimate right to explain the grant.¹²⁷

There are striking parallels between this position and the one taken by Marshall in *M'Culloch*. Most proponents of an expansive reading of the text draw primary support from Marshall's axiom that "[i]n considering this question . . . we must never forget, that it is a *constitution* we are expounding."¹²⁸ The sentence is clearly critical to the opinion. It falls at the end of the paragraph in which Marshall stressed the refusal of the individuals who framed the Tenth Amendment to include the limiting term "expressly," and emphasized that the enumerated powers sections of the text simply provided a "great outline[]" within which "important objects

124. James Madison, Veto Message (Jan. 30, 1815), in 8 MADISON'S WRITINGS, *supra* note 83, at 327, 327. For a discussion of the process and events surrounding the creation of a federal bank, see BRAY HAMMOND, BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR 227-33 (1957). Hammond notes that Madison's "objections were wholly practical[.]" *id.* at 232, and that "[t]he question of constitutionality, which had so much sincere prominence in 1791 and so much insincere prominence in 1811, had none at all in these debates of 1814, 1815, and 1816," *id.* at 233.

125. See Letter from James Madison to N.P. Trist (Dec., 1831), in 9 MADISON'S WRITINGS, *supra* note 83, at 471.

126. *Id.* at 476-77. It is worth noting that Madison's actual grounds for the veto were a gap between the professed intentions and the actual mechanics. See Madison, Veto Message, *supra* note 124, at 330 (summarizing his objections and indicating that "in return for [the] extraordinary concessions" granted, there "should [be] a greater security for attaining the public objects of the institution than is presented in the bill").

127. Letter from James Madison to Spencer Roane (May 6, 1821), in 9 MADISON'S WRITINGS, *supra* note 83, at 55, 61; see also *id.* at 62 ("A liberal & steady course of practice can alone reconcile the several provisions of the Constitution literally at variance with each other[.]"). Madison insisted, however, that this process required broad participation. In the sentences immediately following, he stressed his conviction "that Legislative precedents are frequently of a character entitled to little respect, and that those of Congress are sometimes liable to peculiar distrust." *Id.* at 61.

128. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

[were] designated" while "the minor ingredients which compose those objects" remained to "be deduced from the nature of the objects themselves."¹²⁹ Marshall would subsequently indicate, however, that this interpretive gloss must be read with care.

Speaking as "A Friend of the Constitution," Marshall emphasized that the interpretive powers vested in the Court did not give that body "a right to change that instrument."¹³⁰ That did not signal, however, any sense that Marshall believed the text had a definite, fixed meaning at the point of ratification. Echoing Madison's precise argument, Marshall had stressed at the outset of his opinion that whether

Congress [has the] power to incorporate a bank . . . can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.¹³¹

In clear reference to the debates between Madison, Jefferson, Randolph, and Hamilton, Marshall stressed that the measure creating the First Bank was "resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law."¹³²

This reading of *M'Culloch* does not do violence to the great lesson of *Marbury*, that "[i]t is emphatically the province and duty of the judicial department to say what the law is."¹³³ Rather, it suggests that both Marshall and Madison understood the role that each branch, and the people, play in the dynamic process of ascribing meaning to a necessarily imprecise document. In particular, it supports Madison's considered judgment that a course of interpretation and conduct, acceded to over time by individuals in a unique position to determine what the text should mean, is entitled to respect. Accordingly, the language and holding of *M'Culloch* seem to be precisely, and unmistakably, an exercise in "liquidating and ascertaining" a reading of the Constitution within which an initial textual grant gained substantive meaning only over time — a meaning "pass[ed] with solemnities and repetitions sufficient to imply a con-

129. 17 U.S. (4 Wheat.) at 401.

130. John Marshall, 8 *A Friend of the Constitution*, ALEXANDRIA GAZETTE, July 14, 1819, reprinted in JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND*, *supra* note 57, at 200, 209.

131. *M'Culloch*, 17 U.S. (4 Wheat.) at 401.

132. 17 U.S. (4 Wheat.) at 404.

133. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

currence of the judgment & the will of those, who having granted the power, have the ultimate right to explain the grant."¹³⁴

The reservations I express about the originalist enterprise are, obviously, limited (at least for the purposes of this review). Assuming for the sake of argument that there is something to be said for ascertaining the original meaning of the words, and the general intentions of those who wrote and spoke them, is it appropriate to rely only on what was said and done during the actual drafting of, debate about, and ratification of the Bill of Rights? Is it proper for the Court in particular to treat the meaning of these constitutional provisions as something that may properly be illuminated only by artifacts dating from that narrow period? That is clearly the position Dean Cogan would have us accept, and one to which a substantial proportion of the devotees of originalism are committed. But it does not appear to be the approach that the principal Framers would have taken, even assuming, for the sake of argument, that it is proper to include, for example, Marshall and Madison within the ranks of originalists. Madison "entirely concur[red] in the propriety of resorting to the *sense* in which the Constitution was accepted and ratified by the nation[,]" understanding that "[i]n that *sense* alone it is the legitimate Constitution."¹³⁵ But he also recognized that "[i]f the meaning of the text be sought in the changeable meaning of the words composing it, it is evident that the shape and attributes of the Government must partake of the changes to which the words and phrases of all living languages are constantly subject."¹³⁶

The approach Dean Cogan embraces is inconsistent with that understanding. And it is clearly less than satisfactory in one area of consummate interest and importance for the contemporary originalist: the question of just what it is Congress had in mind when it sent to the several states an amendment proposing that "Congress shall make no law respecting an establishment of religion" (p. 11), much less what Madison meant when he initially proposed that "nor shall any national religion be established."¹³⁷ Which brings us back to Judge Hand, and, in particular, the metaphor that has dominated the Court's discussion of the

134. Letter from James Madison to Spencer Roane (May 6, 1821), in 9 MADISON'S WRITINGS, *supra* note 83, at 55, 61.

135. Letter from James Madison to Henry Lee (June 25, 1824), in 9 MADISON'S WRITINGS, *supra* note 83, at 190, 191 (emphases added).

