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“BAD HISTORY”¹: THE LURE OF HISTORY IN ESTABLISHMENT CLAUSE ADJUDICATION

Steven K. Green*

INTRODUCTION

“For certainty in the law a little bad history is not too high a price to pay.”²

History has been a popular source of authority for constitutional adjudication for many years.³ This stands to reason, as American law is generally a precedent-based system, and constitutional law in particular turns on interpreting a 215-year-old document. Yet despite the ubiquity of historical authority in constitutional interpretation, in no area has such reliance been more noticeable (and notable) than in Establishment Clause cases.

This observation is, of course, neither profound nor original. Justice Rutledge made his pithy observation about the importance of history for Religion Clause controversies more than fifty-five years ago in the first modern establishment case.⁴ Whether Rutledge’s statement served as an invitation or a premonition, since 1947 lawyers and

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1 *Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting); John Courtney Murray, *Law or Prepossessions?*, 14 *LAW & CONTEMP. PROBS.* 23, 25 (1949).

2 CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 195 (1969) (quoting William S. Holdsworth, *The Place of English Legal History in the Education of English Lawyers*, in *ESSAYS IN LAW AND HISTORY* 20, 24–25 (A.L. Goodhart & H.G. Hanbury eds., 1946)).

3 *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407–09, 432–36 (1857).

4 *See Everson v. Bd. of Educ.*, 330 U.S. 1, 33 (1947) (Rutledge, J., dissenting) (“No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment.”).

judges have used history with abandon to justify their arguments and decisions about the proper relationship between church and state.⁵

So, the question arises whether the recent spate of historically-based scholarship,⁶ arguments and holdings in Supreme Court establishment cases⁷ represents anything new. The short answer is “no,” and, of course, “yes.” Although the recent occurrence of historically oriented cases may be explained by the randomness of the particular controversies or “cycles in history,” something different is afoot. Not since the mid-1980s—and the 1940s before then—has the lure of history been so dominant in Religion Clause jurisprudence. But since that last epoch, the story that has been emerging from the historical record has been vastly different than before. Due to an upsurge in revisionist histories since the mid-1980s,⁸ the historical account has increasingly been hostile to the separationist position represented by the Jeffersonian-Madisonian position recounted in *Everson v. Board of Education*.⁹ Those who once criticized or marginalized the significance of the history are now embracing it, and those who once felt the comfort of having “history on their side” now find themselves on the defensive. But the most significant aspect of this renewed interest in history is the growing awareness—and lack thereof—about the appropriate uses of history in Supreme Court adjudication. The remaining “separationists” on the Court—inspired by former Justice Brennan—have recognized the errors of Justice Black’s *Everson* approach and now call for limits on historical analysis in judicial decisionmaking.¹⁰

5 See *Wallace*, 472 U.S. at 92–106 (Rehnquist, J., dissenting); *Marsh v. Chambers*, 463 U.S. 783, 786–92 (1983); *Sch. Dist. v. Schempp*, 374 U.S. 203, 254–58, 266–78 (1963) (Brennan, J., concurring); *Engel v. Vitale*, 370 U.S. 421, 425–30 (1962); *McGowan v. Maryland*, 366 U.S. 420, 431–47 (1961); *id.* at 484–95 (Frankfurter, J., concurring); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 213–25 (1948) (Frankfurter, J., concurring); *id.* at 244–48 (Reed, J., dissenting); *Everson*, 330 U.S. at 8–15; *id.* at 33–43 (Rutledge, J., dissenting).

6 See, e.g., DANIEL L. DREIBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* (2002); PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002).

7 See *Van Orden v. Perry*, 125 S. Ct. 2854, 2858 (2005) (holding that display of Ten Commandments on grounds of state capitol did not violate Establishment Clause); *McCreary County v. ACLU*, 125 S. Ct. 2722, 2745 (2005) (upholding preliminary injunction barring display of Ten Commandments on the ground that the county had a “predominantly religious purpose” in erecting the display).

8 See sources cited *infra* notes 68–71.

9 330 U.S. 1, 11–13, 18.

