

Should the “Hollow Core” of Constitutional Theory Be Filled with the Framers’ Intentions?

By Stephen B. Presser

Federalism & Separation of Powers Practice Group

A Review of:

The Hollow Core of Constitutional Theory: Why We Need the Framers, by Donald L. Drakeman (Cambridge University Press), <https://www.cambridge.org/core/books/hollow-core-of-constitutional-theory/6F565573B88F4E15D42F87A045A32132#>

About the Author:

Stephen B. Presser is the Raoul Berger Professor of Law Emeritus at Northwestern University Pritzker School of Law.

Note from the Editor:

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, we offer links to other perspectives on the issue. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

Other Views:

- Lee J. Strang, *Originalism’s Promise, and Its Limits - Symposium: History and Meaning of the Constitution* 63 CLEV. ST. L. REV. 81 (2014), available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol63/iss1/8/>.
- John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371 (2019), available at <https://scholarlycommons.law.northwestern.edu/nulr/vol113/iss6/4/>.
- Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENTARY 71 (2016), available at <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1025&context=comm>.

I. THE PROBLEM: JUDICIAL ARBITRARINESS

In one of the most memorable judicial sallies of the last few years, Chief Justice John Roberts—himself no stranger to judicial legerdemain (more about that below)—exploded at his five colleagues who had just discovered, in *Obergefell v. Hodges*, a previously unknown constitutional right to marry a person of the same sex:

The majority’s decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court’s precedent. The majority expressly disclaims judicial “caution” and omits even a pretense of humility, openly relying on its desire to remake society according to its own “new insight” into the “nature of injustice.” As a result, the Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. *Just who do we think we are?*¹

Who, indeed? No one should have been surprised by *Obergefell*, however, since the Supreme Court since Earl Warren’s time—and possibly even earlier, when the New Deal Court reversed itself on the scope of the United States Congress’s power to regulate interstate commerce in the late 1930s²—has been engaged more-or-less openly in a project to remake much of constitutional law without resorting to Article V.

So blatant has this arbitrary judicial behavior been that it is no exaggeration to say that, for almost the last 70 years, the principal concern among constitutional law scholars in this country has been attempting to come up with a defense for the creative activity of the Warren Court and its successors, such as the remarkable 7-Justice majority that decided *Roe v. Wade*.³ Given that the Court’s constitutional change of this type has been in the direction favored by liberals and progressives, and given that liberals and progressives make up the majority of law school faculties, this activity has been embraced by most of our law professors with enthusiasm, if not exactly jurisprudential acuity or fidelity to law. Still, a few have dissented, and Donald Drakeman is among their ranks.

1 *Obergefell v. Hodges*, 576 U.S. 644, 687 (Roberts, C.J., dissenting) (emphasis added) (internal citation omitted).

2 *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

3 *Roe v. Wade*, 410 U.S. 113 (1973). Of *Roe* it might be said—and was, pungently and eloquently by one of our most brilliant and fearless constitutional scholars—that “Bluntly put: *Roe* is as wrong as wrong can be, and everybody knows it.” Michael Stokes Paulson, *Repudiating Roe (Part I): The Most important Abortion Case in 30 Years*, PUBLIC DISCOURSE, June 28, 2021, <https://www.thepublicdiscourse.com/2021/06/76590/>.

Among the best parts of the work here under review is the title: “The Hollow Core of Constitutional Theory.”⁴ It reminds us that much of the debate over constitutional interpretation in the last few decades has been arid and of interest only to specialists because we have all but lost sight of what it is a constitution is supposed to do, and, in particular, what the role of the Justices of the Supreme Court was originally conceived to be. Drakeman recognizes this, but the significance of his effort might be revealed a bit more satisfactorily by considering that there was a profoundly important debate on these issues which ran from the late 1950s to the late 1970s.

