Restoring the foundations

Rachael J. Denhollander

Intelligent Design proponents are in a legal quagmire in America. Revisionist history and an activist judiciary have so managed to reshape the meaning of the Establishment Clause in the First Amendment that any attempts to introduce the theory of Intelligent Design into public education have stalemated. Without substantial reversal and return to the original intent of the United States Constitution, success in this area continues to be unlikely. This paper will examine the historical and precedential arguments for a return to an original-intent understanding of the Establishment Clause in the United States Constitution.

Few issues in America have drawn fire from as many quadrants of society as the issue of Intelligent Design (ID). Merely hinting at including the theory in public education has the ability to clearly display the sharp divide in all realms of American society. ID has become a prominent player in the culture war as constant controversy highlights the closed-off nature of the science community and displays the dogmatic humanism in the education field. It has showcased the sharp political divide in executive and legislative branches, and successfully demonstrated the abject failure of the legal system to fashion any form of consistent or historically accurate legal standard. In every area of American life, ID highlights the battle being waged across campuses, court rooms, and culture. Multiple attempts have been made to advance the theory or allow for a critique of Darwinian Evolution, but even the most innocuous have not succeeded. While a myriad of different approaches may need to be tried,[1] recent case law has made one aspect perfectly clear: America is in desperate need of a complete overhaul of current Constitutional jurisprudence, and a return to an original-intent understanding of key passages in the First Amendment.

Dick Thompson, senior counsel for Thomas Moore Law Center and attorney for the Dover School District in the most recent landmark case regarding ID,[2] concluded upon hearing the court's ruling, "What is clear from this decision is that our present Establishment Clause jurisprudence, as several Supreme Court justices have noted, is in hopeless disarray and in need of substantial revision."[3] This is perhaps the most pertinent synopsis of what may be needed if the academic realm is ever to open again to alternate theories of origin. While an overhaul of Establishment Clause jurisprudence is decidedly a monumental undertaking, and it is by no means certain the Court would accept it, it is arguably the only remaining option.

The necessity of an overhaul was made abundantly clear in the recent decision, *Kitzmiller vs Dover*,[2] a case in which a US District Court ruled it was unconstitutional to read a four-sentence declaration to school children which stated that evolution was a theory, rather than fact, and which informed students that ID was an alternate hypothesis which they could explore, if they so chose. A lawsuit was brought against the school district, arguing that the reading of the statement violated the Establishment Clause of the United States Constitution, because the theory was related to creationism and presupposed a deity. In response, the District asserted that ID was not a religious exercise both because the theory did not require any particular deity, merely an intelligent force, and because the hypothesis was based in observable science, rather than religious belief. During the trial, substantial evidence was presented to demonstrate the scientific nature of ID, but the Court chose to overlook it all, finding that, regardless of the validity of ID claims, to include the theory in public education is constitutionally prohibited simply by virtue of the fact that some form of deity is necessarily entailed.

This rationale, which essentially held that any incorporation of a deity is by default unconstitutional, is inescapably tied to the reshaping that has taken place in the last 60 years of the Establishment Clause in America. This reshaping is critical to understand, because under the Court's new definition of the Establishment Clause, many scholars and legal counsel have argued, quite persuasively, that even *if* ID were found to be a science, it would still be prohibited as government endorsement of religion simply by virtue of the fact it necessitates belief in a deity, an inherently religious concept.[4] Richard B. Katskee, Assistant Legal Director of Americans United for Separation of Church and State, and one of the principal attorneys for the plaintiffs in the *Kitzmiller* case, emphasized this, stating,

> "Whether intelligent design is science was not the ultimate question in *Kitzmiller*. *What really mattered was whether intelligent design is religion* ... [emphasis added]."[5]

While Katskee argued that part of this analysis entails proving that ID is not science, he also made it clear that the essential issue is the *religious* nature of ID, regardless of the validity of its scientific claims. *Kitzmiller* underscored the reality that, without a return to the original-intent understanding of the Establishment Clause, the fate of the ID movement in the public school system is, in all practicality, sealed.