10 See *Van Orden*, 125 S. Ct. at 2882–90 (Stevens, J., dissenting); *McCreary*, 125 S. Ct. at 2742–45.

Still, Thomas Jefferson's Bill for Establishing Religious Freedom¹¹ and James Madison's *Memorial and Remonstrance*¹² remain the separationists' Holy Grail.¹³ In contrast, the Court's "accommodationists," now enjoying fruits from the tree of history, are engaging in some of the worst historical analysis imaginable. Justices Scalia and Thomas's obsession with "originalism," and the latter's recent advocacy of reverse incorporation, are the latest examples.¹⁴ Despite more than forty years of criticism by the historical academy,¹⁵ "bad history" abounds in Religion Clause jurisprudence.

This Article argues that because bad history is so prevalent in Religion Clause adjudication, history as an analytical tool should be circumscribed.¹⁶ While history serves as an indispensable source of information, inspiration, and even authority for some Establishment Clause controversies, its role and effectiveness in Supreme Court adjudication are necessarily limited. History can never provide specific answers to modern controversies; neither can history tell us what the Founders may have thought about future church-state conflicts or, in many instances, even about the church-state conflicts they faced. The historical record is too amorphous and too easily misread or manipulated to resolve modern controversies. In essence, the very attempt to use history to *answer* current constitutional questions is a misuse of the historical craft. At best, history can only inform; it cannot resolve legal controversies.

11 THOMAS JEFFERSON, A BILL FOR ESTABLISHING RELIGIOUS FREEDOM (1779), reprinted in 5 THE FOUNDERS' CONSTITUTION 77 (Philip B. Kurland & Ralph Lerner eds., 1987).

12 James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), in 2 THE WRITINGS OF JAMES MADISON 183 (Gaillard Hunt ed., 1901).

13 See, e.g., *Mitchell v. Helms*, 530 U.S. 793, 870–72 (2000) (Souter, J., dissenting).

14 See *Van Orden*, 125 S. Ct. at 2865 (Thomas, J., concurring); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49–51 (2004) (Thomas, J., concurring in the judgment); *Zelman v. Simmons-Harris*, 536 U.S. 639, 678–79 (2002) (Thomas, J., concurring); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

15 See, e.g., MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 10–11 (1965) ("By building constitutional law on history thus oversimplified, the Court has widened the gap between current social reality and current constitutional law."); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985) ("It is commonly assumed that the 'interpretive intention' of the Constitution's framers was that the Constitution would be construed in accordance with . . . the framers' own purposes, expectations, and intentions. Inquiry shows that assumption to be incorrect.").

16 See Christopher L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 FORDHAM L. REV. 1611, 1622 (1997) ("[T]here is too much history in constitutional interpretation as it is practiced today.").

Part I of this Article briefly traces the Court's use of historical analysis and documents the historical shift (pardon the pun) in the substantive answers to the Court's historical inquiries. Part II discusses the appropriate uses of history in Establishment Clause adjudication and recommends a model of analysis. In so doing, this author is not so bold as to pronounce the "correct" method of historical analysis in constitutional cases. As the author of three "historian's" briefs in recent Court cases, I too have felt the lure of "law office history."¹⁷ Part III then critiques four more recent controversies: the persistence of "originalism;" the relevance of the Blaine Amendment in religious funding cases (*Locke v. Davey*¹⁸); the Ten Commandments and Pledge of Allegiance cases (*McCreary County v. ACLU*;¹⁹ *Van Orden v. Perry*;²⁰ *Elk Grove Unified School District v. Newdow*²¹); and Justice Thomas's advocacy of a "federalism" approach to establishment cases.