For our purposes, we can limit that debate to just a few participants, some of whom are at least noticed in passing by Drakeman, but some of whom are not mentioned at all. Perhaps the most important was Herbert Wechsler, who wrote what is still one of the most important relevant articles: “Toward Neutral Principles of Constitutional Law.”⁵ Wechsler, much like Drakeman, had the courage that is sometimes necessary to state the obvious: that the Warren Court was making constitutional law up as it went along.⁶ The Warren Court was, to use a now trendy term employed by Drakeman, “consequentialist.”⁷ It cared little about doctrinal niceties and simply strove to get what it believed was the right result, or to do what the then-Chief Justice famously declared was “fair.”⁸ Wechsler reminded us that the need to make new rules was why we have *legislatures*, and that the task of courts was reasoned elaboration from the existing rules, not promulgating new ones.

Anticipating the activities of the Justices who would eventually enact such judicial legislation as *Roe* and *Obergefell*, there were defenders of the Warren Court, most notably Judge J. Skelly Wright of the District of Columbia Circuit, who echoed the idealism of the Chief Justice and called for a jurisprudence of “goodness”—one that would realize the wishes of progressives for a remaking of American society along lines they favored.⁹

One disciple of Wechsler, Yale’s Alexander Bickel, archly noted that the Warren Court’s ambitious plan of “centralization, equality and legality” was simply one version of an ideal polity for the United States, and one that might well *not* have been shared by the majority of Americans. In a provocative series of lectures from the same podium Wechsler had used, Bickel made the stunning claim that the Warren Court had worked from an imagined past and had misconstrued the future needs of our polity.¹⁰ This is the obvious problem of consequentialist constitutional law interpretation—that a judge is not actually in a position to determine the political preferences of the populace—and, to his credit, Drakeman sensibly rejects consequentialist jurisprudence on that ground.

Consequentialist jurisprudence is also, of course, flagrantly undemocratic, since our constitutional principle of separation of powers dictates that it is the people’s elected representatives, not their appointed, life-tenured judges, who are supposed to make law. Wechsler and Bickel, then, and now Drakeman, were following Blackstone in sensing that the temptation to do equity is one that must be resisted if we are to have the benefits of the rule of law, since it is actually better to have a system of pure law than it is to be guided only by what the old common lawyers called “the Chancellor’s foot.”¹¹

The outrageous audacity of what the Warren Court did was perhaps best revealed in the work of a man whose project was very similar to Drakeman’s, and who Drakeman does at least cite, although sparingly. This was Raoul Berger, whose masterpiece, *Government by Judiciary*,¹² was a frontal attack on the Warren Court on the grounds that it failed to understand that its assigned task was simply to effect the intentions of the framers, the precise principle which animates Drakeman’s work. Like Drakeman’s, Berger’s constitutional theory grew out of his close reading of English common law authorities, in particular Blackstone and Coke.¹³ As indicated in more detail below, Drakeman uses his intentionalist approach to evaluate and, in some instances, to question the Supreme Court’s interpretation of particular constitutional provisions. Berger fearlessly went much further and argued that the Warren Court (and its successors) were actually betraying the framers’ most basic principles of constitutional structure, in particular the *separation of powers* (which dictates that judges do not make law) and *federalism* (which means that

4 DONALD L. DRAKEMAN, *THE HOLLOW CORE OF CONSTITUTIONAL THEORY: WHY WE NEED THE FRAMERS* (2021).

5 Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Wechsler, delivering the Oliver Wendell Holmes, Jr. Lecture at the Harvard Law School, was replying to the lecture delivered one year before, from the same podium, by Judge Learned Hand, who had also criticized the Warren Court from an originalist perspective. See generally LEARNED HAND, *THE BILL OF RIGHTS* (1958). On the debate among Hand, Wechsler, J. Skelly Wright, and Alexander Bickel, see generally STEPHEN B. PRESSER, *LAW PROFESSORS: THREE CENTURIES OF SHAPING AMERICAN LAW*, ch. 11 (2017).