The new understanding of the Establishment Clause, a line in the United States Constitution which simply reads

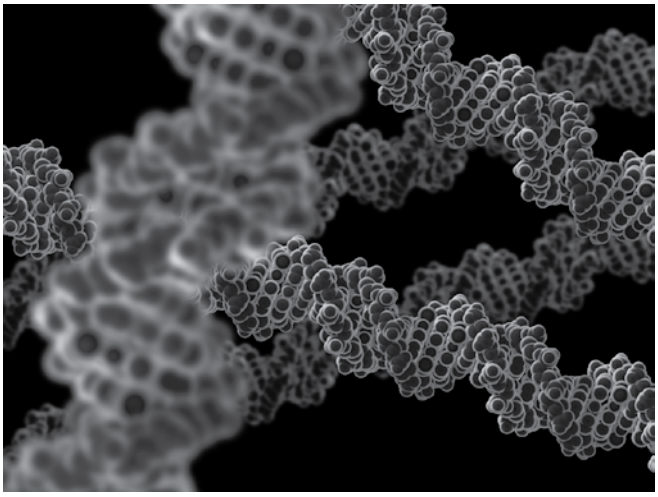

Figure 1. With the Court's reinterpretation of the Establishment Clause, no amount of evidence showing the scientific nature of intelligent design will be sufficient to gain its acceptance because, at its core, a higher power is still required.

"Congress shall make no law respecting an establishment of religion", came in 1947, in the case *Everson vs Board of Education*. This new understanding created in *Everson* in turn became the foundation for all Establishment Clause challenges which followed. In *Everson*, the court diverted from the long-held understanding of the words 'establish' and 'religion', to fashion a new interpretation of the clause which held that governmental expressions must be religiously neutral, rather than that the clause merely prevented the government from placing the force of law behind a particular religion.[6] *Everson*, in turn, formed the basis for both main tests the Court uses in determining whether the Establishment Clause has been violated: the *Lemon* test, and the *Endorsement* test.

The *Lemon* test requires a three-pronged analysis of any government action, and holds that the Establishment Clause has been violated if the government action fails any one of the prongs. Under the *Lemon* test, the court is required to analyze the following:

1. whether the statute has a valid, secular legislative purpose;
2. whether the statute's principal effect is one that neither advances nor inhibits religion;
3. whether the statute fosters excessive entanglement with religion.

The *Endorsement* test, proposed by Justice Sandra Day O'Connor, is similar in nature to aspects of the *Lemon* test, and requires the government to consider whether the reasonable observer would perceive government endorsement of religion. Both tests, in turn, share the same foundational errors, having their roots firmly grounded in the flawed understanding, proposed by the Court in *Everson,* of the First Amendment.

Indeed, the Court explicitly tied two of the prongs of the *Lemon* test directly to *Everson* in *School District of Abington Township vs Schempp*,[7] and also noted that the Endorsement test is merely "a refinement of the *Lemon* test",[8] rather than a new test with independent historical justification. Yet while some work has been done to refine or revise these two tests, very few attempts have been made to combat the foundational misconception proposed by *Everson*, though it is this flawed understanding that is central to the battle for educational integrity and ID in the public school classroom.

Justice O'Connor concisely set out the two considerations for interpreting the Constitution, in her concurring opinion in *Wallace vs Jaffree*,[9] and it is these two considerations which demand revisiting the current understanding of the Establishment Clause. Justice O'Connor correctly emphasized that the goal of the Court ought to be to

> "… frame a principle for constitutional adjudication that is not only grounded in the history and language of the First Amendment, but one that is also capable of consistent application to the relevant problems."

To these two standards, then, the interpretation in *Everson* should be held, and by these two standards, *Everson* fails abysmally.

Historical analysis of *Everson*'s definition of 'establish'

The Court has often observed that the Constitution must be interpreted in light of the historical understanding of that document. Justice O'Conner correctly pointed out in her concurring opinion in *Wallace vs Jaffree*[10] that the Court has looked to history in upholding legislative prayer,[11] property tax exemptions for religious institutions,[12] and Sunday closing laws.[13] In fashioning Constitutional theory, "a page of history is worth a volume of logic".[14] Thus, history and the intent of the Founders are central to a proper understanding of the Establishment Clause. Yet this necessary foundation has been largely ignored by the Court in shaping Establishment Clause jurisprudence to this point.

