Articles

History, Transparency, and the Establishment Clause: A Proposal for Reform

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> *History has to be rewritten because history is the selection of those threads of causes or antecedents that we are interested in.*[1]

Introduction

When the U.S. Supreme Court began to write about the historical roots of religious freedom, it was inevitable that scholarly attention would be captured. History is a grand subject in which we all have a very real stake. "[T]hat which, in the opinions of the Supreme Court, is believed to be true about the past"[2] actually lives in the present—it forms a narrative that shapes doctrine, determines outcomes, and affects lives. Today the Court continues to write about history, and academics continue to comment on the Court's use of history to interpret the Establishment Clause.[3] What more can be said about a subject that has

1. Oliver Wendell Holmes, Jr., *quoted in* Ferenc M. Szasz, *The Many Meanings of History, Part I*, *in* THE HISTORY TEACHER 552, 557 (1974).

2. CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 20 (1969) (defining the history produced by the U.S. Supreme Court) ("[T]hat which, in the opinions of the Supreme Court, is believed to be true about the past—about past facts and past thoughts.").

3. In January of 2006, the Association of American Law Schools Section on Law and Religion assembled an impressive panel of scholars to comment on history in the Court's Establishment Clause and Free Exercise jurisprudence. Podcast of Panel Program: "The (Re)Turn to History in Religion Clause Law and Scholarship" (Jan. 6, 2006), http://www3.cali.org/aals06/mp3/AALS%202006%20Delaware%20A%2020060106%20The%20Return%20to%20History%20in%20Religion%20Clause.mp3. A majority of the panelists published articles in a symposium issue of the *Notre Dame Law Review*. 81 NOTRE DAME L. REV. 1697-1894 (2006). Only one of the articles addresses the Court's use of Establishment Clause history. *See* Steven K. Green, *"Bad History": The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. REV. 1717

produced countless books, law journal articles, and scholarly commentary by legal academics, historians, political scientists, and Supreme Court Justices, no less?[4] Yet there is the unfinished business of crafting a solution to the problem of the Court's use of history, a theme that has been conspicuously absent from much of the discussion on the subject.

First, the problem. The landmark Supreme Court decision incorporating the Establishment Clause against the states—*Everson v. Board of Education*—interpreted the Clause based on its history.[5] Though *Everson* purported to apply an original understanding of the Establishment Clause, it is most often rejected as "law office history" by originalists, Justices who otherwise support a historical method of interpretation.[6] On the other hand, living Constitutionalists, the Justices most likely to support *Everson*, are the ones who, though quite comfortable with history, recoil from a strict application of a presumed original understanding to decide cases.[7] This jarring lack of consensus on the Court concerning how to use history in Establishment Clause cases—in the face of apparent agreement that the history should play some role—has prevented the Justices from seriously evaluating each other's historical claims. Instead, what one finds in the opinions are simply different versions of the same purported history, none of which speak directly to each other aside from predictable retorts about the

(2006). Other recent works have also addressed the Supreme Court's use of history. *See generally* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002); LEONARD W. LEVY, RELIGION AND THE FIRST AMENDMENT: THE ESTABLISHMENT CLAUSE (2d ed. Univ. N.C. Press 1994) (1986); Steven G. Gey, *More or Less Bunk: The Establishment Clause Answers That History Doesn't Provide*, 2004 B.Y.U. L. REV. 1617; Mark David Hall, *Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religion Clause Cases*, 85 OR. L. REV. 563 (2006); John C. Jeffries & James R. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001); David Reiss, *Jefferson and Madison as Icons in Judicial History: A Study of Religion Clause Jurisprudence*, 61 MD. L. REV. 94 (2002); John E. Joiner, Note, *A Page of History or a Volume of Logic?: Reassessing the Supreme Court's Establishment Clause Jurisprudence*, 73 DENV. U. L. REV. 507 (1996).

4. Such luminaries have addressed the larger question of whether the Court should use history in constitutional decision-making. *See generally, infra* notes 10 and 11.

5. Everson v. Bd. of Educ., 330 U.S. 1 (1947).

6. I have chosen the terms "originalist" and "living Constitutionalist" to describe, respectively, the views of those who advocate a jurisprudence of original intention or original meaning and those who do not. Although these are less than perfect terms, the basic disagreement should be familiar to most readers.

7. In his extensive survey of the Court's Religion Clause cases, Mark Hall found liberal justices, *i.e.*, justices who have voted against the state in favor of individuals or groups—a description that correlates with the living Constitutionalists described in this article—actually used history slightly more than conservative justices. *See* Hall, *supra* note 3, at 577. He found that liberal justices, unlike conservatives, tended to cite to Thomas Jefferson and James Madison more than other framers and founders or the historical context combined. *See id.* at 580.

beliefs of Thomas Jefferson or James Madison. A striking feature of this history, particularly to the non-historian, is its incredible flexibility. Justices and Courts over time have drawn dramatically different conclusions from the same basic pool of facts.

The many legal scholars, historians and academics familiar with this problem have developed a narrow range of proposals: avoid the use of history to decide Religion Clause cases,[8] improve the quality of the history presented,[9] lower the standards for evaluating the history found in judicial opinions,[10] and develop a usable historical narrative to achieve desirable political and social goals.[11] Because scholars, like the Court, are divided on the appropriate use of history in Establishment Clause cases, their proposals tend to embed their general views on the use of history. Hence, the proposals are of little practical value, not necessarily because they lack merit, but because a judge or Justice must be inclined to treat history in the same way as the scholar who offers the proposal. In a perfect world, a viable proposal to address the Court's use of history in Establishment Clause jurisprudence would transcend this ideological barrier. A proposal that avoids the basic fight over how to use history, however, also should have enough substance to be useful.

In this article, I offer a procedural solution to the problem of the Court's use of Establishment Clause history: I propose that the Court separate its discussion of history from the Court's holding in the case. At first blush it may seem that the Court already engages in this practice, and that my proposal therefore has failed the usefulness criterion. It is true that in the typical history-based Establishment Clause opinion the Court frames the legal issue, then it sets out a review of historical material, followed by its legal analysis, which includes some application of the history to the facts in the case. But even with a format that already includes a separate discussion of history, the significance of the history to the decision is often obscured by the rhetoric surrounding the historical presentation. An originalist historical analysis often presupposes the existence of connections between past and present that are far from obvious. A living Constitutionalist historical account assumes, without attempting to prove, that the history actually points to the supposed larger premises that drive the decision. Currently, the fact

8. *E.g.*, Green, *supra* note 3, at 1753; Gey, *supra* note 3, at 1624-31; Reiss, *supra* note 3, at 174.

9. *See* Hall, *supra* note 3, at 604-09 (providing suggestions to improve the quality of the Court's history).

10. *See generally* John Phillip Reid, *Law and History*, 27 LOY. L.A. L. REV. 193 (1993) (not limiting discussion to Establishment Clause cases).

11. *See generally* Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87 (1997) (not limiting discussion to Establishment Clause cases).

that the history is provided up front does little to elucidate the significance of the history to the decision, or to reconcile the competing historical interpretations found in the various opinions in the case.

By contrast, the type of bifurcation proposed here involves a separation that goes further than the ordinary break between history and analysis found in the Court's opinions. What I propose is a complete separation between the Court's treatment of history and its holding in a particular case. The "history" section would contain the facts and details surrounding historical events. In this section, the opinion writer would be required to explain the choice of materials, their significance, and any additional information that would be helpful. The history section would also contain, where appropriate, a mention of alternative interpretations of certain historical facts and events. The "law" section would follow with an explanation of how the history is relevant to the decision in the case. This explanation is perhaps the most promising feature of the procedural framework because it requires the authoring justice to detail and justify the use of history. Currently, Justices providing Establishment Clause history approach their task as if the history itself commands a particular result. Instead, this conspicuous acknowledgment of the opinion writer as middle man would remove some of the persuasive force of "mythistory,"[12] inviting the reader to think soberly about whether the history points to the decision in the case, or to any particular decision at all. In other words, I propose a type of transparency that would untie the Establishment Clause history and doctrine so that we may critically evaluate their relationship to each other.

At this point the reader may question whether this proposal truly avoids the ideological battle between the originalists and the living Constitutionalists. In other words, the reader may assume that my proposal also embeds *my* views concerning the wisdom of using history to decide Establishment Clause cases. Because the proposal assumes that history will be used in future cases, it does reflect my general disagreement with scholars who counsel a wholesale retreat from Establishment Clause history.[13] Instead of retreating from the use of history, it seems preferable that the Court should endeavor to clarify its

12. *See* Paul Horwitz, Book Review, *The Past, Tense: The History of Crisis—and the Crisis of History—in Constitutional Theory*, 61 ALB. L. REV. 459, 507-08 (1997) (reviewing LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996)) ("[W]e cannot choose between the competing visions of our past treatment of religious liberty and establishment offered by cases such as *Everson v. Board of Education* and *Wallace v. Jaffree* purely through historical research. We must also ask ourselves which narrative rings the most true for *us*, as we go about constructing our own narrative about religious freedom.") (emphasis added) (citations omitted).

13. *See* discussion *infra* Part II.A.

use of history. Both originalists and living Constitutionalists should welcome the clarifications suggested in this proposal because each camp has accused the other of hijacking history.[14] Beyond mutual suspicion, however, there is a further reason for originalists as well as living Constitutionalists to seriously entertain a proposal designed to improve the Court's use of history: for better or for worse, the modern Establishment Clause was born in history and has been justified by history throughout its existence. As a practical matter, it is unlikely that the Supreme Court will completely abandon the use of history in this area.[15]

Part I of this article briefly contextualizes and describes the Court's use of history in Establishment Clause doctrine. Specifically, the first major obstacle to any unified approach is the significant disagreement over the appropriate role for history, a debate that is outlined in Part I and explored further in Part II. Likewise, Part II offers some insight from the discipline of history, including criteria for evaluating and explaining the use of history in opinion writing. Part III of this article defends the procedural proposal and ultimately offers a sample re-writing of the *Everson* opinion using the framework proposed in this article.

I. A Brief Review of History's Ascendancy in Establishment Clause Jurisprudence

A. A Contextual Review

Justice Rutledge, in his dissent in *Everson*, made the now oft-quoted assertion that "[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment."[16] As he put it, the Religion Clause is "at once the refined product and the terse summation of that history."[17] But the Court's use of history in the context of the Religion Clause(s), and more specifically the Establishment Clause, is more clearly understood in light

14. The promise of transparency in this context calls to mind a quote attributed to Justice Brandeis: "Sunshine is the best disinfectant." LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY 92 (1914).

15. *E.g.*, Hein v. Freedom From Religion Found., Inc., 127 S. Ct. 2553 (2007). In the recent taxpayer standing decision from the Court's 2006-2007 term, though the plurality avoided discussion of the history that grounded the applicable precedent, neither Justice Scalia nor Justice Souter could resist mentioning it. *See id.* at 2576, 2581-83 (Scalia, J., concurring); *see also id.* at 2585, 2588 (Souter, J., dissenting). As new legal issues arise for which there is no directly applicable Establishment Clause precedent, resort to some other ground for decision, such as history, should be expected.

16. Everson v. Board of Education, 330 U.S. 1, 33 (1947) (Rutledge, J., dissenting).

17. *Id.*

of the Courts use of history in constitutional cases, particularly in the second half of the twentieth century.[18]

Though the Supreme Court's use of history can be traced back to its earliest decisions, the opinions of the Supreme Court during the Warren Court era came under heavy fire for their asserted misuse of history. Historian Alfred Kelley in his 1965 article, *Clio and the Court: An Illicit Love Affair*, issued a stinging contemporary criticism that accused the Court of employing the historical essay as a means of avoiding undesirable precedent in an effort to reach a particular result.[19] Kelley charged that the Court's opinions were full of "law office history"[20] that paved the way for "extensive judicial intervention in contemporary political problems."[21] Kelley's critique of the Court's Establishment Clause history plainly rejected the fruit of *Everson*:[22]

> The present-day debate over the aboriginal meaning of the Establishment and Free Exercise clauses of the First Amendment illustrates very clearly the many dangers involved in attempting to recover a clear and precise judgment on the part of the authors of a text almost two hundred years old, and expecting it to throw a decisive, revelatory light upon twentieth-century problems of church and state. The eighteenth-century proponents of the First Amendment did not do us the favor of conducting their discussion in terms of released time, school religious exercises, bus transportation, Sunday closings, and so on. They were concerned with the problems of their day and not with those of ours, and to assume that a revelatory reconstruction is possible is to fall into an amateurish historical solecism. Pragmatically speaking, the religion clauses in the Constitution cannot be construed today merely in terms of their

18. The topic of whether the Court has used history properly has become something of a "dead horse," and I only briefly summarize those arguments in this article, though some rehashing is unavoidable. *See, e.g.*, William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227, 227 (1988) ("For the past half-century, historians, judges and lawyers have bemoaned the ways that the Court has misunderstood, misapplied, or otherwise abused the past on its way to formulating doctrines for the present."); *see also* Reid, *supra* note 10, at 198-99. Reid observes: "[t]here are no other decisions dealing with American constitutional law that owe more to violations of the canons of historical interpretation than those dealing with the establishment and free exercise of religion." *Id.* at 220.