136. *Id.*

137. P. 1. It is, I believe, worth noting that Dr. Johnson illustrated at least two of his definitions of the word "establish" with quotations speaking expressly of the "establishment" of religion. See 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (photo. reprint 1967) (1755) ("Soon after the rebellion broke out, the Presbyterian sect was *established* in all its forms by an ordinance of the lords and commons" . . . "So were the churches *established* in the faith.").

Establishment Clause for the past one hundred and twenty years, Jefferson's "wall of separation."

III. JUDGE HAND REVISITED

As the Court voyages through the stormy seas created by modern efforts to, for example, "put Christ back in Christmas,"¹³⁸ the issues posed by attempts to enforce an Establishment Clause proposed and ratified in the almost uniformly Christian world of the late eighteenth century in the diverse and cacophonous 1990s are extraordinarily complex. Not surprisingly, the Court's various solutions to the problems are often confused and confusing at best. Depending on what is at stake, for example, the analytic matrix is as varied as the three part inquiry articulated in *Lemon v. Kurtzman*,¹³⁹ the historical test advanced in *Marsh v. Chambers*,¹⁴⁰ the "plastic reindeer" option outlined in *Lynch v. Donnelly*,¹⁴¹ the coercion approach set forth in *Lee v. Weisman*,¹⁴² and the different forms of an endorsement inquiry found in various opinions by Justice O'Connor¹⁴³ and, arguably, in *Capitol Square Review & Advisory Board v. Pinette*.¹⁴⁴

In each instance, there is at least one common denominator: the realization that much of our understanding of the Establishment Clause has been shaped by Jefferson's "wall of separation." The origins of the metaphor are familiar. When asked by a Committee

138. It is one of the enduring ironies of modern Establishment Clause jurisprudence that those seeking to achieve this goal are allowed by the Court to do so only to the extent that their displays include, "among other things, a Santa Claus house [and] reindeer pulling Santa's sleigh[.]" *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984). Christmas, it seems, is not a Christian holy day. It is, rather, a "traditional event long recognized as a National Holiday." *Lynch*, 465 U.S. at 680 (citation omitted). And it remained for Justice Brennan, in dissent, to remind the Brethren that "[t]he nativity scene is . . . the chief symbol of the characteristically Christian belief that a divine Savior was brought into the world and that the purpose of this miraculous birth was to illuminate a path toward salvation and redemption. For Christians, that path is exclusive, precious, and holy." *Lynch*, 465 U.S. at 708 (Brennan, J., dissenting) (footnote omitted).

139. 403 U.S. 602 (1971). As matters stand today, reports of the death of *Lemon* have been greatly exaggerated, much to the chagrin of certain members of the Court. In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), the Court invoked *Lemon* as part of its analysis, 508 U.S. at 395, prompting Justice Scalia to lament:

Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of the Center Moriches Union Free School District.
508 U.S. at 398 (Scalia, J., concurring).

140. 463 U.S. 783 (1983).

141. 465 U.S. 668 (1984).

142. 505 U.S. 577 (1992).

143. See, e.g., *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 627-32 (1989) (O'Connor, J., concurring); *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) (characterizing the central concern as whether the display "endorsed Christianity").

144. 515 U.S. 753, 763 (1995) (plurality opinion); 515 U.S. at 790 (Souter, J., concurring).

of the Danbury Baptist Association for his understanding of these matters, Jefferson responded with his famous letter of January 1, 1802.¹⁴⁵ And he expressed the views that have shaped much of our modern understanding of the Establishment Clause when he declared:

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 government reach actions only, and not opinions, I contemplate with sovereign reverence the 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.¹⁴⁶

Dean Cogan does not include Jefferson's celebrated letter as one of the supplemental texts. This reflects, presumably, his belief that a letter sent twelve years after ratification cannot, or at least should not, be deemed significant in a truly originalist explication.¹⁴⁷ That assumption, as I argued in the previous section of this review, is curious for at least two reasons. As a matter of technique, it embraces a very narrow understanding of what originalism entails, imposing the date on which a sufficient number of states had ratified as the outer limit on materials of importance. More troubling, at least in my estimation, is the belief that this approach is consistent with the views and intentions of a group of individuals who understood the imprecise and tenuous nature of the document they had crafted and who stressed the need to "liquidate and ascertain" its meaning over time.

It is also possible that Dean Cogan believes the letter and the metaphor it embraces might be troubling in their own right. If so, he is not alone in this. The Court itself has indicated that the "wall" is often rather a "blurred, indistinct, and variable barrier, depending on all the circumstances of a particular relationship."¹⁴⁸ It is, as Justice Jackson once observed, "as winding as the famous serpentine wall" Jefferson designed for the University of Virginia.¹⁴⁹ At best, it is a "useful figure of speech."¹⁵⁰ Indeed, various members of the Court have railed against the very idea of a wall, maintaining

145. Danbury Baptist Letter, *supra* note 28, at 281.

146. *Id.* at 281-82.