It has been noted both by members of the Court[15] and by history scholars that *Everson* contains a multitude of serious historical errors. So much so that Daniel L. Dreisbach characterized the criticism of *Everson* as being a "broad agreement among critics" that the Court employed a "selective, erroneous version of history" in reaching their conclusion.[16] This 'erroneous version of history' was a result of the *Everson* Court's failure to use the most relevant evidence of the Establishment Clause's meaning.

There are three long-recognized primary sources for determining the public understanding of the Establishment Clause: The Congressional debates concerning the Clause, the state conventions considering ratification of the Constitution,[17] and the practices of the first Congresses

who ratified the Constitution and the Bill of Rights.[18] The importance of these elements has been repeatedly affirmed by the Court in prior cases, noting that any act

> "… passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument ... is contemporaneous and weighty evidence of its true meaning."[19]

The Court has even gone so far as to state that the actions taken by the first Congress reveal the intent and application of the First Amendment.[11]

Perhaps even more pertinently, James Madison, who penned the original draft of the First Amendment, submitted it to Congress, and debated the resolution on the House floor, unequivocally stated that the Constitution *must* be interpreted according to the intent and understanding of the states which ratified it for "in that sense alone is it the legitimate Constitution".[20] Perhaps the most glaring problem of *Everson,* then, is that rather than relying on any of the three primary sources for determining intent, the Court relied instead almost solely on two independent sources: 1. a letter by Thomas Jefferson to the Danbury Baptist Association and, 2. Virginia's debates in ratifying their own *state* constitution—a reliance fundamentally in error.

The Court justified their reliance on the latter by stating that the provisions of the *Federal* First Amendment had the same objective and intent as Virginia's *state* constitutional protections. Yet the Federal Constitution was never intended to mimic or adopt one particular state's choice or protections. On the contrary, its purpose was to reserve to the states the right to govern. Virginia's Constitution is a demonstration of how one state chose to use the power reserved to it; it is in no way indicative of how the Federal government was intended to operate.

In addition to the fact that the Court's use of a state constitution to interpret Federal law violates the fundamental concept of Federalism, it is additionally less reliable than the Federal Constitutional debates because the proponent of Virginia's Constitution, Thomas Jefferson, was neither a member of Congress when the Federal Establishment Clause was drafted nor even present for its ratification. In choosing to rely solely on debates regarding a state constitution made by a man who was neither a member of Congress nor involved at all in creating the Federal provision, the Supreme Court fashioned for themselves a version of history which comports with their personal views, but in no way reveals the intent of the Constitution itself.

Reliance on Jefferson's letter to the Danbury Baptist Association is equally flawed, being both misplaced, and grossly misinterpreted. As Justice Rehnquist aptly pointed out in the dissenting opinion in *Wallace vs Jaffree*,[21] Jefferson and his letter are "a less than ideal source ... as to the meaning of the Religion Clauses" first, because Jefferson was in France during the writing and passage of the Amendment and, thus, entirely uninvolved in process and, second, because the letter itself was written 14 years after the Establishment Clause was enacted.

Furthermore, even had Jefferson's letter been an appropriate source, the Court went far wide of the intended meaning. Jefferson's long-abused metaphor of a "wall of separation" existing between church and state was not, as the Court proposed, intended to require religious neutrality by the government, but rather was intended to assure the Danbury Baptist Association that the government would not infringe on their religious freedom by establishing a national religion. Rather than supporting the Court's view in *Everson*, Jefferson's letter was intended to communicate protection and support of religion; not the suppression of it.[22]

This inconsistency can be seen when one holds the actions of the early Congress against the modern tests which the Court uses in Establishment Clause cases. While the current tests prohibit government action from being wholly religiously motivated, having the effect of endorsing religion, or resulting in the government's entanglement with religious enterprises, the early Congress enacted multiple laws which violate each of these prongs. Thomas Jefferson himself, as President, negotiated and received Senate approval for a treaty with the Kaskaskia Indians which provided for the support of a Catholic priest, and the building of a church, both maintained through Federal funds.[23]