6 Drakeman emphasizes that judicial arbitrariness is contrary to the rule of law and that judicial policy-making is arbitrary. Accordingly, Drakeman criticizes the work of “noninterpretivist” scholars such as Brian Leiter, Cass Sunstein, and Mark Tushnet. See generally Drakeman, *supra* note 4, at 178-96. Wechsler excoriated the Warren Court’s arbitrary policy-making in its equal protection decisions such as *Brown v. Board of Education*. 347 U.S. 483 (1954).

7 See, e.g., Drakeman, *supra* note 4, at 74.

8 See, e.g., *Earl Warren’s Way: ‘Is it Fair?’*, TIME MAG., July 22, 1974, at 66 (Obituary of Earl Warren).

9 See generally J. Skelly Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971).

10 ALEXANDER BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970).

11 For Blackstone’s argument that it is better to have law without equity than equity without law, see 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 62 (1765). For explication of the notion that the “Chancellor’s foot,” is an unsatisfactory jurisprudential guide, see, e.g. H. Jefferson Powell, “*Cardozo’s Foot*”: *The Chancellor’s Conscience and Constructive Trusts*, 56 LAW & CONTEMP. PROBLEMS 7 (1993).

12 RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977).

13 For a useful study of Berger’s approach, see Johnathan G. O’Neill, *Raoul Berger and the Restoration of Originalism*, 96 NW. U. L. REV. 253 (2001).

the *states*, not the federal government, much less its judiciary, are the designated primary promulgators of public policy).¹⁴

Berger was an important influence on participants in conferences organized by the Federalist Society for Law and Public Policy, the publisher of this journal, and that Society was brought into existence because its founders understood that the Supreme Court, under Earl Warren, and quite possibly under his New Deal predecessors, had either forgotten or seriously eroded those two great structural principles of our Constitution. The ideas that prompted the eventual success of the Federalist Society, and the work of Justices such as Antonin Scalia and Clarence Thomas, have led to a renaissance in constitutional law scholarship rededicated to the work of the framers, or to put it in the language now routinely employed, to the promulgation of “originalist” theories of constitutional interpretation. Drakeman’s book is clearly part of that effort, and it is a worthy companion to two key tomes that he frequently cites, two attempts to fill in Drakeman’s “hollow core”: Lee Strang’s effort to interpret originalism through the lens of Thomistic natural law,¹⁵ and John McGinnis and Michael Rappaport’s approach to originalism as an embodiment of majoritarian popular sovereignty.¹⁶

II. DRAKEMAN’S SOLUTION: LOOK TO THE FRAMERS’ INTENTIONS

The particular spin that Drakeman applies is to argue that the key to originalism is, just as Raoul Berger maintained, to look for the *intent* of the framers, rather than the somewhat more esoteric search for the contemporary “public meaning” of constitutional terms, in which search, for example, Justice Scalia usually engaged.¹⁷ Drakeman suggests that the intent-based approach is more satisfactory and more clarifying, because it requires a focus on the actual problems the framers confronted, and it is thus more faithful to what Drakeman argues were the policy choices the creators of the Constitution sought to make.

After a Preface acknowledging that he rejects the “living Constitution” view as arbitrary, and stating his position that we not only *can* discern the framers’ intentions but that it is our *duty* to adhere to them, Drakeman, in 10 short chapters, outlines a blueprint for sensible constitutional interpretation for our time. In the course of his clear and thoughtful exposition, informed by a myriad of references to contemporary scholars, he seeks to solve two currently vexing doctrinal problems: the nature of permissible federal taxation under the Constitution, and the scope of the First Amendment’s prohibition on the “establishment” of religion.

Chapter One, “The Framers and Contemporary Constitutional Theory,” is a brief survey of the unsatisfactory nature of the work of several prominent constitutional theorists, particularly those who, in essence, argue for a legislative role for judges, including giants such as Jack Balkin, Cass Sunstein,

David Strauss, Ronald Dworkin, and Richard Posner. This chapter also explains why Drakeman casts his lot with other prominent adherents to “original intent” such as Edwin Meese, Raoul Berger, and Robert Bork, and why he rejects the “original public meaning” school of Justice Scalia.