19. *See generally* Alfred Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 S. CT. REV. 119.

20. *See id.* at 122. Kelley defined law office history as "the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered." *Id.* at 122, n.13.

21. *See id.* at 125.

22. Kelley echoed criticism found in a review article by Mark DeWolfe Howe, a critic of the Court's history in *Everson* and later cases following in *Everson*'s path. *Id.* at 119. *See generally* MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY (1965).

> aboriginal meaning. The failure to understand this elementary fact constitutes one of the major weaknesses of the history-oriented opinions of the Court in the last few years.[23]

Criticisms such as Kelley's were followed by a wave of renewed interest in and attention to history in legal and constitutional scholarship. Much of the robust historical scholarship that ensued, or the "turn to history" as it is sometimes called, proceeded from the same basic premises but launched in different directions. In one direction was the search for the original intent of the Framers and ratifiers of the Constitution and the Bill of Rights—the method of constitutional interpretation that became known as "originalism."[24] Originalism found its supporters on the Court while witnessing the intellectual development of its chief rival, living Constitutionalism.[25]

Viewed through today's lens, the Court's use of history in the context of the Establishment Clause highlights the "Great Divide"[26] between these two distinct and familiar schools of constitutional interpretation—the modern version of originalism and a historically informed living Constitutionalism. Originalism is currently understood as an interpretive method that relies on the original meaning of the framers and ratifiers of the Constitution.[27] By contrast, living Constitutionalism is an interpretive method that is governed by contemporary concerns as

23. Kelley, *supra* note 19, at 141-42.

24. Moving in another direction but only tangentially related to the subject of this article was a genre of legal scholarship known as "civic republicanism." For a lengthy discussion of this development, *see generally* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996), and the treatment of her work in two articles: Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court's Uses of History*, 13 J.L. & POL. 809, 823-30 (1997), and Horwitz, *supra* note 12, at 459-510.

25. It is worth noting that originalism has earned its share of criticism for its treatment of history. *See, e.g.*, Larry D. Kramer, *The Constitutional Origins of Judicial Review: When Lawyers Do History*, 72 GEO. WASH. L. REV. 387, 407 (2003). *See generally* Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995) (criticizing prominent originalists but focusing on the work of civic republicans); H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987) (criticizing originalist assumptions and methodology). Civic republicans, mentioned earlier, also took some heat. *See* Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT L. REV. 909, 926-28 (1996). Mark Tushnet concludes that history generated by lawyers does not pretend to be history at all. *Id.* at 932. *See also* Flaherty, *supra*.

26. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997).

27. This definition stresses an inquiry into the original meaning of the language of the Constitution as contrasted with the original intent of the Framers, which is how originalism was first understood by critics and conceived by its proponents. *Compare, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977) (original intent) *with* SCALIA, *supra* note 26 (original meaning).

well as precedent.[28] Though the living Constitutionalist may be influenced by the Constitution's original meaning, she is rarely bound by it. In the Court's Establishment Clause jurisprudence, the originalist and living Constitutionalist approaches feature two very different paths for the use of history—one that would reject *Everson* and another that would hold it firm.[29] In the Part that follows, I briefly outline the emergence of these two approaches to history as reflected in a sampling of some of the Court's major Establishment Clause cases, witnessing the development of the problem with an eye toward crafting a solution.[30]

B. Doctrinal Review

1. Old-School Law Office History

The Court's use of history in Establishment Clause cases can be traced to a free exercise case involving early Mormon bigamy prosecutions in the Territory of Utah. In *Reynolds v. United States*,[31] the Court considered Reynolds' claim that his indictment violated the First Amendment's Free Exercise Clause because the criminal prohibition against bigamy conflicted with his Mormon beliefs.[32] To divine the meaning and scope of the Free Exercise Clause, the Court turned to "the history of the times in the midst of which the provision was adopted."[33]

The Court began with a general description of the purported excesses of religious establishments in "some of the colonies and States,"[34] asserting that states had taxed citizens to support religion against their will, that states had punished citizens for not attending public worship, and that states had also punished citizens for "entertaining heretical opinions."[35] Moving from the general to the

28. *See infra* Part II.A.2.

29. As will be seen, these two approaches to history dominate the discussion in this article, though there are other categories of "history" that the Court has used in Establishment Clause cases. This article does not explore separately, for example, the Court's treatment of the historical genesis of certain practices, otherwise known as tradition. Nor does this article evaluate the Court's discussion of the cultural history of certain controversies, though cultural history also has played a role in some of the Court's Establishment Clause opinions.

30. Although I only survey a handful of cases here, some of the descriptions provide more detail than may be required for those familiar with this area. Scholars in other areas and students, however, should find the descriptions helpful.

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

32. *Id.*

33. *Id.* at 162 ("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.").

34. *Id.* at 162.

35. *Id.* at 162-63.

specific, the Court identified the Virginia experience as particularly revelatory.[36] The Court described the sequence of events known as the Virginia Assessment Controversy—the proposed "bill establishing provision for teachers of the Christian religion," James Madison's Memorial and Remonstrance against the bill, and Thomas Jefferson's alternative and successful bill "for establishing religious freedom."[37] Based on language from Jefferson's preamble to the bill, the Court laid out the boundaries of its free exercise doctrine, claiming to have ascertained "the true distinction between what properly belongs to the church and what to the State."[38]

Turning to the Constitutional convention, the Court again looked to Jefferson as an authority and cited from a personal letter Jefferson wrote that expressed disappointment at the absence of a specific provision in the Constitution guaranteeing freedom of religion.[39] Following logically in the Court's sequence of events was Madison's proposal of the "amendment now under consideration" to the first Congress, in which the Court concluded simply that it "met the views of the advocates of religious freedom, and was adopted."[40] Thomas Jefferson, "afterwards," the Court continued, penned his now famous letter to the Danbury Baptist Association from which the Court quoted, crowning Jefferson as the authoritative voice on the scope of the Religion Clause(s).[41] Based on the language of the preamble and Jefferson's letter to the Danbury Baptists, the Court held that Congress could exercise legislative power over actions such as bigamy so long is it did not regulate opinions.[42]

It is unfortunate that Chief Justice Waite's opinion in *Reynolds* launched the Court's religion clause doctrine with such patent use of law office history. In less than 350 words, the Supreme Court covered much historical ground, creating a seemingly coherent flow of events that lead to its conclusion that Jefferson's preamble and letter to the Danbury Baptists defined the religion clauses. The Court does not admit that Madison's initial proposal of the First Amendment to the first Congress was revised after much debate, and only later became the language embodied in the First Amendment and adopted in 1789.[43] Jefferson's

36. *Id.* at 163.

37. Reynolds v. United States, 98 U.S. 145, 163 (1878).

38. *Id.*

39. *Id.* at 163. The Court acknowledged that Jefferson was in France at the time of the Convention. *Id.*

40. *Id.* at 164.

41. "Coming 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." *Id.* at 164.

42. *Id.* at 164.

43. Madison first proposed that Art.I. § 9 be amended to add: "The civil rights of

letter to the Danbury Baptists, which came "afterwards," was written in 1802.[44] An important question left unanswered after *Reynolds* is why the Court concluded that the Virginia experience alone purportedly gave birth to the ideological underpinnings of the First Amendment, a question that the Court purported to answer in its first modern Establishment Clause case, *Everson v. Board of Education*.[45]

Everson v. Board of Education marked the Court's incorporation of the Establishment Clause through the Fourteenth Amendment and ushered in the Court's modern Establishment Clause jurisprudence[46] In *Everson*, the Court considered an Establishment Clause challenge to a New Jersey statute and school board resolution authorizing the use of public funds to reimburse parents for the cost of bus transportation to parochial schools.[47] To determine the meaning of "establishment," as much as to remind modern Americans of the "evils, fears, and political problems" that drove the Framers to create the Establishment Clause, the Court tentatively began with a review of the history introduced in *Reynolds* surrounding the framing and adoption of the Establishment Clause.[48]

Justice Black's account of First Amendment history in *Everson* was much lengthier than the version in *Reynolds*, shading in more detail while generalizing about the sentiments of "freedom-loving colonials"[49] towards the persecution of religious dissenters in the various state establishments.[50] Justice Black's opinion also settled on Virginia as the locus of meaning for the religion clauses, and the opinion went a step further than *Reynolds* in explaining why the Virginia experience should define the Establishment Clause.[51]

Justice Black's opinion echoed *Reynolds* in the assertion that the religion clauses of the First Amendment were coextensive with the goals

none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." 1 Annals of Cong. 451 (Joseph Gales ed., 1789).

44. Letter from Thomas Jefferson to a committee of the Danbury Baptist Association in the state of Connecticut (Jan. 1, 1802).

45. *See generally* Everson v. Bd. of Educ., 330 U.S. 1 (1947).

46. *See generally id.*

47. *Everson*, 330 U.S. 1. at 8-15.

48. *Id.* at 8 ("Once again, therefore, it is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted.") (citing in a footnote *Reynolds*, 98 U.S. 145, 162 and a tax case, Knowlton v. Moore, 178 U.S. 41 (1900)).

49. *Everson*, 330 U.S. at 11.

50. *Id.* In a footnote, the Court quoted a letter in which Madison expressed contempt for persecution and a longing for "liberty of conscience to all." *Id.* at 11, n. 9.

51. According to the Court, in Virginia "[T]he established church had achieved a dominant influence in political affairs and . . . many excesses attracted wide public attention. . . ." *Everson*, 330 U.S. at 11. *See* APPENDIX A for the full text of this passage.

and protections of the Virginia bill.[52] Following *Reynolds*, the Court stated that Jefferson and Madison, as prominent voices in opposition to the Virginia Assessment, both played "leading roles" in the drafting and adoption of the First Amendment.[53] Mentioning state establishments after ratification of the First Amendment and controversies over public funding of religious schools, the Court passed quickly through a discussion of Fourteenth Amendment incorporation to return to its discussion of the meaning of the Establishment Clause.[54] According to the Court, the same history, featuring Jefferson and Madison, defined the Establishment Clause generally as erecting a "wall of separation between church and state."[55]

Beyond the task of unfolding and explicating the Establishment Clause history, the real trouble for Justice Black was the application of the history to the case. Though the rhetoric of the *Everson* opinion set the Court firmly on the high wall separation course it would follow for years to come, the Court ultimately concluded that the transportation reimbursement payments did not violate the Establishment Clause.[56] Justice Jackson's dissent identified the conflict between the majority's separationist language and its decision in the case, and revealed his view of the bus payments as little more than a direct subsidy of the Catholic Church.[57] Justice Rutledge, writing in dissent, parsed the history presented by Justice Black's majority opinion in *Everson*.[58] Rutledge provided a readable account of Madison's opposition to the Virginia assessment, Madison's support of Jefferson's bill, and his first proposal of the First Amendment to the first Congress.[59] Filling a hole left open in *Reynolds* and in the *Everson* majority, Rutledge's dissent provided the first authority for the proposition that Jefferson's Virginia bill was the model for the First Amendment.[60]

Unlike the Court's earlier Establishment Clause history, however, Rutledge's dissent focused on Madison rather than Jefferson as the lead actor in the events leading up to the adoption of the First Amendment.[61]

52. *Id.* at 13.
53. *Everson*, 330 U.S. at 11-13.
54. *Id.* at 13-15.
55. *Id.* at 16 (quoting *Reynolds*, 98 U.S. at 164).
56. *Id.* at 18.
57. *Id.* at 18-28 (Jackson, J., dissenting).
58. *Id.* at 28-63 (Rutledge, J., dissenting).
59. *Id.*
60. *Id.* at 34 n.11 (citing generally SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA (1902); WILLIAM WARREN SWEET, THE STORY OF RELIGION IN AMERICA (1939))*; cf. id.* at 9 n.5 (majority opinion) (citing COBB for a different historical proposition).
61. *See, e.g., id.* at 34 (Rutledge, J., dissenting) ("In the documents of the times, particularly of Madison, who was leader in the Virginia struggle before he became the

In his dissent, Rutledge referred repeatedly to Madison and a generic cohort of "followers" and "coworkers" who fought against the Virginia assessment.[62] Rutledge went as far as to append a copy of Madison's Memorial and Remonstrance to his lengthy opinion, lest the reader "lose sight of what [Madison] and his coworkers had in mind when . . . they forbade an establishment of religion and secured its free exercise. . . ."[63] Rutledge characterized Madison's proposal to the First Congress as merely an extension of his work in Virginia,[64] giving Madison credit for "secur[ing] the submission and ratification of the First Amendment as the first article of our Bill of Rights."[65]

Justice Rutledge relegated to a footnote the actual text of Madison's initial proposal,[66] which was far different from the opaque language of the religion clauses adopted by the First Congress and ratified by the states, and noted that "[i]n the process of debate this was modified to its present form."[67] In fact, the evolution of the religion clauses and the corresponding debate that is recorded, suggest that crediting Madison as the sole author of the First Amendment without simultaneously acknowledging the subsequent changes to his proposal seems dubious. To the contrary, Rutledge mentioned the evolution of the language of the religion clauses only one other time, in which he distinguished language that could otherwise counsel against a broad interpretation of the Establishment Clause.[68]

A defining feature of Justice Rutledge's use of history in his *Everson* dissent was the application of the imprint of history to the facts of the case, a sine qua non of law office historiography: "New Jersey's action therefore exactly fits the type of exaction and the kind of evil at

Amendment's sponsor . . . is to be found irrefutable confirmation of the Amendment's sweeping content.").