I. A TORTURED PATH

"The true meaning of the Establishment Clause can only be seen in its history."²²

No case is more responsible for introducing the historical method in Establishment Clause adjudication than *Everson v. Board of Education*.²³ Justice Black—with help from Justice Rutledge—resurrected from obscurity Jefferson's Virginia Bill for Religious Freedom and Madison's *Memorial and Remonstrance* and turned the two documents into constitutional canon.²⁴ As is a familiar saga, *Everson* elevated Jefferson and Madison to semi-god status, making them the authoritative expositors on the meaning of nonestablishment and free

17 See Brief Amicus Curiae of Legal Historians and Law Scholars on Behalf of Respondents, *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005) (No. 03-1693), 2005 WL 166586; Brief Amicus Curiae of Historians and Law Scholars in Support of Respondent, *Newdow*, 542 U.S. 1 (No. 02-1624), 2004 WL 298112; Brief Amicus Curiae of Historians and Law Scholars on Behalf of Petitioners, *Locke v. Davey*, 540 U.S. 712 (2004) (No. 02-1315), 2003 WL 21697729.

18 540 U.S. 712.

19 125 S. Ct. 2722.

20 125 S. Ct. 2854 (2005).

21 542 U.S. 1.

22 *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting).

23 330 U.S. 1 (1947).

24 See *id.* at 11–13. As Justice Rutledge remarked in his *Everson* dissent, these documents from the "Virginia struggle for religious liberty . . . became [the] warp and woof of our constitutional tradition." *Id.* at 39 (Rutledge, J., dissenting).

exercise as found in the First Amendment.²⁵ Black interpreted the command of the Bill and *Memorial* in simple and stark terms.²⁶ Black reaffirmed the validity of relying on history to resolve constitutional questions the following year in *Illinois ex rel. McCollum v. Board of Education*.²⁷ Significantly, Black's historical approach and interpretations did not raise dissent on the Court. Justices Rutledge (in *Everson*²⁸) and Frankfurter (in *McCollum*²⁹) fully embraced the relevance of history, the significance of Black's sources, and the interpretations to be drawn therefrom, only arguing for a stricter application of those principles. Only Justice Reed in *McCollum* expressed some reservation, remarking that a "rule of law should not be drawn from a figure of speech."³⁰

For all of its attributes (e.g., correct holding and identification of the significant principles and sources), *Everson* is an example of "bad history." Although the Bill for Religious Freedom and the *Memorial and Remonstrance* are seminal important documents, Black's analysis was stilted. He failed to examine the legislative history of the drafting and ratification of the First Amendment, consider other important historical sources or acknowledge that competing views may have existed at the time of the Constitution's drafting and ratification. But more than anything, Black's decision falsely professed that the two documents provided *definitive* answers to modern questions of transportation reimbursements and release-time religious instruction,³¹ likely two issues that had not occurred to either Jefferson or Madison. Black thus built a mansion on a foundation of sand: the Bill and *Me-*

25 *Id.* at 13 (majority opinion) (declaring that Madison and Jefferson played "leading roles").

26 *Id.* at 15–16 ("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. . . . 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 organization 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.' " (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878))).

27 333 U.S. 203, 212 (1948) ("[A]s we said in the *Everson* case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable.").

28 330 U.S. at 28–63 (Rutledge, J., dissenting).

29 333 U.S. at 212–32 (Frankfurter, J., concurring).

30 *Id.* at 247 (Reed, J., dissenting).

31 *Everson*, 330 U.S. at 11–15 (majority opinion); *see also id.* at 44–45 (Rutledge, J., dissenting) (critiquing Black's undiluted use of Madison's and Jefferson's writings).

morial were not merely instructive but *conclusive*, the historical approach was indisputable (although a fuller account of history did not matter).

Criticism (some well deserved) was quick. Edward Corwin, John Courtney Murray, James O'Neill, and Mark DeWolfe Howe decried the Court's selective use of historical documents and the claim of infallibility that accompanied that history, now revealed.³² As Howe asserted, "The complexities of history deserve our respect."³³ Instead, the Court was "building constitutional law upon history . . . oversimplified."³⁴ Howe's chief complaint, however, was not with the Court's reliance on historical authority but that its use in *Everson* was incomplete and misleading. Howe offered only one specific alternative—an evangelical basis for separation³⁵—and apparently would have been satisfied with the Court's analytical approach had his preferred view been included. He did not address the more troubling questions of completeness, proper use, and ultimate relevance of history.