Chapter Two, “The Framers Intentions: Who, What and Where,” signals Drakeman’s dependence on the Anglo-American common law tradition of Sir Edward Coke, William Blackstone, Joseph Story, and William Rawle, for which the “will” of the “law-making body”¹⁸ is the indispensable guide to interpretation. This is his key methodological exegesis, in which, using admirably clear and witty prose, he demonstrates how the purported difficulties of discerning the subjective “intent” of a myriad of individuals can be overcome by careful discernment of the legislative purpose at issue and the “end-means choice” employed.¹⁹ Drakeman acknowledges that there are cases where intent is ultimately elusive, and he says that in such cases the judiciary should leave choices to the legislature; but he maintains that in some cases the framers’ intent is certainly discernible.

Chapter Three, “Original Methods and the Limits of Interpretation,” indicates Drakeman’s agreement with recent work by John McGinnis and Michael Rappaport which argues that the framers were, in fact, “originalists” and demonstrates how the framers did leave some room for the meaning of some constitutional provisions to evolve, just as the framers understood the English common law’s dynamic interpretation of Magna Carta. This is a laudably frank and sophisticated recognition that our constitutional tradition may have multiple legitimate interpretative strategies. Still, Drakeman is careful to indicate that focus on the framers’ intentions prevents these multiple traditions from resulting in arbitrary judicial behavior. In a nice turn of phrase, he condemns the 20th century living constitutionalists’ notion that “ends justify meaning.”²⁰

Chapter Four, “Original Methods Updating,” continues Drakeman’s explication of permissible dynamic constitutional interpretation. Intriguingly, though he had earlier rejected Antonin Scalia’s general constitutional theory of “original public meaning,” Drakeman praises the Justice’s dynamic Fourth Amendment decisions. Drakeman underscores that he opposes arbitrary judicial discretion, but he makes clear that the application of old law to new facts—the enterprise in which he says Scalia was engaged in his Fourth Amendment opinions—is perfectly permissible and necessary. In this chapter, Drakeman defends *Brown v. Board of Education* as just such an exercise, arguing that advances in psychological knowledge invited an appropriate new application of the 14th Amendment’s Equal Protection Clause to end racial segregation in public education. As discussed below, this is problematic and might be best explained as Drakeman’s attempt to follow the prominent Yale Law Professor Jack Balkin’s dictum

¹⁴ See generally *id.*; RAOUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* (1987).

¹⁵ LEE J. STRANG, *ORIGINALISM’S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION* (2019).

¹⁶ JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* (2013).

¹⁷ See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed., 2018).

¹⁸ Drakeman, *supra* note 4, at 27.

¹⁹ *Id.* at 53.

²⁰ *Id.* at 73.

that no theory of constitutional interpretation is acceptable unless it validates *Brown*.²¹

Chapter Five, “The Semantic Summing Problem,” further elaborates Drakeman’s disagreement with original public meaning approaches to the Constitution and contains his explication of the two particular constitutional provisions he uses as models in support of the validity of his framers’ intentions approach: the scope of Congress’s taxing power and the meaning of the First Amendment’s Establishment Clause. This chapter thus forms a sort of core to the book. In the opinion of this reviewer, Drakeman certainly must be correct on the meaning of the Establishment Clause,²² but his effort to suggest that John Roberts correctly interpreted Congress’s taxing power in *NFIB v. Sebelius*²³ is less convincing, as indicated below.

Chapter Six, “Is *Corpus Linguistics* Better than Flipping a Coin?” is a bit of a detour to explore the possibility that newly-available digitized databases might be able to reveal once and for all, through sophisticated searches, the precise nature of the framers’ intentions. Drakeman wisely concludes that given the difficulties posed by questions of representativeness of the available data and of formulating the appropriate search queries, as well as the possible existence of multiple meanings of terms used in 18th century discourse, at this stage of development of *Corpus Linguistics*, coin-flipping as a determinant of meaning is likely to be as accurate as sophisticated database searching.