62. *Id.* at 37-41.

63. *Id.* at 37-38.

64. *Id.* at 39 ("All the great instruments of the Virginia struggle for religious liberty thus became warp and woof of our constitutional tradition, not simply by the course of history, but by the common unifying force of Madison's life, thought and sponsorship. He epitomized the whole of that tradition in the Amendment's compact, but nonetheless comprehensive, phrasing.").

65. *Id.* The fact that the First Amendment originally was the third and not the first article in the Bill of Rights also detracts from the historical credibility of the Rutledge dissent, though it is a relatively minor point compared to the other assertions. Justice Jackson attempted to make a similar point in his separate dissent, asserting that the First Amendment came first because it was "first in the forefathers' minds." *Id.* at 26 (Jackson, J., dissenting).

66. *Id.* at 39 n.27 (Rutledge, J., dissenting).

67. *Id.* (Rutledge, J., dissenting).

68. *See id.* at 42 n.34. Rutledge attempted to explain the language of an earlier version, which read as follows: "No religion shall be established by law, nor shall the equal rights of conscience be infringed." *Id.*

which Madison and Jefferson struck."[69]

2. Originalism as a Response to *Everson*

After an inconsistent line of decisions following the Burger Court's 1971 inauguration of the *Lemon* test,[70] the Court addressed legislative prayer in *Marsh v. Chambers*.[71] In *Marsh*, Nebraska legislator Ernest Chambers challenged the practice of legislative prayer as well as the payment of a legislative chaplaincy as violations of the Establishment Clause.[72] Chief Justice Burger, writing for a 6-3 majority, upheld the legislative chaplaincy based on the history of legislative chaplaincies present at the time of the framing of the First Amendment.[73] The Court's use of history to decide the dispute was unexpected, to say the least, given its heavy reliance in prior cases on the three-part test of *Lemon v. Kurtzman*.[74]

Marsh returned the Court to a focus on history. Even though the Chief Justice's opinion relied upon some of the same history as the *Everson* line of cases, it interpreted the history differently. In a footnote, Burger acknowledged Virginia as a colony that "took the lead in defining religious rights."[75] He also noted that in addition to Virginia, Rhode Island, founded by Roger Williams, had constitutional provisions on religious freedom and maintained the practice of legislative prayer.[76] Burger likewise observed that the Continental Congress and the First Congress adopted the practice of legislative prayer.[77] Rather than making generalized statements about why the founders came to America or what the framers of the First Amendment had in mind, Burger supported the decision by the actions of the framers in authorizing paid

69. *Id.* at 46 (Rutledge, J., dissenting).

70. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) ("Three . . . tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'") (citations omitted). Immediately preceding the *Lemon* era was the Warren Court's history-based decision in Flast v. Cohen, 392 U.S. 83 (1968) (taxpayer standing in Establishment Clause cases proper in light of Establishment Clause history).

71. 463 U.S. 783 (1983).

72. *Id.* at 785.

73. *Id.* at 786-95.

74. For some cases decided under Lemon immediately prior to the decision in Marsh, *see, e.g.*, Mueller v. Allen, 463 U.S. 388 (1983) (decided 6 days before Marsh); Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (previous term); Larson v. Valente, 456 U.S. 228 (1982) (using history, precedent, and Lemon test). *See also* Committee for Public Ed. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (some detour through Everson history before applying Lemon test).

75. *Marsh*, 463 U.S. at 787 n.5.

76. *Id.*

77. *Id.* at 787-88.

chaplains while finalizing the language of the First Amendment.[78] The opinion recognized Madison as a drafter of the Establishment Clause and acknowledged him as one of "the men who wrote the First Amendment Religion Clauses."[79] Jefferson, on the other hand, was not mentioned in the Court's opinion.[80]

Chief Justice Burger's opinion in *Marsh* was in no sense a perfect model of historical analysis. Yet the historical flaws were arguably less controversial in *Marsh* because the fit between the history and the practice of legislative prayer was tighter than it had been in *Everson* and subsequent cases. Although Burger's opinion in *Marsh* assumed that the framers serving in the First Congress approved of legislative prayer with an awareness of the constitutionality of their actions, this was not an outlandish leap of logic given the proximity in time between their legislative act and the adoption of the Establishment Clause.[81] Justice Brennan's dissent also raised the important question of whether the actions of the ratifying States, rather than that of the First Congress, should be used to interpret the Establishment Clause.[82] The real fight, however, was over whether the history should be dispositive at all.[83]

In the very next term, the Court decided *Lynch v. Donnelly*.[84] *Lynch* involved a Pawtucket, Rhode Island crèche erected as part of a public Christmas display.[85] The Court reversed the First Circuit's decision that the municipality's maintenance of the crèche display endorsed religion in violation of the Establishment Clause.[86] Building on the reasoning in *Marsh*, Chief Justice Burger stressed the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."[87] Burger cited a catalog of references to religion that included George Washington's Thanksgiving Proclamation, national Thanksgiving and Christmas holidays, "In God We Trust" on currency, "under God" in the Pledge of Allegiance, religious paintings in public art galleries, and the frieze of Moses and the Ten Commandments in the Supreme Court building.[88] Against this

78. *Id.* at 788; *see also id.* at 790 ("In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent.").
79. *Id.* at 788, n.8.
80. *See id.* at 784-95.
81. *But see* Green, *supra* note 3, at 1724-25.
82. *Marsh*, 463 U.S. at 815 (Brennan, J., dissenting).
83. *See id.* at 816-17.
84. 465 U.S. 668 (1984).
85. *Id.* at 671.
86. *Id.* at 672.
87. *Id.* at 674.
88. *Id.* at 675-77.

backdrop, the Court found that the Pawtucket crèche easily passed the *Lemon* test.[89]

An important feature of the *Lynch* opinion was the Court's heavy reliance on tradition and its minimal engagement with precedent. The Court limited its discussion of the First Amendment history to a repeat of the evidence adduced in *Marsh* concerning legislative prayer.[90] Thus, unlike *Marsh*, the opinion lacked any secure fit between the history and the practice—a point Justice Brennan sharply exploited in his dissent[91]—requiring the Court to go beyond the framing history to support its decision. The Court justified its decision with the post-framing, general tradition of religious acknowledgment, concluding that in light of decades of tradition, it was "far too late in the day" to interpret the Establishment Clause to forbid an acknowledgment such as the crèche.[92] By contrast, in applying *Lemon*'s prong forbidding the effect of advancing religion, Justice Burger argued that to invalidate the public crèche would mean that the crèche was "more beneficial to and more an endorsement of religion" than other practices that the Court had previously upheld.[93] This questionable "no more than" reasoning reveals the limited role of precedent under an approach explicitly justified by history and tradition.

As the Court's Establishment Clause doctrine returned to history, its confrontation with *Everson* was perhaps inevitable. It was then-Associate Justice Rehnquist's dissent in *Wallace v. Jaffree*[94] which challenged the Court's exposition of Establishment Clause history in *Everson*. Voicing the misgivings of earlier opinions[95] and attempting to

89. *Id.* at 679-86.

90. *See also id.* at 719-20 (Brennan, J., dissenting) (noting the absence in the *Lynch* majority opinion of the history of the public display of nativity scenes and the paucity of evidence on the Framer's intent).

91. *See id.* at 725. Ironically, Justice Brennan accused the Court of using history to achieve precisely the kind of activism that is usually associated with the living Constitutionalist method of interpretation:

> [O]ur prior decisions which relied upon concrete, specific historical evidence to support a particular practice simply have no bearing on the question presented in this case. Contrary to today's careless decision, those prior cases have all recognized that the "illumination" provided by history must always be focused on the particular practice at issue in a given case. Without that guiding principle and the intellectual discipline it imposes, the Court is at sea, free to select random elements of America's varied history solely to suit the views of five Members of this Court.

Id. at 725.

92. *Id.* at 687 (majority opinion).

93. *Id.* at 681-82.

94. 472 U.S. 38 (1985).

95. For example, in Justice Stewart's *Schempp* dissent, he rejoined the incorporation

make good on his threat to reduce the scope of the Establishment Clause, Rehnquist stated:[96]

> It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years. Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.[97]

Justice Rehnquist, like Justice Rutledge's dissent in *Everson*, fixed his view on Madison rather than Jefferson as a source of understanding nonestablishment. Rather than focusing on the Virginia assessment controversy, however, Rehnquist outlined the evolution of the language of the First Amendment.[98] Rehnquist's opinion demonstrated that Madison did not champion a "wall of separation" agenda in his proposals, nor in the debates on the floor of Congress, notwithstanding his disdain for the Virginia assessment.[99] Rehnquist characterized

debate, noting that the Establishment Clause was adopted as a limitation on the National Government and was not intended to affect existing state establishments. Sch. Dist. of Abington Twp v. Schempp, 374 U.S. 203, 310 (1963) (Stewart, J., dissenting). Unlike Clark's majority opinion and Brennan's concurrence in that case, Justice Stewart did not attempt to provide any principles based on what the Framers intended. Of course, Stewart's failure to connect the Framers with his conclusions certainly follows from his brief explanation of the history itself, which would suggest, consistent with later historical interpretations, that the Framers did not intend to affect state practices at all. *See* scholarship cited *infra* at 220. Stewart acknowledged his reluctant acceptance of the incorporation of the Establishment Clause, noting only the irony of its enforcement against the states given its history. *Id.* Revealing a philosophical divide on the Court, Justice Stewart used historical arguments as a type of reality-check against what he termed mechanistic applications of the Establishment Clause. *Schempp*, 374 U.S. at 310 (Stewart, J., dissenting); *see also* Sherbert v. Verner, 374 U.S. 398, 415 (1963) (Stewart, J., concurring) (characterizing the Court's Establishment Clause jurisprudence as "mechanistic" and "historically unsound"); Engel v. Vitale, 370 U.S. 421, 445-50 (1962) (Stewart, J., dissenting).

96. *See* Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 720-27 (1981) (Rehnquist, J., dissenting) (Free Exercise Clause) (opining in dissent that both the Free Exercise and Establishment Clauses had been interpreted too broadly in the Court's doctrine). For an account of the lead up to Rehnquist's dissent in *Jaffree* and the scholarly response, *see* Lee Strang's introduction to the Notre Dame symposium, Lee J. Strang, *The (Re)Turn to History in Religion Clause Law and Scholarship*, 81 NOTRE DAME L. REV. 1697, 1703-05 (2006).

97. *Wallace*, 472 U.S. at 92 (Rehnquist, J., dissenting).

98. *Id.* at 92-100.

99. *Id.* at 92-99.