On the same day the Congress considered the First Amendment, they also enacted the Northwest Ordinance, which provided funding for schools, stating that religion was an indispensable support for government.[24] Not surprisingly, many of these schools were sectarian. Presidents from Washington forward issued proclamations denoting the importance of God in the country's governing. Each of these acts noted above are but a minute portion of the numerous acts and proclamations done contemporaneously with, and subsequent to, ratification of the First Amendment, and each fail the Court's current tests for the Establishment Clause. The only conclusion one can reach, then, is that either the Founding Fathers were hypocrites who did not follow the Constitution which they themselves proposed and fought for, or the Court's tests are not an accurate interpretation of the Constitution.

Historical analysis of *Everson*'s definition of 'religion'

In every Establishment Clause challenge, the Plaintiff must prove two essential elements: 1) that the government is involved in religion, and 2) that such involvement has the effect of establishing a religion. While the Court's definition of 'establish' has often been challenged, much attention ought also be paid to properly defining the term 'religion' as well, for if the challenged action cannot be classified as a religious exercise, it is, in fact, impossible to conclude that the government has established it.

Much like with the overall understanding of the Establishment Clause, history is of supreme importance,

Photograph courtesy of wikipedia.org

Figure 2. The understanding of the Founding Fathers, at the time they ratified the Constitution, must be of supreme importance when defining the terms in that document.

with members of the Court going so far as to state, "The line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers."[25] In determining whether a theory acknowledging the existence of a deity is a religious exercise as opponents of ID have claimed, then, one must turn to the understanding of the Founding Fathers. In *Reynolds vs United States*,[26] the Court noted that, because the word 'religion' is not defined in the Constitution, "We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted."

One such historical fact on which the Court relied heavily was the definition James Madison gave to religion in his Memorial and Remonstrance Against Religious Assessments (1785), where he stated that religion was "the duty which we owe to our Creator and the Manner of discharging it". Unlike the court in *Everson*, Madison did not define religion merely as an *acknowledgment* of God, but rather as the *convictions* of a duty owed to God, and the active *practice* of fulfilling that duty. Interestingly enough, though, the Court in *Everson* relied heavily on misquoted portions of Thomas Jefferson's writings. Jefferson himself also shared Madison's view, interpreting the Establishment Clause to prohibit "intermeddling with religious institutions, their doctrines, discipline, or exercises."[27] This understanding is precisely what led the early Court to define religion similarly, stating that the term 'religion' referenced one's *personal views* of his *own* relations to God, the obligations those views imposed, and obedience to the perceived will of God.[28] According to early Supreme Court decisions, the 'religion' protected by the First Amendment was the right to hold to one's own beliefs regarding the duties he owed to God, and act freely to fulfill those duties.

It is this definition of religion which ought to determine whether teaching ID is a religious exercise for the purposes of the Establishment Clause. Opponents of the theory contend that it is a religious exercise simply because it requires the existence of a supernatural being. Yet in order for this argument to be correct, the Court must hold that any theory which incorporates the possibility of the supernatural is a religious activity; a ruling grossly out of step, not only with the historical meaning of religion, which required an actual practice of faith, but also with the prior opinions of the Court. This Court has considered the issue in dicta, and noted a clear distinction even between a governmental reference to God, and the practice of one's faith, concluding that even direct references to God are not 'religion' for the purposes of the First Amendment.

In *School District of Abington Township vs Schempp*,[29] Justice Goldberg noted in his concurring opinion that a reference to God is not an unconstitutional endorsement of *religion*. While the Court has invalidated instances of government-sponsored religious activities such as prayer, meditation, and fasting, on the reasoning that such activities are religious *exercises*, they have upheld government *acknowledgments* of religion, such as legislative prayer, our national motto, and public manifestations of the role that belief in God has played in shaping our country.[30] In the same way, ID is a theory which *acknowledges* the existence of the supernatural, but neither directly teaches it, nor compels a person to participate in such a belief.