Given the methodological difficulties revealed in Chapter Six, Chapter Seven, “The Framers’ Intentions Can Solve the Semantic Summing Problem,” is a sensible restatement of Drakeman’s key thesis that if we bear in mind the “ends-means” policy choices with which the framers were confronted, we can arrive at a single clear meaning for constitutional provisions. Here again Drakeman turns to the meaning of the Taxation and Establishment Clauses in the Constitution. Drakeman concludes that Chief Justice Roberts correctly decided *NFIB v. Sebelius* (the Obamacare decision) by interpreting the legislation’s “penalty” for failing to purchase health insurance as a “tax.” He argues that this interpretive move was consistent with the manner in which the framers had used the term “tax,” for example in the early case of *Hylton v. U.S.*²⁴

Whatever the meaning of the word “tax” to the framers, however, Drakeman fails to consider the more troubling questions of the consistent and repeated statements of the ACA’s proponents that the penalty was *not* a tax, and the implication, made manifest in the dissents in *NFIB v. Sebelius*, that whatever Congress’s taxing

power, if Congress possessed the power to compel such acts of “commerce,” the Tenth Amendment and federalism had become virtual dead letters. If the Federalist framers were able to be queried, one finds it hard to believe they would have approved of Roberts’s *deus ex machina* performance in the case (assuming that his interpretation was meant to avoid plunging the Court into the political maelstrom of overruling the signature act of the Obama Administration). Surely an appropriate theory of constitutional interpretation ought to condemn such an act as improper politics rather than neutral interpretation of framers’ intent.

Even so, as indicated earlier, Drakeman is convincing in his other argument in this chapter, that the original policy choice made in the First Amendment’s Establishment Clause was a federalism-based decision to leave the question of the appropriate treatment of religious matters to the states, and simply to bar Congress from establishing a mandated national sect. This implies, of course, that all the First Amendment decisions that have interpreted the Establishment Clause to bar any favoring of religion over non-religion are incorrect, as I and others have argued.²⁵ Instead, as Drakeman understands, it was the framers’ intention that the government should actively encourage public religious observances.

Chapter 8, “Interpretation and Sociological Legitimacy,” is Drakeman’s exploration of several scholars’ thought regarding how the Court must be concerned with elite and public opinion regarding the legitimacy of its interpretations. Drakeman wisely suggests, however, that the legitimacy of the Court’s interpretative operations actually depends only upon its adherence to the framers’ intent. Drakeman also observes that a majority of the American people actually understand this, and he implies that this understanding is instrumental in creating a situation where 70% of American voters believe that the question of who appoints Supreme Court Justices is of vital concern.

Chapter 9, “Noninterpretive Decisions,” underscores and repeats Drakeman’s condemnation of prominent scholars, including, in particular, Brian Leiter and Cass Sunstein, who have essentially advocated the appropriateness and inevitability of the Supreme Court’s functioning as a national Super-Legislature. Here, without reference to them, Drakeman echoes the ideas of Wechsler and Bickel. Further, Drakeman not only criticizes the proponents of “non-interpretive” constitutional theory, but stresses the importance of the Justices’ frankly acknowledging what it is that they are doing. While stressing the importance of transparency, Drakeman takes a swipe at one of the founders of Critical Legal Studies, now distinguished constitutional scholar and Harvard Law Professor Mark Tushnet, who once wrote that were he a judge he would adopt whatever grand theory of interpretation was then in vogue, but would nevertheless simply seek to render rulings that would advance socialism.²⁶ This chapter also reviews the arguments that courts lack the resources and the abilities presumably possessed by legislatures, enabling the latter,

21 *Id.* at 94 (noting that the same point has also been made by libertarian constitutional theorist Randy Barnett).