147. One may usefully contrast this decision with the one made by the editors of *The Founders' Constitution*, who include an excerpt from the letter in their work. See 5 THE FOUNDERS' CONSTITUTION, *supra* note 24, at 96.

148. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

149. *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 247 (1948) (Jackson, J., concurring).

150. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

that, for example, “[a] rule of law should not be drawn from a figure of speech.”¹⁵¹

That view, of course, has not been embraced by the Court as a whole. Rather, Jefferson’s wall has become a central tenet in the protracted debate. Indeed, the Court has attributed it not simply to Jefferson, but to the entire Founding generation for whom he presumably spoke. In the first decision in which the Court used the wall metaphor, Chief Justice Waite tied the invocation of the letter to Jefferson’s status as a central figure in the Framing process, observing, “[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.”¹⁵² That characterization is, obviously, at odds with the one that would be ascribed to the letter if the approach adopted by Dean Cogan is embraced. A work that defines “a reasonably complete set of *relevant* texts” as one that stops at “the point of ratification” (p. lviii; emphasis added) can hardly include a letter written almost twelve years later, much less treat such a document as “authoritative” given the assumptions on which it proceeds. Nor, for that matter, can it properly be concerned with the nature and implications of a decision reached at a point in time even more removed from the one it seeks to illuminate, such as the drafting and ratification of the Fourteenth Amendment, which provided the means by which limitations imposed on the power of Congress to “establish” religion were made applicable against the states themselves.

Strictly speaking, the assumptions that animated Jefferson, Madison, and the other Framers and Founders as they debated the need for, and eventually proposed and ratified, a Bill of Rights have little bearing on the question that provoked Judge Hand — whether or not the State of Alabama could pass measures that posed a spectre of establishment in a world where the First Amendment in fact limited the authority of the states. In this regard, much can be said for the position Justice Scalia expressed in *McIntyre*, which arguably eschews probing the minds and practices of the Founding generation in favor of an inquiry into what was intended by the individuals who crafted the Fourteenth Amendment itself.¹⁵³ The originalist enterprise assumes by its very nature, however, that the thoughts and deeds of individuals like Jefferson and Madison matter a very great deal in the process of giving meaning to the Bill of Rights. There is, accordingly, considerable justification for relying on the letter and its description of a wall of separation as an appropriate point for judicial interpretation — assuming, as I do, that the

151. *McCullum*, 333 U.S. at 247 (Reed, J., dissenting).

152. *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

153. See *supra* text accompanying notes 76-77.

Framers and Founders themselves intended that original meanings and intentions be leavened with the wisdom gained by experience.

One need not, of course, rely on postratification events and documents to understand the nature and scope of the concerns posed by either a formal relationship between church and state, or by any intimation that the coercive powers of a state might be brought to bear either to shape individual religious beliefs or to restrict religious practices. As Dean Cogan himself correctly perceives, one may glean considerable insight from preratification texts, including, for example, Madison's *Memorial and Remonstrance Against Religious Assessments*, 1786 (pp. 46-51) and Virginia's *Bill for Religious Freedom*, 1786 (pp. 51-52), which has appropriately been characterized as an enactment of principles Jefferson championed under the leadership of Madison.¹⁵⁴ And there is much that might be learned from many other pre-ratification texts, some of which Dean Cogan does not include. Jefferson, for example, proposed in 1776 that the Virginia Constitution declare expressly that "nor shall any [person] be compelled to frequent or maintain any religious institution,"¹⁵⁵ a prohibition that tracks closely the spirit that animates his eventual expression of the need for a "wall of separation." And in his *Bill for Religious Freedom*, 1786 (pp. 51-52), he condemned as "sinful and tyrannical" the assumption that any government could "compel a man to furnish contributions of money for the propagation of opinions which he disbelieves[.]"¹⁵⁶

These sentiments are consistent with an understanding of both the need for and implications of a wall of separation that would condemn even the intimation that government could direct the manner in which individual citizens professed, or failed to profess, their religions — much less the assumption that government could embrace one particular sect as its established church or insinuate the prayers and practices of that sect into public life. And they are consistent with the postratification experiences of individuals whose own *official* encounters with demands that government recognize particular religions in a variety of ways amply demonstrated the

154. See DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 162 (1994).

155. Thomas Jefferson, *Third Draft [of the Virginia Constitution] by Jefferson*, in 1 *THE PAPERS OF THOMAS JEFFERSON* 356, 363 (Julian P. Boyd ed., 1950). As Mayer notes, the draft arrived too late for consideration, see MAYER, *supra* note 154, at 158, and the Convention adopted a formulation proposed by Madison, which spoke simply of the "free exercise of religion, according to the dictates of conscience" P. 44.