In light of court precedent, and against the backdrop of history, if a return is made to an original-intent definition of 'religion', teaching ID in the public school system cannot be found to be an unconstitutional establishment of religion, because it is not religion at all. Indeed, it was largely on this exact basis that the Tennessee Supreme Court originally held, in *Scopes,*[31] that neither the Creation nor Evolution theory could be held 'religion', for nothing in its instruction relates to a religious exercise, or compels a person to hold and act upon a particular view of God. Thus, it in no way pertains to "the duties owed to God and the manner of discharging it". Rather, it is a scientific theory which contains an acknowledgment of an unspecified deity.

Everson's inability to be consistently applied

The second goal for which the Court must aim in fashioning a test is the capability of that test to be consistently applied. In this respect as well, the Court's current tests, *Lemon* and *Endorsement,* fall short, again due to the flawed understanding of the Establishment Clause painted in *Everson*. While neither test was without censure at the outset, both have become the subject of severe

criticism, not only from legal scholars and historians, but from individual members of the Court, and majority court opinions as well.

Justice Robert H. Jackson aptly noted that "The first essential of a lasting precedent is that the court ... [which] promulgates it be *fully committed* to its principle."[32] Yet 'fully committed' to the current tests this Court has never been. On the contrary, the tests have been modified and questioned,[33] even by the author of *Lemon* himself.[34] The Court has characterized the test as nothing more than a "guideline",[35] "not easily applicable",[36] "not wholly ... accurate.",[37] and "no more than [a] useful [signpost]".[38] The constitutional metaphors serving the foundation for these tests, the Court has said, are a "blurred, indistinct, and variable barrier",[39] which "is not wholly accurate"[40] and can only be "dimly perceived".[34] The Court has even gone so far as to state that that the *Lemon* test *has never been binding on the Court*,[34] and has refused to apply it in several recent cases.[41] Individual members have been even more direct, unequivocally stating the tests are "problematic",[42] an "insoluble paradox",[43] "a maze",[44] and lead to decisions that are reached using "little more than intuition and a tape measure".[45]

Such criticism is well founded, for not only have the tests yielded results which are incongruent with history, they have yielded results which are incongruent with other current case law. For instance, under current case law, a state may lend to parochial school children geography textbooks that contain maps of the United States, but the state may not lend maps of the United States for use in geography class.[46] They may lend the classroom workbooks, but not workbooks in which the parochial school children write.[47] A state may pay for bus transportation to religious schools,[48] but not for transportation from the parochial school to the public zoo or museum for a field trip.[49] Speech and hearing 'services' may not be conducted by the state inside the sectarian school,[47] but diagnostic testing is permitted.[49]

Neither test employed by the Court today meets the two goals required of a legal test: neither test is grounded in history, nor capable of consistent application. This is precisely why, as Dick Thompson noted after the decision in *Kitzmiller*, America's Establishment Clause jurisprudence is in need of "substantial revision".[50] If America's current interpretation is flawed, however, the question then becomes, "What interpretation is proper for considering Establishment Clause issues?" As with *Everson*, the two principles outlined by Justice O'Connor, history, and ability for consistent application, hold the key.

Proper historical understanding

Currently, there are three main theories of Constitutional interpretation fighting for prominence in the legal field, originalism, literalism, and living constitution. The 'living constitution' theory espouses the idea that the language of the Constitution must be interpreted in light of contemporary societal norms and changes, ultimately resulting in a document that evolves over time.[51] This theory has been most prominent among activist or left-leaning judges, as it provides a mechanism for judicial legislation and societal change, rather than requiring a strict interpretation of the law.[52]

Literalism is a theory which, in ultimate effect, bears close resemblance to the 'living constitution' ideology. Proponents of literalism suggest that the Constitution ought to be interpreted only according to its language, without the context of any outside source, including the historical understanding of the language, to interpret the meaning of the terms. While initially this may seem to be less subjective than the 'living constitution' theory, in reality the results are similar, because without the context of history, the actual language cannot help but be interpreted through the contemporary understanding of the words.