22 At least that’s the conclusion I’ve also come to, after reviewing contemporary materials regarding the framers’ intentions, in much the manner Drakeman did. See STEPHEN B. PRESSER, RECAPTURING THE CONSTITUTION: RACE, RELIGION, AND ABORTION RECONSIDERED 225-41 (1994) (concluding that the purpose of the First Amendment’s Establishment Clause was to leave religious matters to the states and to deny the federal government the power to mandate a national sect).

23 *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

24 3 U.S. 171 (1796).

25 See *supra* note 22.

26 Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981). Tushnet wrote that piece 40 years ago, of course, in the beginning of his academic career, and one wonders if he would take the same position now.

but not the former, more accurately to weigh the costs and benefits of promulgating particular policies.

A final chapter, Drakeman's "Conclusion," realistically reviews this country's judicial history of static and dynamic interpretative behaviors, but once again makes clear Drakeman's position that our constitutional structure of separation of powers means that the only legitimate judicial strategy is to leave law-making to the legislature and the people, and to defer to the intentions of the framers of the Constitution and laws. Once again Drakeman stresses that he (like his predecessor Berger) is following in the steps of Coke and Blackstone. He also repeats an earlier suggestion that even in doing constitutional interpretation, Justices can occasionally follow the English common law tradition of "new thinking in old directions." This is Drakeman's way of suggesting some potential for judicial updating of the Constitution, as in his earlier example of Scalia's Fourth Amendment decisions. Here, of course, though he does not quote it, Drakeman is invoking the old saw about "new wine in old bottles," or to use Coke's phrase, "from the old fields, new corn." Drakeman thus adopts a Burkean perspective on the inevitability of some legitimate change, but not every reader will leave convinced that a clear line has been drawn between illegitimate "non-interpretive" judging and permissible judicial "updating."

III. PUSHING DRAKEMAN'S IMPLICATIONS EVEN FURTHER

Drakeman writes with clarity, wit, and power, and if there is a general criticism to be made of his approach, it is probably only that he fails to explore some of the implications of his understanding that there is a judicial obligation to be bound by the framers' intent. I have already indicated some reservations about Drakeman's slighting some matters relating to federalism and the separation of powers, but for a book that brilliantly argues that there is a "hollow core" that needs to be filled by what the framers thought, there is relatively little about that thought itself.²⁷ In particular, and in contrast to Lee Strang's work,²⁸ there is very little consideration given to what we might describe as the metaphysical background for the Constitution. In our time, with secular humanism in the saddle in most of the legal academy and on most of the bench, and given Drakeman's expertise in the area,²⁹ it might have been useful to have some additional reminders that many framers thought their Constitution could not be successfully implemented by any but a moral and a religious people. This might make the misconceived nature of the Court's current Establishment Clause jurisprudence even more manifest.³⁰

Nevertheless, Drakeman is clearly onto something with his recognition that the constitutional structure's separation of powers restraint needs more deference from the Court. In this

regard, one might quibble with his concession to those who say that no constitutional theory that doesn't approve of *Brown* passes muster. As Drakeman's predecessor intentionalist Raoul Berger dramatically demonstrated, the Warren Court's "equal protection" jurisprudence violated the separation of powers insofar as it was judicial legislation. And for Berger, it was equally concerning that in taking matters such as education (and, as Alexander Bickel argued, many other policy subjects), out of the purview of state and local governments, the Warren Court undermined the vital check on federal power that was reflected in the 10th Amendment: the Constitution's federalist structural safeguard. The work of undermining federalism was almost completed with cases such as *Roe* and *Obergefell*, where the Supreme Court again took upon itself matters intended for the resolution of the governments closest and most responsive to the people. Given the explosive growth of the federal leviathan in our time, and given the possible constitutional betrayal by the "administrative state" that has ensued,³¹ perhaps it is more convincing to say that a constitutional jurisprudence that approves of *NFIB v. Sebelius* and that does not challenge *Roe* and *Obergefell* is deficient. Perhaps Drakeman, with his measured, calculated, and careful approach, will illuminate these implications in his next work.