156. Cogan includes the Bill but does not, consistent with his general editorial principles, document Jefferson's role. The sentiments expressed in the Bill itself, of course, echo both Jefferson's wall and the Court's understanding that the prohibition on "establishment" means that "[n]o tax in any amount, large or small, can be levied to support any religious activities," *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) (emphasis added) — a declaration I take to include within its ambit state support for the sort of prayers at issue in *Jaffree*, "whatever they may be called, or whatever form they may adopt[.]" 330 U.S. at 16.

need for fashioning a wall. During the campaign that propelled him into the Presidency, for example, Jefferson was assailed by Federalist clergy from New England who believed he would not in fact "establish[] a particular form of Christianity through the United States."¹⁵⁷ In language that tracks closely the message he would send two years later, Jefferson confirmed their fears: "they believe that any portion of power confided to me, will be exerted in opposition to their schemes. And they believe rightly: for I have sworn upon the altar of God, eternal hostility against *every* form of tyranny over the mind of man."¹⁵⁸

Hostility to *every* form of such enactments, of course, expresses an opposition to impositions by both federal and state tyrants, a position consistent with both his understanding of the demands imposed by the by-then ratified First Amendment and, I assume, with how he would view the strictures of an Amendment incorporated against the states. That was, obviously, a development Jefferson could not have anticipated, and likely would have opposed vigorously on other grounds. But it is also one that, if in place, he would presumably have enforced, particularly when the proscription echoes the precise state of affairs he successfully pursued in Virginia. In a similar vein, a *President* Madison, troubled by the negative reaction to a proclamation that counseled prayer only by those "so disposed,"¹⁵⁹ in a subsequent proclamation both repeated that qualifier¹⁶⁰ and stressed that the only "public homage . . . worthy the favorable regard of the Holy and Omniscient Being to whom it is addressed" must be the product of the "free choice" of a people "freed from all coercive edicts."¹⁶¹ And on leaving office, Madison would speak with considerable approval of the changes wrought in Virginia in the wake of the Commonwealth's decision to "abolish[] the Religious establishment, and put[] all Sects at full liberty and on a perfect level."¹⁶²

157. Letter from Thomas Jefferson to Dr. Benjamin Rush (Sept. 23, 1800), in 10 JEFFERSON'S WRITINGS, *supra* note 28, at 173, 175.

158. *Id.* (emphasis added).

159. Proclamation (July 9, 1812), reprinted in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 83, at 513, 513.

160. See Proclamation (July 23, 1813), reprinted in *id.* at 532, 532 (recommending prayer to "all who shall be piously disposed").

161. *Id.* at 533. I discuss the implications of Madison's willingness to even issue such Proclamations at *infra* text accompanying notes 187-192.

162. Letter from James Madison to Robert Walsh (Mar. 2, 1819), in 8 MADISON'S WRITINGS, *supra* note 83, at 425, 430. The letter tracks closely sentiments Madison expressed forty-five years earlier, when he compared the favorable climate found in the "Northern Colonies" (such as Pennsylvania) with the less propitious situation that prevailed in Virginia, where "the Church of England [was] the established and general Religion[.]" Letter from James Madison to William Bradford (Jan. 24, 1774), in 1 MADISON'S PAPERS, *supra* note 98, at 104, 105.

There is, accordingly, considerable justification for relying on the letter and its description of a wall of separation as a proper starting point for judicial interpretation, assuming, as I do, that the Framers and Founders themselves were both concerned with original intentions and understood that these were to be leavened with the wisdom gained by experience. Obviously, the Framers and Founders did not understand the First Amendment to limit state actions, and many of them shared a particularly robust set of beliefs about the sovereignty of the individual states. Indeed, *M'Culloch* in particular would prove an especially galling development for a substantial number of individuals, including Jefferson.¹⁶³ The question is not, however, how they might have felt about the suggestion that the Establishment Clause might limit state actions in a world without the express limitations on state authority provided by the Due Process Clause of the Fourteenth Amendment. It is, rather, how their notions of the natural rights of man, informed by a particular understanding of the evils of establishment, might best be understood in a contemporary world where incorporation in fact limits state authority in fundamental respects.

This is a difficult question for any number of reasons, not the least of which is that, viewed in isolation, the events and expectations of the period immediately after ratification offer considerable comfort to those who believe the authors of the First Amendment contemplated leaving these matters to the individual states — and that, by doing so, they expressly countenanced any number of practices that the modern Court condemns.

Six of the ratifying states supported either a single church or had constitutional or statutory provisions that authorized multiple establishments.¹⁶⁴ Four others, while arguably not “establishing” in the traditional sense, nevertheless barred anyone who was not a Protestant, or at least a Christian, from holding public office.¹⁶⁵ Many of these arrangements were ended during and immediately after ratification, with the last state to do so, Massachusetts, ratifying, by popular vote and a ten-to-one margin, an amendment to its Constitution in 1833 that ended its relationship with the

163. For a general discussion of the controversy the decision provoked, see JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND*, *supra* note 57, at 3-21.

164. The six were Connecticut, Massachusetts, and New Hampshire, within which the Congregationalists were recognized by local rules permitted by the state structure, and Georgia, Maryland, and South Carolina, which embraced a more general form of establishment. For a detailed discussion of the authorizations and arrangements, see LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 25-62 (1986).

165. The four were Delaware, New Jersey, North Carolina, and Pennsylvania. In Rhode Island, in turn, Catholics and Jews were apparently not even allowed to become citizens, much less members of the governing class. See GERARD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* 29 (1987).