Originalism, which as a whole holds to the belief that the Constitution ought to be interpreted according to how it was originally intended to be, is the theory most prominent in conservative circles, as it ensures a more stable legal system, and also stands against the humanistic idea that law evolves with societal norms. Currently in Constitutional jurisprudence there remains somewhat of a debate over whether the 'original intent' of the Constitution refers to the subjective desires of each drafter (a theory often referred to as 'old originalism'), or whether the original intent of the Constitution is instead the contemporary usage and understanding of the language in the document ('original meaning').[53] For numerous reasons, including the inability to discern the individual desires of each drafter, the latter theory has emerged as the most defensible method of discerning original intent.[54]

As with *Everson,* it is imperative that whatever test the Court adopts conforms with the intent of the Founders, and also presents a clear, consistent test by which to measure alleged Constitutional infringements. When one considers the statements of the Founding Fathers regarding the Establishment Clause, the actions of early Congress, and the evils the Clause was intended to prevent, it is readily apparent that the correct test for measuring alleged violations should be whether a person is compelled by force or threat to conform his beliefs or actions to a particular religion.

James Madison, the Founding Father who drafted, proposed, and debated the First Amendment, unequivocally stated that the meaning of the Establishment Clause was that

> "Congress should not establish a religion, and *enforce* the *legal observation* of it *by law*, nor *compel* men to worship God in any manner contrary to their conscience."[55]

He further explained that the Amendment was in response to concerns expressed during state conventions to ratify the Constitution that Congress might rely on the Necessary and Proper Clause to establish a national religion.[55] This view, placing legal compulsion at the crux of the Establishment Clause, is consistent both with the expressly religious acts taken by the First Congress and early federal leaders, as well as the proposed constitutional

Figure 3. A proper understanding of the Establishment Clause that will remain consistent through the ages will always be based on the history surrounding its ratification.

declarations and amendments submitted during the state ratifying conventions, which held that the government should be prohibited from compelling religion by "force or violence".[56]

Interpreting the Clause as prohibiting the legal compulsion of religion is not surprising, given the Court's recognition that the "meaning and scope of the First Amendment" must be read "in light of its history and the evils it was designed forever to suppress",[57] noting that the Founders were attempting to avoid the system in England whereby it was a criminal offense to practice a non-state-sponsored religion, punishable by imprisonment. Perhaps even more pertinently, the text of the Amendment supports the view, as 'establishment' was defined in the first American dictionary as "the act of establishing, founding, ratifying or ordaining", such as in "[the] Episcopal form of religion, so called, in England".[58] It was this history that led Justice Scalia to conclude that

> "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*."[59]

This Court has further recognized, and yet failed to follow, the principle that actual compulsion is central to an Establishment Clause analysis, noting that the Clause "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship",[60] and

> "We repeat and again reaffirm that neither a state nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.'"[61]

The Founders, the actions of early Congress, state conventions ratifying the Constitution, and the Court, all recognize that actual compulsion is at the heart of the Establishment Clause, and it thus follows that a test which requires such a showing comports with the actual intent of the Founders, and is solidly rooted both in history and in case law.

Capability of consistent application

Justice Scalia aptly noted that coercion which is a result of legal force is "readily discernible", a desirable characteristic in fashioning Establishment Clause jurisprudence.[62]

While the *Lemon* and *Endorsement* tests require a psychoanalysis into the purposes of individuals and the mental state of bystanders, often invalidating nearly identical and, at times, seemingly innocuous laws based on the subjective motivation of individual legislators, the Coercion test articulated by Justice Scalia presents a bright-line rule for measuring government conduct. One need only examine the text and effect of a law to determine whether the government has compelled support of, or adherence to, a particular religious belief. This test allows for official acknowledgments of a religion when a party is not required to adopt a particular belief, such as invocations in the legislature, or the acknowledgments of God in our historical documents, yet it preserves the freedom of thought and conscience by unequivocally preventing the government from dictating what a person may think, believe, or do. It also allows the government to accommodate religion by providing funding or services to religious groups for the benefit of the broader community, so long as aid is given in a manner that is neutral in all aspects toward religion itself. Such an allowance comports with history (as the Founders and early Congress repeatedly authorized federal funds for religious purposes), but also prevents a person from being compelled to support a particular religion, by ensuring that the government has not 'played favorites' with one belief or sect. In doing so, the test yields much-needed clarity for difficult school-aid cases, where confusion and inconsistency have generally reigned supreme,[63] and provides a lasting test which is capable of being consistently applied in every Establishment Clause challenge.