Everson's wall metaphor as "bad history" that did not reflect the intent of the drafters and ratifiers of the First Amendment.[100] Instead, Rehnquist offered his own originalist account of the Establishment Clause history; he cited, among others, the Northwest Ordinance, George Washington's Thanksgiving Proclamation and the Congressional Resolution calling for it, Congressional appropriation of funds in the 18th and 19th centuries to support sectarian education for Indian tribes, and the constitutional law commentaries of Justice Joseph Story and Thomas Cooley.[101] The evidence that Rehnquist marshaled in support of his position repudiated *Everson*'s requirement of neutrality between religion and non-religion.[102] Still, Rehnquist's non-preferentialist interpretation of the Establishment Clause, that the clause only ". . . forbade establishment of a national religion, and forbade preference among religious sects or denominations,"[103] remains controversial.[104]

Rehnquist's originalist approach differed in character from the Court's earlier forays into history; it followed a premise-evidence-conclusion format that lacked the rhetorical zeal of *Everson*'s colorful narrative. The critical tone would be taken up by originalist Justices Scalia and Thomas, often in dissent, in later cases concerning the meaning of the Establishment Clause.[105]

3. Living Constitutionalist History

To understand the living Constitutionalist approach to Establishment Clause history, it is necessary to return to the era of *Everson* and to Justice Brennan's concurring opinion in *School District of Abington Township v. Schempp*,[106] which was itself a defense of the Court's Establishment Clause history.[107]

Relying explicitly on Jefferson's wall of separation as the lesson of the history set forth in *Everson*, in the following term the Court invalidated a release-time program in the Illinois public school system.[108]

100. *Id.* at 107-08.
101. *Id.* at 99-106.
102. *Id.*
103. *Id.* at 106.
104. *See, e.g.*, Reiss, *supra* note 3, at 138 (characterizing Rehnquist's position as an appeal to a "culturally conservative—some might even say xenophobic— tradition").
105. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 640-41 (1992) (Scalia, J., dissenting) (arguing that the majority failed to apply the Establishment Clause consistent with its historical meaning, the Framers having intended only to prohibit at the federal level coercion of religious orthodoxy and financial support "by force of law").
106. 374 U.S. 203 (1963).
107. *See infra* text accompanying note 118.
108. Ill. *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203 (1948); *see also id.* at 211, 231 (Frankfurter, J., concurring); *but see* Zorach v. Clauson, 343 U.S. 306 (1952) (off-

The Court took up the issue of public school prayer in *Engel v. Vitale*,[109] in the context of a New York school board's policy of daily recitation of a nonsectarian "Regents' prayer."[110] Justice Black's majority opinion compared the prayer in the case to The Book of Common Prayer used in the Sixteenth Century Church of England and concluded that the practice of government-composed prayer was one that the founders fled Europe to avoid.[111] Justice Black briefly recounted the Court's now familiar ideological history of disestablishment.[112] Instead of making specific claims on behalf of Jefferson or Madison like the previous opinions in *Reynolds* and *Everson*, however, Justice Black spoke more generally about the founders and what they knew, understood, and intended.[113] Black used history to derive the aims of the Establishment Clause, which yielded the decision in the case.[114]

In the very next term, the Court heard *School District of Abington Township v. Schempp*,[115] which, like *Engel*, involved daily Bible reading and recitation of the Lord's Prayer. Given the similarity between the facts in *Engel* and *Schempp*, it seemed that the Court's grant of certiorari in *Schempp* had been either to overrule or reaffirm the previous term's decision in *Engel*.[116] Justice Clark's majority opinion in the case referred to the general history of the Establishment Clause, and gruffly acknowledged commentators by characterizing criticism of the Court's methodology as "entirely untenable and of value only as academic exercises."[117] Justice Brennan, responding directly to Court critics, however, wrote a separate, 74-page concurrence designed to situate the Court's school prayer cases within its Establishment Clause jurisprudence, and to justify the decisions in *Engel* and *Schempp* with reference to the history of the framing of the First Amendment.[118] The

campus release time program constitutional).

109. 370 U.S. 421 (1962). The Court had avoided on standing grounds a similar case involving Bible reading in Doremus v. Board of Ed., 342 U.S. 429 (1952).

110. *Id.* at 423.

111. *Id.* at 425-28.

112. *Id.* at 425-29. This time the Court acknowledged that "[s]imilar though less far-reaching legislation was being considered and passed in other States." *Id.* at 428-29 (citing COBB, *supra* note 60, at 482-509).

113. *See id.* at 429-33. Of the few footnotes that support Black's discussion of the generalized attitudes of the founders toward religious establishments, most cite Madison's Memorial and Remonstrance. *See id.* at 431-32 n.13-14, 432 n.15-16.

114. *Engel*, 370 U.S. at 433.

115. 374 U.S. 203 (1963).

116. *See, e.g.*, BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT 466 (N.Y. Univ. Press) (1983) (quoting Justice Harlan at oral argument in *Schempp*: "What these cases really present is the question whether we are going to reexamine the past cases.").

117. *Schempp*, 374 U.S. at 217.

118. *Id.* at 232-304 (Brennan, J., concurring) ("The importance of the issue and the

tone of Justice Brennan's concurrence confirms its character as a refutation of the critics; Brennan book-ended his lengthy opinion with the observation that the Court's decisions in *Engel* and *Schempp* had been neither "radical" nor "novel."[119]

Brennan expressed great confidence in his historical claims at a certain level of generality, but his opinion expressly disclaimed any absolute doctrinal propositions based on history. Brennan explained that "an awareness of history and an appreciation of the aims of the Founding Fathers" could not always be utilized to solve "concrete problems."[120] Justice Brennan candidly asserted that, in particular, the increase in religious pluralism required a more modern understanding of the Establishment Clause than the perspectives presumably held by the founders.[121] Read together with the Court's opinion in *Engel*, Brennan's concurring opinion in *Schempp* created a bridge between the stamp-imprint law office history of earlier decisions and later methodology based on the generalized historical purposes of the Establishment Clause.[122] Though Brennan's *Schempp* concurrence sometimes backslid into speaking through the framers,[123] it was an important justification of living Constitutionalist visions of the Establishment Clause, imposing a sort of filter on history based on relevance and need. In later opinions he

deep conviction with which views on both sides are held seem to me to justify detailing at some length my reasons for joining the Court's judgment and opinion."). *See also* SCHWARTZ, *supra* note 116, at 466-67 ("The March 1 conference revealed a consensus not to overrule *Engel*. But concern was expressed that *Engel* had not fully explored the history and development of the Establishment Clause as it bore upon cases like those before the Court. Brennan in particular asked whether it could be demonstrated that the Founding Fathers meant to forbid some forms of religious activities and manifestations in public institutions while permitting other forms to survive.").

119. *Id.* at 274, 304. Brennan's concurring opinion alone contained 78 footnotes with references to cases, law review articles, and other scholarly works.

120. *Id.* at 234 (Brennan, J., concurring). "Whatever Jefferson or Madison would have thought of Bible reading or the recital of the Lord's Prayer in what few public schools existed in their day, our use of the history of their time must limit itself to broad purposes, not specific practices. . . . It is '*a constitution we are expounding*,' and our interpretation of the First Amendment must necessarily be responsive to the much more highly charged nature of religious questions in contemporary society." *Id.* at 241 (emphasis added).

121. *Id.* at 234 (Brennan, J., concurring).

122. *See* cases discussed *infra* at II.C.

123. For example, in a subsection discussing "*Religious Considerations in Public Programs*," no doubt distinguishing his majority opinion in Sherbert v. Verner, 374 U.S. 398 (1963), decided the same day, Brennan asserted that the "Framers" would not have deemed free exercise exemptions from general welfare programs to be religious establishments. While Brennan may have been referring to the framers' general purposes, his assertion flew directly into the net of critics like Kelley, who pointed out the obvious fact that the framers had no opinions concerning the general welfare programs of the 20th Century.

would decry betrayal of the "lessons of history,"[124] just as Justices following in his interpretive vein would speak of the need for a "sense of the past."[125]

Justice Souter, a strong living Constitutionalist voice on the Court, carried forward Brennan's notions about the limits of history. Likewise, Souter confronted some of the assumptions underlying Rehnquist's critique of *Everson*. In his concurrence in the Court's graduation prayer case,[126] Justice Souter responded directly to Rehnquist's originalist account of the Establishment Clause drafting history with a cogent textual argument. Rather than interpreting the prior versions of the First Amendment to explain what the framers had in mind, Souter used the versions to show what they explicitly rejected—an Establishment Clause that forbade "a national religion," the preference of "one religious sect," or the promotion of "articles of faith."[127] Justice Souter candidly admitted that modern day judges cannot profess to know why the framers settled on the precise language of the Establishment Clause.[128] Nonetheless, Souter aligned himself with historian Leonard Levy[129] who, contrary to Rehnquist's cited historian Robert Cord,[130] read the evolution of the drafts to preclude a weak Establishment Clause.[131] Otherwise, Souter reasoned, the framers would have been "extraordinarily bad drafters" who purposely avoided the wording that could have conveyed their true meaning.[132] Souter and Rehnquist spoke the same language, but Souter's approach to history depended on the strength of the Court's prior Establishment Clause decisions and not merely history.[133] Souter relied heavily on Madison and Jefferson to show a lack of consensus among the founders concerning the propriety of government

124. Marsh v. Chambers, 463 U.S. 783, 816-17 (1983) (Brennan, J., dissenting) (characterizing the majority's historical methodology).

125. McCreary County v. American Civil Liberties Union of Kentucky, 545 U.S. 844, 876 (Souter, J.).

126. Lee v. Weisman, 505 U.S. 577 (1992).

127. *Id.* at 614, 612-16 (Souter, J., concurring).

128. *Id.* at 615-16, 626.

129. LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (Univ. of N.C. Press 1994) (1986).

130. ROBERT CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (Baker Book House 1988) (1982).

131. LEVY,*supra* note 129.

132. *Lee*, 505 U.S. at 615 (Souter, J., concurring) (quoting Doug Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 882-83 (1986)). In a footnote, Justice Souter addressed the rest of Rehnquist's historical evidence in *Wallace*, concluding that members of the First Congress, as well as Presidents and other public officials, did not necessarily act with Establishment Clause principle in mind. *Lee*, 505 U.S. at 616 n.3 (Souter, J., concurring).

133. *See infra* notes 135.

acknowledgment of religion.[134] Rather than turn to tradition in the soft spots where history did not fully support his positions, Justice Souter reminded the reader that to reconsider the Clause in light of history would upset settled law.[135] Thus, precedent, when not supported by history, functioned in the opinion as a formidable counterweight to history.[136]

4. A Summation

The importance of precedent to living Constitutionalists was highlighted in the Ten Commandments cases decided at the end of the Court's 2004-2005 term.[137] After 60 years of an incorporated Establishment Clause, the Justices openly debated their positions on the use of history, shedding more heat than light on what was, by then, an old dispute. But the argument brought into focus important differences between the history of the originalists and that of the living Constitutionalists.

To invalidate the Ten Commandments display in *McCreary County*, Justice Souter turned not to history but to the *Lemon* purpose prong, a rarely used tool in the Court's arsenal.[138] Souter explained that the majority's decision could be squared with the general concerns of the framers, but he clearly did not claim to have achieved an originalist interpretation or result.[139] Rather, Justice Souter alluded to a "sense of the past,"[140] and defended neutrality as a means of "keeping sight of something the Framers of the First Amendment thought important."[141] Responding directly to Justice Scalia's dissent, Souter criticized originalist interpretations of the Establishment Clause as lacking support

134. *See id.*

135. *Lee*, 505 U.S at 610 (Souter, J., concurring) ("In barring the State from sponsoring generically theistic prayers where it could not sponsor sectarian ones, we hold true to a line of precedent from which there is no adequate historical case to depart."); *id.* at 622 (Souter, J., concurring) (alteration in original) ("The setting in which the Establishment Clause was framed, and the [political] practices [of the Framers following ratification] warrant canvassing, but while they yield some evidence for petitioner's argument, they do not reveal the degree of consensus in early constitutional thought that would raise a threat to *stare decisis*. . . .").

136. *Id.*

137. McCreary County v. American Civil Liberties Union of Kentucky, 545 U.S. 844 (2005) (In *McCreary*, the stormy evolution of the display evinced a religious purpose on the part of lawmakers and it was invalidated); Van Orden v. Perry, 545 U.S. 677 (2005) (In *Van Orden*, the 43 year old capitol monument situated in a park with 17 other displays was upheld.).

138. *McCreary*, 545 U.S. at 844.

139. *McCreary*, 545 U.S. at 874-77.

140. *Id.* at 876.