Congregational Church.¹⁶⁶ Of course, it was one thing to eliminate the provision that authorized each of the "several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of GOD,"¹⁶⁷ and quite another to sever the church-state relationship entirely. *Preferences* for Christianity, or at least for a profession of belief in a single God, persisted well into the twentieth century. In Massachusetts, for example, the same amendment that terminated the local support option nevertheless reminded one and all that "the public worship of GOD and instructions in piety, religion, and morality, promote the happiness and prosperity of a people, and the security of a republican government[.]"¹⁶⁸ Nor was there inclination to criticize when, for example, the Supreme Court of Nebraska, confronted in 1908 by a challenge to a Sunday closing law by someone who did not view the solemnities of that day in the same manner as the Christian majority, reminded those who might be troubled by such practices that while

[w]e doubt very much whether there were any disciples of Mahomet in Nebraska in 1873, . . . those who have emigrated to Nebraska since that day come here with full knowledge of the Sunday statute, and their appearance in our commonwealth will hardly render unconstitutional and void an act of the Legislature that theretofore was valid.¹⁶⁹

In both words and deeds, then, the United States remained a Christian nation long after ratification, and there is little evidence that the passage of the Fourteenth Amendment had a material effect on this reality. The provision in the Maryland Declaration of Rights mandating "no religious test . . . other than a declaration of belief in the existence of God,"¹⁷⁰ for example, remained in force until stricken by the Court in 1961.¹⁷¹ The inhabitants of Utah, in turn, while deprived of their ability to practice polygamy by *Reynolds*, entered the Union with a Constitution whose Preamble expressed their gratitude "to Almighty God for life and liberty."¹⁷² And the people of Texas, having abjured "the heresies of nullification and secession" in an 1868 instrument that contained broad pro-

166. See LEVY, *supra* note 164, at 37-38.

167. MASS. CONST. Declaration of Rights, art. III, in 3 Thorpe, *supra* note 24, at 1889, 1890.

168. MASS. CONST. amend. XI, in 3 Thorpe, *supra* note 24 at 1914.

169. *Ex parte Caldwell*, 118 N.W. 133, 135 (Neb. 1908). As is the case with creches and Christmas, the Court's modern protection of Sunday turns on notions that what was once a holy day for a substantial portion of the population has transformed itself, becoming instead a secular "day of rest." See *McGowan v. Maryland*, 366 U.S. 420 (1961).

170. MD. CONST. art. 37, *quoted in* *Torcaso v. Watkins*, 367 U.S. 488, 489 (1961).

171. See *Torcaso*, 367 U.S. at 496.

172. UTAH CONST. 1895, Preamble, in 6 Thorpe, *supra* note 24, at 3700, 3702.

tection of religious liberty and strict separation,¹⁷³ quickly clarified how limited their actual vision of religious liberty was in 1876 when they proclaimed that

No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being.¹⁷⁴

Does all of this, as Judge Hand maintained, mean that a state is in fact free to establish religion, perhaps even, as nine of the states did in 1776,¹⁷⁵ to embrace a particular sect as the preferred expression of its citizens' beliefs? These are, after all, the sort of historical artifacts that give considerable aid and comfort to those who argue that the Establishment Clause does not stand as a barrier to these particular sorts of practices. My own inclination is to answer, resoundingly, "no."¹⁷⁶ And I believe this is how Madison, Jefferson, and the others of their generation who considered such matters would respond when confronted by the demands made today in the name of their supposed beliefs. But in doing so I draw on materials outside the ambit of *The Complete Bill of Rights*, framing my response within both the letter and spirit of Jefferson's wall and my attempt, to use one of Dean Cogan's formulations of the originalist enterprise (p. lvi), to determine the "principle" for which the Establishment Clause stood in the minds of the principal players, even if that principle might occasionally seem at odds with, for example, their "understanding" as expressed through their occasional actions and those of the states and nation within which they lived.

The lines of demarcation undergirding this particular assumption are hardly clear. Justice Story, for example, maintained in his *Commentaries* that

Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration, the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship.¹⁷⁷

This position, he believed, was entirely reasonable:

[E]very American colony, from its foundation down to the revolution, with the exception of Rhode Island, (if, indeed, that state be an exception), did openly, by the whole course of its laws and institutions,

173. See TEXAS CONST. 1868, Preamble & art. 1, § 4, in 6 Thorpe, *supra* note 24, at 3591-3592.

174. TEXAS CONST. 1876, art. I, § 4, in 6 Thorpe, *supra* note 24, at 3621, 3621.

175. See *Jaffree v. Board of Sch. Comms.*, 554 F. Supp. 1104, 1114 (S.D. Ala. 1983) ("At the beginning of the Revolution established churches existed in nine of the colonies.").

176. For a brief take on the nuances of my position, see *infra* text accompanying notes 194-197.

177. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1868 (1833). The amendment "now under consideration" was, of course, the First.

support and sustain, in some form, the Christian religion; and almost invariably gave a peculiar sanction to some of its fundamental doctrines.¹⁷⁸

Justice Story thus distinguished the "duty of supporting religion" from the "right to force the consciences of other men,"¹⁷⁹ and limited the scope of the First Amendment to an attempt to "exclude all rivalry among Christian sects" and to "prevent any *national* ecclesiastical establishment."¹⁸⁰

Indeed, as advocates of various forms of establishment remind us, Jefferson himself at many junctures engaged in conduct arguably at odds with the wall metaphor. For example, he sent to Congress a treaty with the Kaskaskia Indians which would require the appropriation of federal funds to both support a Catholic priest to minister to the tribe and build a church for those purposes.¹⁸¹ And he *seemed* to contemplate that religion, and matters religious, would play a substantial role in the lives of the faculty and students at one of his most treasured creations, the University of Virginia.¹⁸²

Jefferson would, nevertheless, insist that Christianity itself was not a part of the common law, a position that particularly rankled Justice Story.¹⁸³ And while he was willing to make religious practices and studies a centerpiece at his University, it would, I believe, be a mistake to ascribe to him a collateral belief either that it was proper to invoke the coercive power of the state to require a particular religious practice, or that state support for religion was proper. As he explained six years after the Danbury Baptist episode, "the dictates of his own reason" told him "that civil powers alone have been given to the President of the United States, and no authority to direct the religious exercises of his constituents."¹⁸⁴ And while

178. *Id.* § 1867.