Should the Court return to an original-intent understanding of the Establishment Clause and adopt the Coercion test, teaching ID in the public school system would certainly be found Constitutional, for no person is being compelled to adopt, profess, or take part in any belief system.

Conclusion—restoring the constitutional foundations in America

While a return to an original-intent understanding of the Establishment Clause would be a difficult, long road, it is one which ought to be considered and, at minimum, worked towards. Monumental as it may be, the legal field is no different than any other area of life—construction, family, education, and the like. If the foundation is allowed to be undermined, all that is built upon that foundation, and the results that follow, will be flawed as well.

References

1. See, e.g., Denhollander, R., Creation and the courtroom—where do we go from here? *J. Creation* **24**(1):113–120, 2010.
2. *Kitzmiller vs Dover*, 400 F. Supp. 2d 707, M.D.P.A., 2005.

3. Thomas Moore Law Center Press Release, *Court Issues Troubling Decision In Dover Intelligent Design Case*; Wed, 21 December 2005.
4. Wexler, J.D., *Religion in the Public Schools: Article: Kitzmiller and the "is it science" question. 5 First Amend. L. Rev. 90, 2006.*
5. Katskee, R.B., *Religion in the Public Schools: Article: Why it Mattered that Intelligent Design Isn't Science*, *5 First Amend. L. Rev. 112, 2006.*
6. For a more detailed discussion of the development of Establishment Clause jurisprudence, see Denhollander, R., If the foundations be Destroyed, *J. Creation* **24**(1):92–98, 2010.
7. 374 US 203, 1963.
8. *Wallace vs Jaffree*, 472 US 38, 69, 1985.
9. *Wallace vs Jaffree,* 472 US 38, 1985, Justice O'Connor concurring, quoting Jesse H. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 Minn. L. Rev. 329, 332–333, 1963.
10. *Wallace vs Jaffree*, 472 US 38, 1985.
11. *Marsh vs Chambers*, 463 US 783, 1983.
12. *Walz vs Tax Commission of the City of New York,* 397 US 664, 1970.
13. *McGowan vs Maryland*, 366 US 420, 1961.
14. *New York Trust Co. vs Eisner*, 256 US 345, 349, 1921.
15. See, e.g., *Wallace vs Jaffree,* 472 US 38, 1985, Justice Rehnquist dissenting.
16. Daniel L. Dreisbach, *A Lively and Fair Experiment: Religion and the American Constitutional Tradition*, 49 Emory L.J. 223, 232, 2000.
17. "Both the Constitution and its Amendments ... became supreme law only by virtue of their ratification by the States, and the understanding of the States should be as relevant to our analysis as the understanding of Congress." *Marsh vs Chambers,* 463 US 783, 815, 1983, Justice Brennan dissenting.
18. "Equal regard must be given not only to the views of others who participated in [the First Amendment's] drafting, but also to the understanding of the Congress which submitted the amendment to the states and to the understanding of the states which ratified it." Paul G. Kauper, *Everson vs Board of Education: A Product of Judicial the Judicial Will*, Ariz. L. Rev. 307, 318, 1973.
19. *Wisconsin vs Pelican Insurance Co*., 127 US 265, 297, 1888.
20. James Madison, *Letter to Henry Lee,* 25 June 1824.
21. *Wallace vs Jaffree*, 472 US 38, 92, 1985, Justice Rehnquist dissenting.
22. David Barton, *The Separation of Church and State,* 1 January 2001, at www.wallbuilders.com/LIBissuesArticles.asp?id=123, retrieved 20 December 2010.
23. 2 Charles Kappler, *Indian Affair—Law and Treaties,* 67, 1904.
24. 1 Stat. 50, 52 (a), 1789.