141. *Id.*.

from the "full range" of information on what the framers believed.[142] Citing acts and writings of Jefferson and Madison, Justice Souter concluded that there was no consensus on the meaning of nonestablishment that could support moving away from the tradition of neutrality.[143] Souter advocated a very general role for history rather than the specific, outcome-determinative role suggested by the originalists.[144] Adding a candid flavor to Brennan's point in his *Schempp* dissent, Souter warned that a thorough inquiry into the framers' understanding of the Establishment Clause would substantiate Rehnquist's undesirable earlier thesis: that the Framers only intended to protect Protestant Christian sects from government favoritism of one sect over another.[145]

At several points in the opinion, Souter warned that following Justice Scalia's originalist approach would overturn all of the Court's Establishment Clause decisions since *Everson* that applied the neutrality principle.[146] Justice Souter closed the opinion with reference both to precedent and modern times, blending his doubts about the usefulness of history with arguments about the virtues of the neutrality principle: "Historical evidence thus supports no solid argument for changing course . . . whereas public discourse at the present time certainly raises no doubt about the value of the interpretive approach invoked for 60 years now."[147]

Justice Scalia's dissent, perhaps the most controversial church/state opinion in recent times, made the originalist case for the Ten Commandments in part by taking the position that the government may favor monotheism.[148] Scalia marshaled data to support his claim about the intellectual history of the founding era, asserting that "[t]hose who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality."[149] Against a compilation of history and tradition, Scalia

142. *Id.*
143. *Id.* at 877-81.
144. *See infra* text accompanying note 147.
145. *Id.* at 881; *see also Van Orden*, 545 U.S. at 708-10 (Stevens, J., dissenting).
146. *McCreary*, 545 U.S. at 876-81.
147. *Id.* at 881. In her concurrence, Justice O'Connor sounded a similar theme, defending the Court's Establishment Clause precedent in light of the Framers' general ideas about religious liberty and world conditions of unrest in other places. *Id.* at 881-84 (O'Connor, J., concurring).
148. "[I]t is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists." *Id.* at 894 (Scalia, J., dissenting).
149. *Id.* at 887 (Scalia, J., dissenting). Justice Scalia noted the phrase, "so help me God," added by George Washington to the Presidential oath by George Washington. *Id.* at 886. Scalia also noted the openings of the Supreme Court ("God save the United States and this Honorable Court") and Congress (legislative prayer), legislation to

flatly rejected the Court's own precedent requiring neutrality: "Nothing stands behind the Court's assertion that governmental affirmation of the society's belief in God is unconstitutional except the Court's own say-so, citing as support only the unsubstantiated say-so of earlier Courts going back no further than the mid-20th century."[150]

Justice Stevens was ready with an answer, and the exchange between Stevens in *Van Orden* and Scalia in *McCreary* represents the impasse at which most Establishment Clause originalists and living Constitutionalists stand: "The task of applying the broad principles that the Framers wrote into the text of the First Amendment is, in any event, no more a matter of personal preference than is one's selection between two (or more) sides in a heated historical debate."[151]

The foregoing cases demonstrate two discernable approaches to history in the Court's Establishment Clause jurisprudence, several points of disagreement, and the tensions those disagreements create in the doctrine. In the following Part, I attempt to view the disagreement in light of issues raised in the discipline of history—working toward a solution to the problem of the Court's use of history in Establishment Clause cases.

II. The Problem of History

A. Optimism and Pessimism

1. The Originalists

"*History is not history unless it is the truth.*" Abraham Lincoln[152]

To both originalists and living Constitutionalists, history provides a framework within which to consider the meaning of very abstract

provide paid chaplains to the House and Senate, as well as a Congressional request for the President to proclaim a day of prayer to "Almighty God." *Id.* Scalia noted President Washington's first Thanksgiving Proclamation, and the Northwest Territory Ordinance of 1787 containing approbatory language concerning religion and morality. *Id.* at 886-87. In addition to other historical materials, he quoted portions of Madison's first and Jefferson's second inaugural addresses containing explicit references to a deified "Being" responsible for the direction and prosperity of America. *Id.* at 888. Justice Scalia found continuity between historical references to religion and modern practices, including paid chaplains and legislative prayer, "In God We Trust" in coins, and, not without controversy, "under God" in the Pledge of Allegiance. *Id.* at 889.

150. *Id.* (Scalia, J., dissenting).

151. Van Orden v. Perry, 545 U.S. 677, 734 (2005) (Stevens, J., dissenting).

152. Ferenc M. Szasz, *Quotes About History*, http://hnn.us/articles/1328.html (last visited July 30, 2007); JOSEPH FORT NEWTON, LINCOLN AND HERNDON 314 (1910).

language.[153] The text itself contains no definition, so it would seem sensible to turn to the history of the creation, adoption, and ratification of the language to determine what it means. How seriously one takes that history in ascribing meaning to the Clause is likely determined by how straightforward one perceives the task of uncovering and applying the history, and how committed one may be to the principle that the history should be determinative, and that, in some cases, is dependent upon how cheerfully one is willing to view the history. In a symposium piece dedicated to the "dead hand problem," *i.e.*, the issue of whether the decisions of long dead framers and ratifiers should govern people and institutions in the present, Michael McConnell characterizes originalism as a response that simply "defend(s) the legitimacy of the dead hand."[154] McConnell says of the originalist perspective that "the people of 1787 had an original right to establish a government for themselves and their posterity," and therefore "the words they wrote should be interpreted—to the best of our ability—as they meant them."[155] Upon surveying the historical evidence, Raoul Berger asserts that the founders intended future generations to be bound by their meaning.[156] He concludes that "original intention is deeply rooted in Anglo-American law" and it "serves as a brake on judges' imposition of their personal preferences under the guise of interpretation."[157] Originalists admit that there are areas in which history fails to provide satisfactory answers, but they optimistically face the task of pressing on in search of the answers that are available.[158]

153. *Cf.* McCreary County v. American Civil Liberties Union of Kentucky, 545 U.S. 844 (2005). Mounting his response to Scalia's originalist account in dissent, Souter acknowledged limited agreement "on the need for some interpretive help. The First Amendment contains no textual definition of 'establishment,' and the term is certainly not self-defining." *Id.* at 874.

154. Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1130 (1998).

155. *Id.* at 1132. Michael Paulsen summarizes the approach as one that involves "giving to the Constitution's words and phrases the meaning they would have had, in context, to informed readers of the language at the time of their adoption as law, within the relevant political community" and argues that such method is dictated by the text of the Constitution itself. Michael Stokes Paulsen, *How to Interpret the Constitution (And How Not To)*, 115 YALE L.J. 2037, 2056 (2006) (reviewing Akhil Amar, AMERICA'S CONSTITUTION: A BIOGRAPHY (2006) and Jed Rubenfeld, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW (2006)); *see also* SCALIA, *supra*, note 26; Antonin Scalia, *The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

156. RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 402-21 (2d ed. 1997). In the second edition, Berger updates several chapters to respond to charges from critics in the twenty years since the original publication of his book and takes particular issue with the work of H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

157. *Id.* at 421.

158. *See generally* SCALIA, MATTER OF INTERPRETATION, *supra* note 26.

Nonetheless, the phrase "founder worship" that is popular with critics of originalism reveals their view that the originalists' devotion to history is misplaced.[159] Whether critics of originalism are responding to a sanguine view of history or to a principled belief about the process of constitutional interpretation, or both, one thing seems clear: the originalist rarely engages the issue of whether history reflects practices that are relevant or desirable today.

2. The Living Constitutionalists

> *Myth, memory, history—these are three alternative ways to capture and account for an elusive past, each with its own persuasive claim.*[160]

Optimists are seldom deterred by the prospect of law office history; if anything, they are motivated to do better history. But pessimists have little confidence in the use of Establishment Clause history, and find instead that it serves only the purpose of justifying a predetermined outcome.[161] In George Orwell's *Animal Farm*,[162] he describes the

159. This theme comes through clearly in Charles Miller's pre-originalism critique of "intent history" as he (somewhat sardonically) describes the significance of the founders in the modern American mind: "In the beginning was the Constitution; and the Constitution was with the Founding Fathers; and the Constitution was the Founding Fathers." MILLER, *supra* note 2, at 181.

160. Warren I. Susman, *quoted in* Szasz, *Many Meanings, Part I*, *supra*, note 1, at 560; http://historynewsnetwork.org/articles/1328.html (last visited December 29, 2007).

161. *See, e.g.*, Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901 (1993).

162. GEORGE ORWELL, ANIMAL FARM (Harcourt Inc. 1946) (Perhaps a few readers will indulge the author's brief retelling of the story: After the revolution, the pigs, as the smartest of the animals, create the rules to be followed and the ceremonies to be preserved under the new government. The pigs distill the tenets of their beliefs in a set of "commandments" and a six stanza song, and for those such as the sheep who can remember neither the rules nor the words of the song, a single mantra—"four legs good, two legs ba-a-a-d"—suffices to preserve the message. As the pigs create new rules and decrees, they justify them with reference to the recent history of the revolution, such as an impassioned speech by old Major, a deceased boar and the patriarch of "animalism." Or they recount how the animals fought bravely to defend an attack by the humans. The other animals always accept the oral histories recited by the pigs, and agree after some persuasion that whatever new law or decree the pigs introduce is justified and necessary. A problem arises, however, because the pigs who control the history blatantly change it, such as when animals who were heroes in the original version of a story later become villains. And they change the rules without admitting that there has ever been a change, such as when the commandment "no animal shall kill another animal," is later given without explanation as "no animal shall kill another animal *without cause*."). *Animal Farm*, believed to be Orwell's thinly-veiled allegory of the Russian Revolution, clearly cautions against the rewriting of history. *See* MITZI M. BRUNSDALE, STUDENT COMPANION TO GEORGE ORWELL 121-36, (2000) (noting that in an earlier work Orwell expressed concerns that "'the very concept of objective truth is fading out of the

animals of the English Manor Farm who soon overthrow their owner and master, a human. In Orwell's story, the pigs are the animals which manipulate history to persuade the other animals to follow their particular post-revolutionary agenda.[163] A cynic could easily overlay the work of the Court onto the characters in Orwell's story,[164] revealing the use of history to justify the creation of a doctrine or to create an artificial sense of continuity with the past. Take, for example, Justice Brennan's cobbling together of Court precedent, state court decisions, history, and tradition in his *Schempp* concurrence to support his repeated claim that the Court's decision in *Engel* had not been radical or novel.[165] Or, consider Chief Justice Burger's opinion in *Marsh*, purporting to follow most of the same history explicated in *Everson* while breaking dramatically from the doctrinal path created by that case.[166]

For many that question the use of history, however, there is something more troubling than law office-style manipulation of history. For these individuals, the use of history raises the specter of what lies beneath, that is, what "an honest fealty to history"[167] would tend to reveal about the Establishment Clause. With language echoing Justices Souter's approach to the Ten Commandments cases, Stephen Gey, for example, asserts that fidelity to history "will yield an Establishment Clause that no religiously pluralistic modern democracy would want or accept."[168] While historians have warned against asking questions of the past that the past cannot answer, living Constitutionalists worry that

world.'").

163. *See* ORWELL, *supra* note 162, at 154.

164. Kelley, in his 1965 article, connected the subject of Orwell's political satire to the work of the Warren Court. *See* Kelley, *supra* note 19, at 157. ("To put the matter differently, the present use of history by the Court is a Marxist-type perversion of the relation between truth and utility. It assumes that history can be written to serve the interests of libertarian idealism. The whole process calls to mind the manipulation of scientific truth by the Soviet government in the Lysenko controversy. The Court's purposes may be more laudable and the politics involved less spectacular, but the assumptions about the nature of reality are the same.").

165. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 274, 304 (1963). Certainly, there were scholars who considered it to be both. For critical commentary predating *Engel and Schempp*, *see, e.g.*, John Courtney Murray, *Law or Prepossessions*, 14 LAW AND CONTEMPORARY PROBS. 44 (1949). For a detailed list of religion clause scholarship during the period following *Everson* (1948-1953), and during the period following *Engel* and *Schempp* (1962-1965), see Lee J. Strang, *The (Re)Turn to History in Religion Clause Law and Scholarship*, 81 NOTRE DAME L. REV. 1697, 1702 n.34 (2006) (symposium introduction).

166. *See* Marsh v. Chambers, 463 U.S. 783 (1983). This largely has been my students' interpretation. Whether defending or attacking the results in particular cases, many students over the years have concluded that the Court has used history in its Establishment Clause decisions to justify result-oriented opinions.