179. *Id.* § 1870.

180. *Id.* § 1871 (emphasis added).

181. The episode is discussed in detail in ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* 38-39 (1982).

182. Professor Mayer, for example, documents Jefferson's opposition to the inclusion of religion in public education in Virginia in general and the University of Virginia in particular, and his reluctant concession to a limited religious presence at the latter. See MAYER, *supra* note 154, at 165-66. I assume a similar opposition would follow from the understanding, in a post-incorporation world, that the Establishment Clause now provided the same sort of restriction on state action it previously imposed on federal.

183. Compare Thomas Jefferson, *Whether Christianity is a Part of the Common Law*, in *REPORTS OF THE CASES DETERMINED IN THE GENERAL COURT OF VIRGINIA FROM 1730 TO 1740 AND FROM 1768 TO 1772*, at 137, 142 (Thomas Jefferson rep., 1829) (characterizing the history as demonstrating "not at all, whether Christianity was part of the law of England, but simply how far the *ecclesiastical law* was to be respected by the common law courts"), with Joseph Story, *Christianity a Part of the Common Law*, 9 AM. JURIST & LAW. MAG. 346, 348 (1833) ("[C]an any man seriously doubt, that Christianity is recognised as *true*, as a revelation, by the law of England, that is, by the common law?").

184. Letter from Thomas Jefferson to The Rev. Samuel Miller (Jan. 23, 1808), in 11 JEFFERSON'S WRITINGS, *supra* note 28, at 428, 429-30.

much of that letter would, as did the earlier one, touch directly on the proper role of the *federal* government in such matters,¹⁸⁵ his cautionary notes on the problems posed by government intervention and, quite possibly, support were not so delimited, for he did "not believe it is for the interest of religion to invite the civil magistrate to direct its exercises, its discipline, or its doctrines[.]"¹⁸⁶

Madison seems to have shared similar views. Obviously, his 1786 *Memorial and Remonstrance Against Religious Assessments* (p. 46) is a major indication of his core beliefs, a powerful indictment against "experiment[s] on our liberties" (p. 47). As Madison observed:

Who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish, with the same ease, any particular sect of Christians, in exclusion of all other sects? That the same authority which can force a citizen to contribute three-pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever. [p. 47]

There is, nevertheless, considerable room for interpretation here. If, as Madison maintained, the evil is exclusivity, does that mean that general recognition of religion is barred? If the problem is three-pence for a *single* church, does a measure that allocates its contributions to *all* churches cure the problem? And if he believed completely what he said in 1786, how can we explain many of his later actions? Can we, for example, read an inclination toward establishment into Madison's willingness to issue a Proclamation making the third Thursday of August 1812 a "day of public humiliation and prayer . . . for the devout purpose of rendering the Sovereign of the Universe and the Benefactor of Mankind the public homage due His holy attributes"?¹⁸⁷

The answer, I suspect, is no — and is properly understood as such when one considers what Madison had to say about these matters in the years after ratification. In 1832 the Reverend Adams sent Madison a copy of a "Convention sermon on the relation of [Christianity] to Civil Govt with a manuscript request of [his] opinion on the subject."¹⁸⁸ Madison acknowledged the various approaches to establishment that had prevailed abroad, and observed that "[i]t remained for North America to bring the great & interest-

185. Compare *id.* at 428 (discussing the powers "delegated to the General Government"), with Danbury Baptist Letter, *supra* note 28, at 281 ("Contemplat[ing] . . . that act of the whole American people.").

186. Letter from Thomas Jefferson to The Rev. Samuel Miller, *supra* note 184, at 429.

187. James Madison, Proclamation (July 9, 1812), reprinted in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 83, at 513, 513.

188. Letter from James Madison to Rev. Adams (1832), in 9 MADISON'S WRITINGS, *supra* note 83, at 484, 484.

ing subject to a fair, and finally to a decisive test.”¹⁸⁹ Some of the New England states still had not, he admitted, “discontinued establishments of Religions formed under very peculiar circumstances; but they have by successive relaxations advanced towards the prevailing example.”¹⁹⁰ That approach was exemplified by Virginia, where “the legal support of Religion was withdrawn[,]” proving sufficiently “that it does not need the support of Govt. and it will scarcely be contended that Government has suffered by the exemption of Religion from its cognizance, or its pecuniary aid.”¹⁹¹

The “fair and decisive” test Madison envisioned was then “an entire abstinence of the Govt. from interference in any way whatever, beyond the necessity of preserving public order, & protecting each sect agst. trespasses on its legal rights by others.”¹⁹² This is, if not exactly Jefferson’s wall, most certainly an approach partaking of its spirit. The initial creation of that wall may well have had political overtones and, while I doubt it, might even have partaken in its language of some elements of “an impish desire to heave a brick at the Congregationalist-Federalist hierarchy of Connecticut, whose leading members had denounced him two years before as an ‘infidel’ and ‘atheist.’”¹⁹³ But the wall metaphor itself expressed an abiding principle, a spirit of formal separation that informed Jefferson’s general understanding of the nature of religious liberty, even as Jefferson the human being occasionally strayed from the path of strict separation.