25. *School District of Abington Township vs Schempp,* 374 US 203, 295, 1963, Justice Brennan concurring.
26. *Reynolds vs United States*, 98 US 145, 162, 1878.
27. 11 *Jefferson's Writings,* 428–430, Monticello Ed., 1905.
28. *Davis vs Beason*, 133 US 333, 1890.
29. 374 US 203, 1963.
30. *Engel vs Vitale*, 370 US 421, 1962.
31. *Scopes vs state*, 289 S.W. 363, 1927.
32. Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334, 335, 1944.
33. See, e.g., *Mueller vs Allen*, 463 US 388, 403, n. 11, 1983.
34. *Lynch vs Donnelly*, 465 US 668, 673, 1984.
35. *Committee for Public Education & Religious Liberty vs Nyquist*, 413 US 756, 1973.
36. *Meek vs Pittenger,* 421 US 349, 358, 1975.
37. *Lynch vs Donnelly,* 465 US 668, 1984.
38. *Mueller vs Allen*, 463 US 388, 394, 1983, citing *Hunt vs McNair*, 413 US 734, 741, 1973.
39. *Tilton vs Richardson*, 403 US 672, 677–678, 1971.
40. *Wolman vs Walter*, 433 US 229, 236, 1977.
41. *Marsh vs Chambers*, ref. 11; *Larson vs Valente*, 456 US 228, 1982.
42. *Wallace vs Jaffree,* 472 US 38, 68, 1985, Justice O'Connor concurring.
43. *Wallace vs Jaffree,* 472 US 38, 109, 1985, Justice Rehnquist dissenting.
44. *Edwards vs Aguillard*, 482 US 578, 636, 1987, Justice Scalia dissenting.
45. *County of Alleghany vs American Civil Liberties Union,* 492 US 573, 676, 1989, Justice Kennedy dissenting.
46. Compare *Meek vs Pittenger*, 421 US 349, 362–366, 1975, with *Wolman vs Walter,* 433 US 229, 249, 1977.
47. *Meek vs Pittenger,* 421 US 349, 1975.
48. *Everson vs Board of Education*, 330 US 1, 1947.
49. *Wolman vs Walter,* 433 US 229, 1977.
50. Thomas Moore Law Center Press Release, *Court Issues Troubling Decision In Dover Intelligent Design Case*; Wed, 21 December 2005.
51. Adam Winkler, *A Revolution Too Soon: Woman Suffragists and The "Living Constitution",* 76 NYULR 1456, 1463.
52. For examples of this theory in modern case law, see, e.g., *Missouri vs Holland,* 252 US 416, 1920; *Trop vs Dulles*, 356 US 86, 1958.
53. For an introduction to this debate, see Larry Solum, *Semantic and Normative Originalism: Comments on Brian Leiter's "Justifying Originalism"*, 30 October 2007, at lsolum.typepad.com/legaltheory/2007/10/semantic-and-no.html, retrieved 20 December 2010.
54. See, e.g. Scalia, A., Originalism: The Lesser Evil, *57 U. Cin. L. Rev.* **849**, 1989.
55. 1 Annals of Congress 730.
56. *I The Debates on the Several State Conventions on the Adoption of the Federal Constitution—Together with the Journal of Federal Constitution—Together with the Journal of the Federal Convention*, 334, Elliot, J. (Ed.), Washington, 1938.
57. *Everson vs Board of Education*, 330 US 1, 14–15, 1947.
58. 1 N. Webster, American Dictionary of the English Language, 1st ed., 1828.
59. *Lee vs Weisman*, 505 US 577, 640, 1992, Justice Scalia dissenting.
60. *Cantwell vs Connecticut*, 310 US 296, 303, 1940.
61. *Torcaso vs Watkins,* 367 US 488, 495, 1961. See also *Zorach vs Clauson,* 343 US 306, 313–314, 1962. The government "may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction."
62. *Lee vs Weisman*, 505 US 577, 642, 1992, Justice Scalia dissenting.
63. *Wallace vs Jaffree,* 472 US 38, 1985, Justice Rehnquist dissenting, citing the unprincipled results the Court has reached in school-aid cases.

Rachael J. Denhollander is an attorney with the California Bar Association, receiving her Juris Doctorate from Oak Brook College of Law in 2008. She has been active in worldview and legal arenas teaching biblical worldview, Christian legal philosophy, and appellate advocacy to attorneys and students.