167. Gey, *supra* note 3, at 1631.

168. *Id.*

history cannot provide the "right" answers.[169] Witness, from another context, progressive history professor Eric Foner's observation that Justice Taney's opinion in *Dred Scott* was "certainly plausible" as history.[170] For the principled pessimist, this conclusion about the function and the nature of Establishment Clause history necessarily leads to a mode of constitutional interpretation that would either disregard history altogether, or relegate it to a symbolic role.[171] And it is precisely this perceived disregard of an external restraint such as history that makes originalists so nervous.[172]

> *When the past no longer illuminates the future, the spirit walks in darkness.*[173]

Though the optimists and pessimists rarely seem to be on the same page, they each have experienced the "lure of history"[174] and that history has found its way into the opinions of the Court in many Establishment Clause cases.[175] The optimists can besmirch the pessimists for asserted lack of principle while the pessimists condemn the optimists to failure, but until either side is willing to move in the direction of the other, no significant agreement will be reached. For those who lack the optimism of the originalists and reject the pessimism of the living Constitutionalists, however, the discussion of the role of history in the Court's Establishment Clause decisions is not quite finished. The scholar or jurist who would attempt to navigate the water between the optimists and the pessimists must first acknowledge what the optimists and pessimists both accept, albeit on different levels—that there is value in history.[176] We are indeed removed from the founders and framers, and we cannot begin to understand the complexities of the world in which they lived. One generation is always removed from the history of previous generations, just as one day will never replicate the one that came before it. But this observation when applied to history in law would also tend to undermine the living Constitution approach, given its

169. *Id.*

170. ERIC FONER, WHO OWNS HISTORY? 177 (2002) ("*Dred Scott* may have been morally reprehensible, but it was good constitutional law—if, that is, good constitutional law means continually reenacting the principles and prejudices of the founding fathers").

171. *See supra* Part I.B.3

172. *Cf.* SCALIA, *supra* note 26, at 113 (contribution by Mary Ann Glendon) (". . . Whom should we fear more: an aroused populace, or the vanguard who know better than the people what the people should want?").

173. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA VOL. 1 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835), quoted in Szasz, *Quotes About History*, *supra* note 152.

174. Green, *supra* note 3.

175. *See supra* Part I.A.

176. *See generally supra* Part I.B.

heavy reliance on precedent.[177]

To conclude that answers from history are inaccessible to modern generations is to assume that there is no continuity in the human experience. By contrast, history is a type of anchor that we would do well not to abandon. William Wiecek, no fan of originalism,[178] summarizes the point as he cautiously concludes that history can be useful: "The past can be known, and it has an integrity that must be respected. Though these two basic propositions are often abused by being treated simplistically, they are true, and stand as our assurance against the unprincipled relativism that produces law-office history."[179]

The assertion that the narrative of our constitutional past is too exclusionary for contemporary relevance involves a distinct type of relativism, which prefers history that is "good" as a matter of substance over history that is "bad."[180] A more coherent response to the assertedly exclusionary nature of the Court's Establishment Clause history would be to include more facts in the historical analysis,[181] to examine them more carefully, and to critically evaluate their modern relevance. In exchange for the exclusionary Establishment Clause history, however, the pessimists thus far have offered little in return. While the optimists should take this claim more seriously than they have in the past, the pessimists should follow it through with some positive alternative.

Both the optimists and the pessimists can benefit from an approach that permits consensus where possible, civil disagreement where consensus is not possible, and open-mindedness toward difficult questions. More importantly, once the optimists and pessimists are speaking the same language, their audience can better evaluate the

177. Jeffries' and Ryan's political history, for example, certainly casts *Everson* in a negative light. *See* Jeffries & Ryan, *supra* note 3.

178. *See infra* Part II. B.1.

179. Wiecek, *supra* note 18, at 268.

180. *See generally* Van Orden v. Perry 545 U.S. 677, 707-737 (Stevens, J., dissenting).

181. For those who have spent time with the Court's Establishment Clause doctrine, it is difficult to envision a world in which the views of Jefferson and Madison and a few select others do not reign supreme. What we choose to privilege as history, however, influences doctrinal outcomes more than squabbles over whether Madison really believed that legislative chaplains violated the Establishment Clause. Just as some working within the discipline of history have challenged the traditional focus of historical works, the proposal in this article provides the opportunity for those who are interested in opening a discussion about what counts as history in the context of the Establishment Clause. Some have already attempted to begin that discussion. *See, e.g.*, Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995) (arguing that the relevant history is that surrounding the Fourteenth Amendment rather than the First Amendment); *see also* Richard Albert, *Beyond the Conventional Establishment Clause Narrative*, 28 SEATTLE U. L. REV. 329 (2005) (purporting to apply Lash's interpretive framework).

substance of their respective historical and doctrinal claims. But how do they go about speaking the same language—that is, how can two divergent approaches to history find some common ground in which to function? The discipline of history may offer some insight into this particular aspect of the problem.

B. Applications from the Discipline of History

1. The Historian's Objectivity

As one might expect, historians have weighed in on both sides of the division on constitutional interpretation. Historians like Kelley, for example, who renounced law office history were not necessarily proponents of originalism.[182] At least part of the issue that some historians take with orginalism (though this apparently was not Kelley's problem[183]) may be attributed to the erosion of the canon of objectivity within their discipline, which creates a seemingly irreconcilable conflict with the assumptions underlying originalist methodology.[184] William Wiecek, for example, presumably takes a swipe at originalists when he refers to "non-historians" engaging in the assumptions that facts are objectively knowable, that the past exists independent of its interpretation, and that "the application of the past to the present is essentially a matter of getting the facts straight."[185] According to Wiecek, such facts ". . . take on meaning only through interpretation," which ". . . begins with the way the historian asks questions, and at all stages is influenced by the historian's own biases (including ideology)."[186] In the context of the Establishment Clause, Steven Green makes essentially the same point, calling for judges and lawyers to "acknowledge that all historical accounts are selective and interpretive—that 'objective facts' or 'historical truths' do not exist."[187] Ambivalence about the role of the historian's lens has left many with real doubts about

182. *See* Kelley, *supra* note 19, at 157 (advocating "the application of precedent, legal continuity, and balanced contemporary socio-political theory" and a "more sophisticated and restrained approach to the use of history").

183. Richards locates Kelley's work within the canon of objectivity, and many of Kelley's conclusions appear to confirm Richards' analysis. *See* Richards, *supra* note 24, at 818; Kelley, *supra* note 19.

184. For a thorough discussion of the objectivity crisis, *see* G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485 (2002); PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION (1988).

185. Wiecek, *supra*, note 18, at 266-67.

186. *Id.* at 267.

187. Green, *supra* note 3, at 1733.

the use of history.

It would seem wise, therefore, to acknowledge this problem of perspective, though it is hardly fatal to history-based adjudication. For one thing, some facts are both objectively true and knowable:[188] Jefferson wrote a letter to the Danbury Baptists.[189] The House and Senate approved the language of what is now the First Amendment on September 25, 1789.[190] And so on. It is the selection, arrangement and interpretation of those facts that invite bias. On the other hand, more complicated factual assertions, say, that "Madison's advocacy . . . shows that the principle of federalism was by no means the main force behind what became the First Amendment,"[191] are inherently interpretive.[192] When a judge or Justice, in writing an opinion, presents basic historical facts, he is engaged in the process of assembling a historical record to reach a particular decision. As discussed below, transparency could be achieved by forcing the opinion writer to disclose his choices and interpretation. When an authoring judge uses a historian's or academic's historical account, transparency could be achieved by requiring the opinion writer to acknowledge the source, and perhaps any reputation of distinction pertaining to the work or one that its author may have earned as a partisan or ideologue.[193] Finally, in both cases, the opinion writer should provide, when reasonably available, any contrary interpretations of historical evidence or contrary historical accounts.

2. The Historian's Methodology

In thinking about how to synchronize the Court's approaches to history in light of the concerns raised about objectivity, the discipline itself offers guidance that follows naturally from the earlier discussion: the opinion writer should "distinguish primary sources from secondary works."[194] Of course the distinction will be obvious to anyone reading

188. Such simple things such as dates and events are "true" and "knowable" to the extent that anything that happened in the past can be known. *See* ROBERT JONES SHAFER, A GUIDE TO HISTORICAL METHOD 19 (3d ed. 1980) (distinguishing between those things that are metaphysical and those that are not).

189. Letter from Thomas Jefferson to Danbury Baptists (Jan. 1, 1802) *in* 16 THE WRITINGS OF THOMAS JEFFERSON 281, 282 (H. Washington ed. 1861).

190. U.S. CONST. amend I.

191. LEVY, *supra* note 129, at 104-09 (reviewing the drafting history of the First Amendment and discussing in particular the language "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.").

192. It has been said that to write an intellectual history is to try to "nail jelly to a wall." NOVICK, *supra* note 184, at 7.

193. This could be particularly helpful in the case of work that is cited in Supreme Court opinions, where the audience of mostly lawyers might not be aware in a particular case that the choice of an historian signals an ideological preference.

194. WILLIAM KELLEHER STOREY, WRITING HISTORY: A GUIDE FOR STUDENTS 18 (2d

the footnotes, but it is also important to approach an analysis using primary sources differently from an analysis using secondary ones.[195] As discussed above, a judge citing a letter of George Washington's or an essay from *The Federalist*, for example, is most likely to be constructing her own intellectual history of the framing rather than simply using a secondary account. More transparency is required in that situation so that the reader can understand the judge's interpretive choices. If, on the other hand, the judge is citing a secondary work, such as Macaulay's *The History of England*,[196] it would suffice simply to acknowledge the secondary work and justify any deviations from the conclusions in the work. The judge could also note whether the work has been accepted as authoritative in another professional or academic discipline such as history.[197] If the judge has knowledge about the reputation of the author, such as whether that author's work is usually associated with liberal or conservative causes, the judge could include that as well.

An intriguing prospect involves engaging historians of various ideological stripes to develop a set of standards to use that is peculiar to judicial opinion writing. The standards could be published in a leading law journal and republished on a web page. These standards would not bind the U.S. Supreme Court in Establishment Clause cases, but one would expect the collective judgment of nonpartisan experts to carry some weight.[198] If the historical professional itself has no interest in drafting such guidelines, there are plenty of historians on law faculties who could undertake such a project. Judges may be wary of making a

ed. 2004). Martin Flaherty goes further in prescribing methodological requirements for legal academics, stressing the "necessity of a thorough reading, or at least citation, of both primary *and* secondary source material generally recognized by historians as central to a given question," so that lawyers can view events and ideas in their larger historical context. Flaherty, *supra* note 25, at 553, 553-54. "Too often, legal scholars make a fetish of one or two famous primary sources, and consider the historical case made." Flaherty, *supra* note 25, at 554.

195. Flaherty, *supra* note 25, at 553.

196. MACAULAY, HISTORY OF ENGLAND (1849) (cited in Everson v. Bd. of Educ., 330 U.S. 1 at 9, n. 5. (1947)). The caveat found in Storey's student guide should be repeated here, lest the historian reader fret over the omission; Macaulay's work would be a primary source if the subject of study were nineteenth century England. STOREY, *supra* note 194, at 19.

197. *See, e.g.*, STOREY, *supra* note 194, at 19 (characterizing Macaulay's work as "classic"). If the judge is unaware of any peer review or other commentary, the judge could determine whether the work is listed in the AMERICAN HISTORICAL ASSOCIATION'S GUIDE TO LITERATURE, a collective work in three separate volumes spanning the twentieth century. These volumes involve some selection and bias, but they are deemed authoritative and are touted as a good starting place for students and nonhistorians. *See* STOREY, *supra* note 194, at 6-7 (apparently discussing the most recent guide).

198. It would be important to avoid the appearance that the standards themselves represent some sort of rebuke. *Compare, e.g.*, H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987).

request for help, perceiving the gesture as a concession of institutional weakness or worse, professional incompetence. But just as historians may have trouble working with legal documents to resolve problems in history,[199] even some of the best legal minds could use help writing history to decide cases.

III. A Procedural Solution

Given the intensity of the debate over history, it is reasonable to assume that the Court's Establishment Clause doctrine will remain frozen at the point of the exchange between Justices Stevens and Scalia.[200] As discussed earlier, this Article proposes a procedural solution that offers some help: separation of the history from the holding in the Court's opinion.

A review of the problem may shed light on the wisdom of a procedural solution. The Establishment Clause originalists want history to determine the outcome while the living Constitutionalists believe that the history deserves a far less significant role, and, fueled by the work of historians, each camp openly challenges the other's treatment of history.[201] Scholars, students, and others are confused and/or skeptical about the role history actually plays in the Court's Establishment Clause decisions.[202] Moreover, they question the way in which both the originalists and the living Constitutionalists use history to reach decisions.[203] A procedural solution in which the Court separates its treatment of history from its analysis of law and then explains the significance of the history to the decision in the case offers the benefits of transparency, clarity and legitimacy.

A. The Virtues of Transparency

As a society we value transparency, so there may seem to be little need to point out its virtues. In the context of opinion writing, Justice Breyer has complained that history-based decisions contain inherently subjective elements that preclude transparency.[204] In his words, "[a] decision that directly addresses consequences, purposes, and values is no more subjective, at worst, and has the added value of exposing

199. *See Forum*: *The Making of a Slave Conspiracy, Part 2*, 59 WM & MARY QUARTERLY 135 (2002); *see also* Thomas J. Davis, *Conspiracy and Credibility: Look Who's Taking, about What—Law Talk and Loose Talk*, 59 WM & MARY QUARTERLY 167 (2002).