This does not mean I am comfortable as a substantive matter with simply imposing an impenetrable wall that severs all possible relationships between Church and State. I have no problem, for example, allowing religious actors — be they parents and children, or even the religious institutions themselves — access to services and benefits routinely provided to all citizens and socially beneficial institutions. I draw the line, however, when the question is whether overtly religious practices should take place in or on public property. On that basis, I am comfortable with the implications of the Court’s decision in *Walz v. Tax Commission of New York* to allow religious institutions access to tax exemptions — not because the practice is “deeply imbedded in the fabric of our national life,”¹⁹⁴ but rather because a general exemption available to *all* “beneficial and stabilizing influences in community life”¹⁹⁵ strikes me as an ap-

189. *Id.* at 485.

190. *Id.* at 486.

191. *Id.*

192. *Id.* at 487.

193. Edward S. Corwin, *The Supreme Court as National School Board*, LAW & CONTEMP. PROBS., Winter 1949, at 3, 14.

194. 397 U.S. 664, 676 (1970).

195. *Walz*, 397 U.S. at 673.

propriate action in the public interest.¹⁹⁶ And I am opposed to prayer in public facilities and at public functions, countenanced by the Court in *Marsh v. Chambers*¹⁹⁷ — not because the historical pedigree for public prayer is somehow greater than that associated with tax exemptions, but because I find in such prayers precisely the sort of “sinful and tyrannical” act Jefferson and Madison believed entirely inappropriate in a government-sanctioned or -supported activity.

A full defense of these and related judgments is far beyond the proper scope of this review. I do believe, however, that there is much to be said for an interpretive regime within which the body of evidence appropriate to an understanding of establishment is more sweeping than that proposed by Dean Cogan. And that Jefferson’s embrace of the wall metaphor, in a document that does not appear in a compendium that seeks to provide a “complete” set of interpretive texts, illustrates nicely the problems I perceive with this volume and the interpretive regime it advances.

The recent discovery that Jefferson edited the original draft of the Danbury Baptist letter in response to political concerns expressed by those with whom he shared the text has given renewed hope to opponents of the wall who believe they now have “proof that Jefferson’s ‘wall’ metaphor should never have been interpreted as an overarching principle.”¹⁹⁸ The metaphor itself, however, was expressed as a central attribute of a fair and just polity long before Jefferson propelled it into the national conscience in his letter.¹⁹⁹ And it remains a useful means for capturing the spirit of a constitutional amendment whose meaning, like so many of the other provisions of that document, was grounded in the words and intentions of those who framed and ratified it, but whose ultimate import was nevertheless to be “liquidated and ascertained” over time, in the light of experience. Madison and Jefferson were not alone in ex-

196. The Court did not embrace this precise approach. It noted that in New York, “[e]xemptions from taxation may be granted only by general laws,” 397 U.S. at 666 (quoting N.Y. CONST. art. 16, § 1), and acknowledged that the state considered the extent to which institutions or organizations are “beneficial and stabilizing influences in community life” as part of the process of exempting entities whose activities are “useful, desirable, and in the public interest,” 397 U.S. at 673. The Court expressed concern about the extent to which such a rule “could conceivably give rise to confrontations that could escalate to constitutional dimensions.” 397 U.S. at 674. That fear is real. I am simply supporting a principle of nondiscrimination, and agreeing that it makes eminent sense to recognize that the sort of evils the Establishment Clause contemplates are not posed when a truly neutral tax benefit is made available to actors who happen to be religious.

197. 463 U.S. 783 (1983).

198. Laurie Goodstein, *Fresh Debate on 1802 Jefferson Letter*, N.Y. TIMES, Sept. 10, 1998, at A20.

199. See Roger Williams, *A Letter to Mr. John Cotton* (1644), quoted in LEVY, *supra* note 164, at 184 (speaking of a “wall of separation between the garden of the church and the wilderness of the world”).

pressing their reservations about the propensity of their countrymen to embrace practices at odds with the spirit of the Constitution.²⁰⁰ Some of their individual *political* practices may, admittedly, have appeared inconsistent with that belief. But their understanding of the First Amendment was indeed that it was designed to interpose a wall, and that matters religious were, in a perfect world, "wisely exempted from civil jurisdiction."²⁰¹ This is, I believe, a lesson inherent in the careful consideration of how the individuals who created the Bill of Rights felt about the manner in which the people would give its guarantees life as the nation itself grew and changed. And it is, in particular, a lesson on the nature and meaning of establishment that may only be learned by those willing to cast their gaze beyond the events and actions described by Dean Cogan in *The Complete Bill of Rights*.

CONCLUSION

Dr. Johnson offers us two definitions of the term "complete." The first, "Perfect; full; without any defects,"²⁰² arguably offers a standard that few would aspire to. Indeed, Dean Cogan eschews such an enterprise, acknowledging that he has made choices and that while labeled "complete," this volume is, realistically, anything but. The second of Dr. Johnson's definitions, in turn, offers what I hope Dean Cogan has in mind when he indicates that "[p]erhaps, if this book proves useful, there may be an opportunity for an expanded edition" (p. lix). As Dr. Johnson observes, a volume is "complete" only when it is "[f]inished; ended; concluded,"²⁰³ a process perhaps, rather than a state of being.