For now, though, we can be grateful that, like Strang, Drakeman has begun to explore the damage the Court has done to our polity by forgetting or disregarding the original intent of the First Amendment's Establishment Clause, and by neglecting the central insight of the importance of the moral and spiritual dimension of temporal existence it was designed to protect.³² Even Americans do not live by bread alone, and our framers knew that.³³ Further reflection on the federalism and Establishment Clause issues Drakeman explores might even lead to the conclusion that the Warren Court made a fundamental error when, through an ill-conceived First Amendment incorporation doctrine applied in its school prayer and Bible reading decisions, it took away from state and local governments part of the means of ensuring that the American people were the kind of moral and religious citizens who would possess the virtue needed to maintain a republic. A candid observer of current American politics might well worry about whether our republic is now endangered as never before. If it is to survive, and if our constitutional tradition of deference to the framers' structural and spiritual insights are to be preserved, works like Drakeman's are invaluable. Perhaps the most important service of scholars such as Drakeman, Strang, McGinnis, and Rappaport, with their aim to return us to the intentions of the

writing the work under review it would have been a different book, and it was. See generally Presser, *Recapturing*, *supra* note 22.

27 For some sage musings in this regard, see, e.g., *THE AMERICAN FOUNDING: ITS INTELLECTUAL AND MORAL FRAMEWORK* (Daniel N. Robinson & Richard N. Williams eds., 2012), in particular Chapter Two by Michael Novak, "The Jewish and Christian Principles of the Founders."

28 See Strang, *supra* note 15.

29 See, e.g., DONALD L. DRAKEMAN, *CHURCH, STATE, AND ORIGINAL INTENT* (2009).

30 This particular quibble with Drakeman should be taken with a grain of salt, since it is the proverbial and perennial reviewer's gripe that if he were

31 See generally PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).

32 See Novak, *supra* note 27. See also PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (rev. ed. 2004).

33 The failure to account for a spiritual dimension in human existence, the failure to understand that there are, indeed, timeless universal truths that transcend our temporal experience is a profound failing of our times, and a difficulty that has been with us, off and on, for centuries. See generally RICHARD WEAVER, *IDEAS HAVE CONSEQUENCES: EXPANDED EDITION* (2013).

framers, would be to produce in our Justices the sort of humility that Chief Justice Roberts called for in *Obergefell* and apparently forgot in *NFIB v. Sebelius*.

At an even deeper level, one can see that the majority that decided *Obergefell* seemed to manifest the sentiment expressed in the infamous “mystery passage” of *Planned Parenthood v. Casey*: “at the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”³⁴ If the aim of human existence were only the fulfillment of individual desires, and if the Constitution was designed for what some psychologists once called “self-actualization,” this stunningly solipsistic perspective might make some sense. There is a rather different view available, to which now-Justice Amy Coney Barrett alluded when she reminded a commencement audience at Notre Dame that it was our purpose here on earth to prepare the way for the Kingdom of God.³⁵ The ultimate implication of Drakeman’s inquiry is to cause us to wonder which view—Kennedy’s expressed in the “mystery passage,” or Barrett’s—is in closer correspondence with the intention of the framers. If we seriously absorb from Drakeman the lesson that we have much to learn from the English common law’s method of interpretation as limned by Blackstone, should we also contemplate the implication of Blackstone’s view (acknowledged by some of our framers) that the English common law incorporates Christianity?³⁶

34 *Planned Parenthood v. Casey*, 505 U.S. 833, 861 (1991).

35 Amy Coney Barrett, *Associate Professor Amy Coney Barrett, Diploma Ceremony Address*, Commencement Programs (2006), available at https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1013&context=commencement_programs.

36 For the details of what he believed to be the common law’s incorporation of Christianity, see 4 WILLIAM BLACKSTONE, COMMENTARIES 41-65 (1769).