200. *See supra* Part I.B.4.

201. *See supra* Part I.B.

202. *See supra* note 3.

203. *Id.*

204. STEPHEN BREYER, ACTIVE LIBERTY 127 (2005).

underlying judicial motivations, specifying the points of doubt for all to read."[205] Nonetheless, some might reasonably fear that such transparency threatens the judiciary's public mantle of objectivity. Consider that the opinion writers are the Members of the Supreme Court and the setting is church/state relations, and the threat may appear more serious. It is precisely in this context, however, that transparency has some distinct advantages.[206]

1. Transparency of Motive

One of the chief complaints about law office history is that it obscures the actual engine of the decision.[207] In *Reynolds*, the Court found it "appropriate" to survey the history surrounding the Religion Clauses, and then it discovered history that led to a certain interpretation of the Free Exercise Clause that resolved the case against the Mormon plaintiffs.[208] Now imagine that the Court had been required to discuss the history, taking into account contrary arguments and evidence provided by counsel and/or any dissent, and then separately justify the use of the history to decide that case. If something such as an agenda to oppress Mormons and not the pursuit of truth were driving the decision, it would have been much harder to conceal. A judge stepping from Point A (assertion of historical fact) to Point B (legal conclusion) must rationalize the move from A to B beyond simple conclusions that the Establishment Clause "commands" or "forever forbade" this or that. And a weak explanation is more likely to indicate some basis other than history driving the decision. True, good rhetoreticians can conceal the ugliest of agendas, just as sophisticated burglars can flout ordinary security systems. Still, common experience suggests a widely shared belief that the use of ordinary security measures is preferable to none at all. In the same way, a procedural framework that makes it more difficult to hide an inappropriate basis for decision does some good.[209]

205. *Id.* ("This is particularly important because transparency of rationale permits informed public criticism of opinions; and that criticism, in a democracy, plays an important role in checking abuse of power."); *see also* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987).

206. This is not to say, however, that the procedural approach advocated in this article cannot be applied to the Court's use of history more generally. Likewise, the procedural approach of separating the basis for the decision from the decision itself may appeal to those who find the misuse of precedent or policy just as problematic as the asserted misuse of history.

207. *See, e.g.*, Kelley, *supra* note 19.

208. Reynolds v. U.S., 98 U.S. 145, 162-64 (1878).

209. It is also possible that once an inappropriate basis for decision becomes apparent to the opinion writer, she will reconsider that decision—an anecdotal phenomenon sometimes described as the opinion that just "won't write." *Cf., e.g.*, Gregory C. Sisk,

Transparency of motive, in turn, increases legitimacy. Suppose, for example, that in its *Everson* decision the Court had explained its assumptions and choices, and even acknowledged some of the weaknesses in its historical case. At best, a modern reader of *Everson* might be less inclined to assume that the Court was either patently wrong or hostile to the growth of parochial schools.[210] At worst, a display of candor in *Everson* might have softened the blows from the criticisms that eventually came, and would have permitted the Court to revisit some of its historical assertions without losing face. Advocates would have perceived the concerns driving the Court so that future cases could be briefed and argued on grounds that might deliver a win. Furthermore, Court skeptics soured by the perceived injustice of the decision could focus their criticism on the Court's approach to the issues presented in the case rather than on the polemics of history. By contrast, unwavering assertion of conviction and rectitude tends to strain rather than foster credibility, and certainly makes it harder to publicly rethink one's position.

2. Transparency of Methodology

The procedural solution of bifurcation also provides readers with a comparison of apples and apples. Suppose again that the justices as authors of the majority, concurring, and dissenting opinions in Establishment Clause cases were required to treat the history section separately from the decision in the case. The justices would be required to identify whether they were constructing an historical account from original sources, repeating a historical narrative created by someone else or blending the two methods. When working from original sources, justices would be required to explain the choice of source, and might even be inclined to speak to authenticity, as well as assumptions made in interpretation, analysis and synthesis of materials.[211] On the other hand, justices using secondary sources would need to justify the choice of source or, at the very least, the selection of a particular narrative or account from a given source.

Because the strengths and weaknesses in the differing historical accounts would be plain, the justices would have an incentive to take the history seriously. So, for example, living Constitutionalist justices would

Michael Heise, Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1411 (1998).

210. Philip Hamburger's SEPARATION OF CHURCH AND STATE, for example, makes much of Justice Black's alleged connections to the Klu Klux Klan. *See* HAMBURGER, *supra* note 3, at 422-34.

211. *See* SHAFER, *supra* note 188.

score fewer points by simply poking holes or threatening to expose embarrassing weaknesses in the originalists' historical case. Similarly, originalist justices would have to explain the holes and the weaknesses rather than charge that, in the places where the history fails, their ideological opponents offer no apparent substantive alternative to originalism. In short, the opinions in Supreme Court decisions would actually speak to each other and, more importantly, would speak to readers (such as students) who may not be precommitted to a particular interpretation of the Establishment Clause.

B. The Limits of a Procedural Solution

Though this article has proceeded as if questionable use of history were the biggest problem with the Supreme Court's Establishment Clause doctrine, those familiar with the area recognize that it provides a sizeable target for any critic.[212] The Court's use of history only amplifies the confusion in the doctrine, so an improvement in the cogency of the treatment of history likely means an improvement overall, which is no small accomplishment. Still, the procedural approach would provide consistency to the Court's Establishment Clause cases in format only. Future opinions would contain the same basic elements, but a procedural safeguard could not guarantee that the Court would (or would not) make history the basis for decision in every Establishment Clause case. Because this approach fails to address the substantive problem of inconsistently applied Establishment Clause doctrine, it is by nature only a partial solution. Based on the state of that doctrine, however, there is ample reason to welcome a promising procedural change, even if somewhat limited in its scope.

C. An Example of Reform

To evaluate the efficacy of the procedural approach, it may be helpful to sample an opinion written within that framework, so I have chosen to rewrite the Court's decision in *Everson*. This rewritten version appears in *Appendix A*. There were many likely candidates, but *Everson* seemed a good choice given its role as the fountainhead of modern Establishment Clause history. The rewrite is partial; what is found there pertains only to the discussion in this article.

To be sure, the re-writing of *Everson* presented some difficulties of the kind already described in this article. Making Justice Black's and the majority's choices transparent required me to assume what those choices

212. *See, e.g.*, Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725 (2006).

may have been. I decided to focus particular attention on the work of two historians, Cobb and Sweet,[213] because their works are cited in the original *Everson* opinion and, more importantly, by Justice Rutledge to support the proposition that the Virginia experience was a paradigm for the First Amendment.[214] These historians focused on the role of religious dissenters as the heroes in this country's history of religious liberty, defined as nonestablishment, and they apparently assumed that the First Amendment embodied that same liberty.[215] Sweet concludes that Massachussetts, Connecticut and New Hampshire, with establishments that existed well beyond the adoption and ratification of the First Amendment, simply lagged behind Virginia and the Federal Constitution.[216] My cursory review of these works and the *Everson* account confirms the insight of the Holmes quotation that opened this article—Cobb and Sweet were interested in the very specific question of who brought about religious liberty.[217] The Supreme Court, on the other hand, was interested in the meaning of the First Amendment.[218] They were working in the same past but with arguably different histories. My sense is, albeit in hindsight, that some transparency about method might have tipped off readers to this incongruity.

The re-written opinion's reflections upon the quality of its history are made with the benefit of sixty years of commentary in the rear view mirror; nonetheless, the re-write is not a "*What* Everson *Should Have Said*"[219] type of opinion. The rewritten opinion maintains the substance of the original and merely presents that substance in a new format. It is in many places only slightly modified from the original, but it does

213. *See* COBB, *supra* note 60; SWEET, *supra* note 60; WILLIAM WARREN SWEET, RELIGION IN COLONIAL AMERICA (1942); *see also* APPENDIX A, *infra*. Historian Paul Murphy criticized Justice Black's citation of Cobb's work and other sources in the Justice's opinion in *Engel v. Vitale*. *See* Paul L. Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64, 65 (1963). Murphy found that Cobb's and the other works represented a "once important, although now outdated view." *Id.*, *cited in* Reid, *supra* note 3, at 203.

214. *See* Everson v. Bd.of Educ., 330 U.S. 1, 33-34 (1947) (Rutledge, J., dissenting).

215. It is interesting that Sweet conflates religious freedom with the separation of church and state, *see* SWEET, COLONIAL AMERICA, *supra* note 213, at 339, a move which Hamburger generally criticizes as historical fallacy, *see* HAMBURGER, *supra* note 3, at 353-54 (noting Sweet's use of the term in another work).

216. *See* SWEET, STORY OF RELIGION, *supra* note 60, at 274-75; SWEET, COLONIAL AMERICA, *supra* note 213, at 339. Cobb seems more nuanced in his view, though he agrees. *See* COBB, *supra* note 60, at 509-17. Justice Black's opinion adopts that position. *See Everson*, 330 U.S. at 13-14; Reiss, *supra* note 3, at 115.

217. *See infra* note 220.

218. *See generally Everson*, 330 U.S. 1.

219. Here, I loosely refer to Jack Balkin's popular series, WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID (Jack M. Balkin ed., 2001) and more recently, WHAT *ROE V. WADE* SHOULD HAVE SAID (Jack M. Balkin ed., 2005).

contain some important improvements. The Court's choices and interpretations are more transparent. The holes in the Court's history are made plain, and though they may give critics cause to be concerned, the critics need not worry that the Court was merely oblivious to potential problems with its history. The tentative nature of the historical claims preserves the integrity of history for those who disagree with the Court's version. The Court's policy choices are also clear; those who accept the history but dislike the decision cannot accuse the Court of simply misapplying the history. Ultimately, the reader can judge whether the re-written opinion accomplishes any of the objectives stated in this article, but the candor and tone of the opinion leaves room for fruitful discussions about history, doctrine, or both.

Conclusion

In this article, I have argued that the Supreme Court's use of history in Establishment Clause cases reveals an ideological divide that has undermined the Court's doctrine. I have proposed a solution in which Establishment Clause majority, concurring, and dissenting opinions separate the historical materials from the decision in *Everson*. This small, procedural change would take an unusual step toward transparency, clarity, and legitimacy.

The procedural solution promises improvements in the way the Court evaluates history, highlighting some debates that show no signs of becoming extinct.[220] Under this approach, Court disagreement on the role of Establishment Clause history may be less likely to color the history itself, and future decisions might reflect intellectual collaboration among the Justices rather than stubborn ideological divisions. Perhaps most important, the procedural solution invites the reader to clearly perceive what the Court has done with history, under fluorescent lights and without the usual rhetoric of Establishment Clause opinions.[221] In

220. The argument that the Establishment Clause was originally intended as a jurisdictional provision that prevented Congress from disturbing state establishments has received renewed scholarly and Court attention in the past several years. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 33-35 (1998); STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM (1995); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998); *see also* Van Orden v. Perry, 545 U.S. 677, 693-94 (2005) (Thomas, J., concurring) (making the historical argument that 14th Amendment incorporation of the Establishment Clause was improper); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45-46, 49-53 (2004) (Thomas, J., concurring) (raising the argument); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. at 232-304 (Brennan, J., concurring) (addressing the argument); *Schempp*, 374 U.S. at 310 (Stewart, J., dissenting) (making the argument).

221. As Steven Smith has said in the context of the jurisdictional claim mentioned above, without the blessing of history, arguments about which Establishment Clause we

the end, we could achieve a more thoughtful and defensible jurisprudence of history in the area of the Establishment Clause.

want will simply have to "bear their own weight." *See* Podcast, *supra* note 3 (oral remarks of Steven Smith); *see also* Steven D. Smith, *The Jurisdictional Establishment Clause: A Reappraisal*, 81 NOTRE DAME L. REV. 1843, 1893 (2006).

APPENDIX A

The re-written *Everson* majority opinion*

Mr. Justice Black delivered the opinion of the Court.

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The New Jersey statute is challenged as a "law respecting an establishment of religion." The First Amendment, as made applicable to the states by the Fourteenth[222] commands that a state "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." These words of the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity. Doubtless their goal has not been entirely reached; but so far has the Nation moved toward it that the expression "law respecting an establishment of religion," probably does not so vividly remind present-day Americans of the evils, fears, and political problems that caused that expression to be written into our Bill of Rights. Whether this New Jersey law is one respecting an "establishment of religion" requires an understanding of the meaning of that language, particularly with respect to the imposition of taxes. Once again,[223] therefore, it is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted.