I view *The Complete Bill of Rights* as a work in progress. This does not mean that this initial accomplishment is not extraordinary, or that it does not merit the description "invaluable," assuming it is understood and employed on its own terms. An individual wondering, for example, what variations on a theme were struck by the various attempts to secure the right "to bear arms" can reliably consult *The Complete Bill of Rights* for a quick and authoritative com-

200. In his discussion of the Bill of Rights, for example, St. George Tucker both condemns many accepted practices and quotes at length contemporaries who perceived that "[c]ivil establishments of formularies of faith and worship, are inconsistent with the rights of private judgment." 2 BLACKSTONE'S COMMENTARIES app. at 7 n.G. (photo. reprint 1996) (St. George Tucker ed., 1803) (quoting Dr. Price's observations on the American revolution); see also 1 *id.* app. at 296-97 n.B (indicating that in Virginia the state bill of rights makes clear how futile are the attempts of "civil magistrate[s] to interpose the authority of human laws . . . to prescribe . . . belief, or produce . . . conviction"). These materials are not, obviously, cited by Cogan.

201. James Madison, First Inaugural Address (Mar. 4, 1809), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 83, at 466, 467.

202. 1 JOHNSON, *supra* note 137.

203. *Id.*

pilation of the various formulations. Massachusetts, for example, sought a provision guaranteeing "[t]hat no person, conscientiously scrupulous of bearing arms in any case, shall be compelled *personally* to serve as a soldier" (p. 181). The people of Pennsylvania, in turn, directly addressed the individual right, maintaining that "the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals" (p. 182). And New York, North Carolina, and Virginia spoke in terms that echoed the provision that eventually emerged, each articulating in close proximity both the "right to keep and bear arms" and the need for a "well regulated militia" (pp. 183, 184, 184-85).

In a similar vein, individuals who are perplexed by the notion that modern free "speech" doctrine protects matters as diverse as nude dancing²⁰⁴ and flag burning²⁰⁵ may find fuel for their analytic fires in the realization that four of the seven states requesting amendments of the sort that would eventually coalesce into the Free Speech Clause spoke of protection for something more than speech. Virginia, for example, proposed that "the people have a right to freedom of speech, and of writing and publishing their Sentiments" (p. 93). The Pennsylvania constitutional predicate, in turn, guaranteed that "every citizen may freely speak, write and print on any subject" (p. 95). These formulations, arguably, draw distinctions between pure speech and other forms of expression. And if pursued appropriately by those of an originalist bent, such formulations might bolster the argument that there is indeed a constitutional distinction between speech and conduct, and that many aspects of modern First Amendment doctrine are worthy of reexamination.

Obviously, I am reluctant to accept many of the assumptions that animate that approach, much less certain of the interpretations it is likely to compel if understood in the manner that many of its practitioners espouse. That reticence does not, however, diminish my respect for the accomplishment that *The Complete Bill of Rights* represents, by providing me with a compilation that makes it so much easier for me to formulate quickly the sort of comparisons I have just offered. And it does so for the Bill of Rights, a portion of

204. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) ("[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so.") (opinion of Rehnquist, C.J.).

205. See *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

the Constitution that is, by any fair measure, of “surpassing importance” (p. lv) in the lives and affairs of the American people.²⁰⁶

What I would like to suggest, then, is that those approaching Cogan’s work take it for what it is, and was presumably intended to be: a rather limited collection of original source materials that offers a “complete” vision of the origins and meanings of the Bill of Rights *only* if one is willing to accede to the proposition Cogan embraces. And that the defects I have identified in this work — if indeed defects they be — highlight flaws in originalism itself, both as it has been commonly practiced and in the extent to which it disregards the considered sentiments of the Framers and Founders about the nature and difficulty of constitutional interpretation. As Jack Rakove has observed:

With its pressing ambition to find determinate meanings at a fixed moment, the strict theory of originalism cannot capture everything that was dynamic and creative, and thus uncertain and problematic, in the constitutional experiments of the Revolutionary era — which is why, after all, the debates of this era were so lively and remain so engaging. Where we look for precise answers, the framers and ratifiers were still struggling with complex and novel questions whose perplexities did not disappear in 1788.²⁰⁷

The Framers and Founders understood that the document they crafted created a startlingly new and fundamentally different polity, a nation of and by the people that would govern through the innovative mechanisms of Compound Republic. And they appreciated that the words they used, and the concepts they expressed, were to be implemented by a form of government the likes of which the world had never seen. They were, moreover, pragmatists, who viewed both the governing and interpretive processes as exercises in trial and error, undertakings in which meanings would be “liquidated and ascertained” and understandings would grow as time passed. Marshall’s great opinion for the Court in *M’Culloch* recognized that dynamic, as did so many of the decisions made by a people, a Congress, and a Court who took the words of the Framers and Founders seriously, but understood nevertheless that they marked the beginning, rather than the end, of the interpretive enterprise. Dean Neil Cogan does us a great service by reminding us of the truth of that proposition, offering as he does a *Complete Bill*

206. For an intriguing argument that the individual rights aspects of the Bill of Rights were arguably of secondary interest to the Framers and Founders, see AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998). I have my reservations about this interpretation, especially in light of my reading of the value attached by the founding generation to rights *per se*, as opposed simply to structural guarantees. A discussion of those qualms is, understandably, beyond the scope of this review. For an initial expression of similar reservations, see Cass R. Sunstein, *Originalism for Liberals*, *THE NEW REPUBLIC*, Sept. 28, 1998, at 31.

207. RAKOVE, *supra* note 30, at 10 (1996).

of Rights that allows us the opportunity to ponder just what might make such an enterprise truly complete.