History

Introduction and Statement of Method

Several historians have attempted to recreate the intellectual landscape of the attitudes of the Founders of this Nation, and their work informs this Court's discussion of the history leading up to the Framing

* This rewrite loosely tracks the language of the original *Everson* opinion, including footnotes, beginning at page eight. Large portions of the opinion have been deleted, but additions and deletions have not been noted. For an accurate comparison, see *Everson*, 330 U.S. at 8-18. The Editors would like the reader to know that the re-write, like the *Everson* opinion itself, lacks attribution footnotes in places where such footnotes most certainly would be required by today's standards. It should also be noted that the Editors have updated many of the citations to reflect current Blue Book conventions, and in one case an erroneous pinpoint citation has been changed.

222. Murdock v. Pennsylvania, 319 U.S. 105 (1943).

223. *See* Reynolds v. United States, 98 U.S. 145, 162 (1878); *cf.* Knowlton v. Moore, 178 U.S. 41, 89, 106 (1900).

of the First Amendment. The Court is particularly impressed by the writings of distinguished historians such as Sanford Cobb and William Warren Sweet, whose work tends to focus on the plight of religious dissenters and their role in bringing about religious liberty—a theme that no doubt animated the Framers of the First Amendment. The Court has not conducted an independent review of all of the primary source documents, but uses primary sources such as James Madison's "*Detached Memorandum*"[224] to amplify important points.

Finally, the reader will note that the historical section, due in particular to the rather extensive citation and explanation of historical sources and conclusions, is lengthier than the average opinion. The Court deems necessary the added length given the importance of this decision as the first to apply the "establishment of religion" clause to the States. It should be kept in mind that the Court's expertise rests, of course, in the domain of law and not history.

Narrative

A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to attend and support with taxes and tithes government-favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. These practices and persecutions of the old world were transplanted to and began to thrive in the soil of the new America.

Such practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence.[225] The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused indignation in Virginia.[226] It was these feelings which

224. James Madison, *Detached Memorandum*, *published in* 3 WILLIAM AND MARY Q. 534, 551, 555 (1946).

225. Madison wrote to a friend in 1774: "That diabolical, hell-conceived principle of persecution rages among some. . . . This vexes me the worst of anything whatever. There are at this time in the adjacent country not less than five or six well-meaning men in close jail for publishing their religious sentiments, which in the main are very orthodox. I have neither patience to hear, talk, or think of anything relative to this matter; for I have squabbled and scolded, abused and ridiculed, so long about it to little purpose, that I am without common patience. So I must beg you to pity me, and pray for liberty of conscience to all." I WRITINGS OF JAMES MADISON (1900) 18, 21, *quoted in* SANFORD H. COBB, RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY 490 (1902).

226. Virginia's resistance to taxation for church support was crystallized in the famous "Parsons' Cause" that Patrick Henry argued against in 1763, in which state-supported clergy opposed a statute that had the effect of reducing their salaries. For a

found expression in the First Amendment. No one locality and no one group throughout the Colonies can be given entire credit for having aroused the sentiment that culminated in adoption of the Bill of Rights' provisions embracing religious liberty, but Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulus and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government that was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious group.[227]

In its analysis of the history, the Court began with the conclusion above, stated succinctly in *Reynolds v. United States*, that "[t]he controversy upon this general subject . . . seemed at last to culminate in Virginia."[228] Several facts confirm the Court's statements regarding the significance of Virginia. As detailed by Justice Rutledge in his dissent, James Madison, the author and sponsor of the first draft of the First Amendment, publicly opposed the Virginia assessment described below in his famous Memorial and Remonstrance. The Memorial, appended in full to Justice Rutledge's opinion, sets out a plausible interpretation of religious liberty which coheres with issues presented in modern times. Virginia aggressively resisted the established church, a path that eventually was followed by each of the remaining establishments. Virginia therefore embodies a prophetic vision of religious freedom that serves as a model for the early, as well as contemporary, meanings of that idea.[229] Because Thomas Jefferson drafted the "Virginia Bill for

brief account *see* COBB, *supra* note 60, 108-11.

227. It is acknowledged that a close inspection of another historical experience based, perhaps, on another working hypothesis, might shade our interpretation of the First Amendment. A survey of the established Congregationalist Church in Massachusetts, for example, may show less popular resistance to the state establishment of religion during the period in question than the established Church of England in Virginia.

228. Reynolds v. United States, 98 U.S. 145, 163 (1878).

229. This appears to be a theme in Cobb's treatment of Virginia and in his conclusions about religious liberty in the colonies. *See generally* COBB, *supra* note 60. Sweet, after discussing the disestablishment movement in Virginia leading up to the passage of Jefferson's "Bill for Establishing Religion Freedom," concludes: "Religious freedom had triumphed in Virginia and was soon to spread throughout the nation, and a few years later in the form of the first amendment to the Federal Constitution was to become a part of the fundamental law of the land." SWEET, THE STORY OF RELIGION, *supra* note 59, at 192; *cf.* SWEET, RELIGION IN COLONIAL AMERICA 339 (1942) ("With the coming of the Revolution, the long struggle for religious freedom and the separation of Church and State in America had been virtually won. . . . The embodiment of these great principles in the new state constitutions and finally in the Federal constitution itself was simply writing colonial experience into the fundamental law of the land.").

Religious Liberty,"[230] the Court gives Jefferson's views on the meaning and scope of the First Amendment considerable weight. Finally, the Court has not been provided with briefs asserting a contrary historical interpretation; therefore, the Court reads the secondary sources to assert that the Virginia experience is a particularly relevant part of this country's history of religious liberty, including the language "establishment of religion" found in the First Amendment.[231] The Court has not compared and does not discuss the original and successive drafts of the First Amendment, having chosen instead to focus only on the final language that was adopted.[232] It is assumed that the men who drafted that charter spoke for the people who called for it, and that the call for religious liberty was heard and understood.[233]

Indeed, the facts of the Virginia Assessment Controversy support the Court's interpretation of the scope intended for the language prohibiting an establishment of religion by the drafters of the First Amendment. In Virginia, the movement toward disestablishment reached its dramatic climax in 1785-86 when the Virginia legislative body was about to renew Virginia's tax levy for the support of the established church. Thomas Jefferson and James Madison led the fight against this tax. Madison wrote his great Memorial and Remonstrance against the law.[234] In it, he eloquently argued that a true religion did not need the support of the law; that no person, either believer or nonbeliever, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions. Madison's Remonstrance received strong support throughout Virginia,[235] and the Assembly postponed consideration of the proposed tax measure until its next

230. *See Reynolds*, 98 U.S. at 163; *cf.* SWEET, THE STORY OF RELIGION, *supra* note 60, at 191-92.

231. *See* U.S. CONST. amend. I.

232. Likewise, the Court does not survey evidence of the intent of the States that ratified the First Amendment.

233. To the extent that the history explicated in *Reynolds* is not binding on this Court, however, the Court notes that it finds the Virginia experience to be useful given its resonance with the issues facing contemporary society. When history appears to repeat itself—thus offering up a lesson on the proper relationship between church and state—that history and the concomitant lesson must be heeded, even if an exhaustive review of historical materials might give rise to a quarrel over the history or the lesson.

234. II WRITINGS OF JAMES MADISON 183.

235. In a recently discovered collection of Madison's papers, Madison recollected that his Remonstrance "met with the approbation of the Baptists, the Presbyterians, the Quakers, and the few Roman Catholics, universally; of the Methodists in part; and even of not a few of the Sect formerly established by law." Madison, *Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments*, *in* Fleet, *Madison's "Detached Memorandum,"* 3 WILLIAM & MARY Q. 534, 551, 555 (1946).

session. When the proposal came up for consideration at that session, it not only died in committee, but the Assembly enacted the famous "Virginia Bill for Religious Liberty" originally written by Thomas Jefferson.[236] The preamble to that Bill stated among other things that

> Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either . . .; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern. . . .[237]

And the statute itself enacted

> That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief. . . .[238]

This Court has previously recognized, as discussed above, that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute.[239] Prior to the adoption of the Fourteenth Amendment, the First Amendment did not apply as a restraint against the states.[240] Most of them did soon provide similar constitutional protections for religious liberty.[241] But some states persisted for about half a century in imposing restraints upon the free

236. For general accounts of background and evolution of the Virginia Bill for Religious Liberty *see* JAMES, THE STRUGGLE FOR RELIGIOUS LIBERTY IN VIRGINIA (1900); THOM, THE STRUGGLE FOR RELIGIOUS FREEDOM IN VIRGINIA: THE BAPTISTS (1900); COBB, *supra*, note 5, 74-115; Madison, *Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments supra*, note 235, at 554, 556.

237. 12 HENING, STATUTES OF VIRGINIA 84 (1823); COMMAGER, DOCUMENTS OF AMERICAN HISTORY 125 (1944).

238. 12 HENING, STATUTES OF VIRGINIA 86.

239. *See* Davis v. Beason, 133 U.S. 333, 342 (1890); Reynolds v. United States, 98 U.S. 145, 164 (1878); Watson v. Jones, 80 U.S. 679, 679 (1871).

240. *See generally* Permoli v. New Orleans, 44 U.S. 589 (1845); Barron v. Baltimore, 23 U.S. 243 (1833).

241. For a collection of state constitutional provisions on freedom of religion *see* GABEL, PUBLIC FUNDS FOR CHURCH AND PRIVATE SCHOOLS 148-49 (1937). *See also* 2 COOLEY, CONSTITUTIONAL LIMITATIONS 960-85 (1927).

exercise of religion and in discriminating against particular religious groups.[242]

Law

Given the rich history of religious liberty, it seems appropriate to interpret the scope of the First Amendment according to the history surrounding its drafting and adoption. The Court is satisfied that the history provides a workable account of relevant events and attitudes leading up to the adoption of the First Amendment, even though some questions remain unanswered and still others remain unexplored. That history, discussed above, and our precedents interpreting the First Amendment, discussed below, guide our decision in this case.

The meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof,[243] in the light of its history and the evils it was designed forever to suppress, have been several times elaborated by the decisions of this Court prior to the application of the First Amendment to the states by the Fourteenth.[244] The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom.[245] There is every reason to give the same application and broad interpretation to the "establishment of religion" clause. Counseling against such an interpretation, however, is the fact, acknowledged earlier, that state establishments persisted beyond the adoption of the First Amendment. It is clear as a historical matter, therefore, that the Federal Constitution did not touch existing state establishments, and apparently was not designed to do so. It may seem inconsistent with history, therefore, to apply the federal prohibition against the states. In gleaning from this Nation's history, however, the Court focuses on the idea of individual freedom from state

242. Test provisions forbade officeholders to "deny . . . the truth of the Protestant religion." *E.g.* N.C. CONST.(1776) § XXXII; II Poore, *Constitutions* 1390, 1413 (1878). Maryland permitted taxation for support of the Christian religion and limited civil office to Christians until 1818, *id.*, I, 819, 820, 832.

243. U.S. CONST. amend. I.

244. *See generally* Reuben Quick Bear v. Leupp, 210 U.S. 50 (1908); Davis v. Beason, 133 U.S. 333 (1890); Watson v. Jones, 80 U.S. 679 (1871); Terrett v. Taylor, 13 U.S. 43 (1815); *cf.* Reynolds v. United States, 98 U.S. 145 (1878).

245. *See generally* Marsh v. Alabama, 326 U.S. 501 (1946); Follett v. McCormick, 321 U.S. 573 (1944); Jamison v. Texas, 318 U.S. 413 (1943), Largent v. Texas, 318 U.S. 418 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); *cf.* Bradfield v. Roberts, 175 U.S. 291 (1899).

establishments that pervaded the writings of Madison and Jefferson. This very individual freedom is consistent with our precedents interpreting the "freedom of speech" and "free exercise of religion" language of the First Amendment in the light of the Fourteenth Amendment.[246] Such an interpretation also seems desirable as a matter of policy, particularly given the recent and historical controversies over public aid to sectarian education.

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to, or to remain away from, church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, or for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt, to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[247] Now as ever, the history developed earlier, of which Jefferson's words are an important part, appeals to our sense of prudence and justice.

We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the bus fares of pupils attending public and other schools. It appears that these parochial schools meet New Jersey's secular educational requirements. The State contributes no money to these schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.

Though the history discussed earlier impresses upon us the importance of separation of church and state, the dangers Jefferson and Madison envisioned are not present in the instant case. The First Amendment has erected a wall between church and state. For historical, practical, and policy reasons, that wall must be kept high and

246. *See* cases cited *supra* note 245.

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

impregnable. We could not and will not approve the slightest breach. New Jersey has not breached it here.