The blistering critiques of *Everson* and *McCollum* did little to dissuade later excursions into the historical record. Part of the problem was that the Court was faced with constitutional challenges to longstanding practices that seemed anachronistic in an increasingly secular culture: Sunday closing laws; tax exemptions for houses of worship; public school prayer and Bible reading. Such practices could not be reconciled with the Establishment Clause without reconciling the history as well. *McGowan v. Maryland*³⁶ and *Waltz v. Tax Commission*³⁷ invited rather straightforward historical inquiries into discrete, longstanding practices, although both holdings engaged in the fallacy that the Framers exercised a consistency of thought when condoning

32 HOWE, *supra* note 15, at 3 (arguing that the Court's close focus on Virginia's church-state experience forced the complex issue into "such a confining frame of reference as to make impossible anything more significant than a parochial gloss on Jefferson's metaphor"); J.M. O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION 224 (1949) (claiming that the *McCollum* opinion represented a "gross misrepresentation" of Jefferson); Edward S. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3, 10 (1949) ("Do historical data, on the whole, sustain [the Court's view of the Establishment Clause in *McCollum*]? The answer is, not in such a way or such a sense as to vindicate the *McCollum* decision."); Murray, *supra* note 1, at 25 ("What needs justification is the absoluteness of the doctrine; and at this point the Court fails.").

33 HOWE, *supra* note 15, at 176.

34 *Id.* at 10–11.

35 *Id.* at 15, 19.

36 366 U.S. 420 (1961).

37 397 U.S. 664 (1970).

those practices.³⁸ Justice Clark's opinion in *School District v. Schempp*³⁹ punted the issue of reconciling the past practice of school prayer to Justice Brennan who, sensing the unpredictability of history, urged caution in its command.⁴⁰ A "too literal quest for the advice of the Founding Fathers" upon modern controversies was "futile and misdirected," Brennan cautioned.⁴¹ The historical record "is at best ambiguous, and statements can readily be found to support either side of [any] proposition."⁴² Instead, the Court's use of the history of the Founding "must limit itself to broad purposes, not specific practices."⁴³ Brennan, however, fell off the wagon of historical sobriety in *Lemon v. Kurtzman*⁴⁴ by asserting that history revealed a "consensus" that public subsidy of religious schooling resulted in impermissible entanglement.⁴⁵

For the first forty years of modern Establishment Clause jurisprudence, the Court's resort to history generally reinforced separationist principles, primarily because of the commanding stature of *Everson's* Jeffersonian-Madisonian interpretation.⁴⁶ In the mid-1980s, the tide began to turn. In 1982, Professor Robert L. Cord published his highly influential revisionist history of the creation of the Religion Clauses, *Separation of Church and State: Historical Fact and Current Fiction*.⁴⁷ Cord's attack was two-fold: to document early practices and attitudes that conflicted with the accepted Jeffersonian-Madisonian interpretation; and—even more heretical—to challenge the separationist pedigrees of the great men themselves.⁴⁸ Justice Rehnquist relied extensively on Cord's analysis in his dissent in *Wallace v. Jaffree*,⁴⁹

38 See *id.* at 677 (noting that Congress in 1802 adopted a taxing statute for Alexandria that contained an exemption for houses of worship); *McGowan*, 366 U.S. at 438 (noting that in the same year (1785) that Madison sponsored the Bill for Religious Freedom he introduced a "Bill for Punishing . . . Sabbath Breakers").

39 374 U.S. 203 (1963).

40 *Id.* at 237–38 (Brennan, J., concurring).

41 *Id.* at 237.

42 *Id.*

43 *Id.* at 241.

44 403 U.S. 602 (1971).

45 *Id.* at 648–49 (Brennan, J., concurring).

46 No doubt, the longevity of that interpretation had much to do with the influence of Leo Pfeffer, both in and out of court. See LEO PFEFFER, *CHURCH, STATE, AND FREEDOM* (rev. ed. 1967).

47 ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982).

48 *Id.* at xiv. An earlier revisionist monograph that was influential in conservative circles was MICHAEL J. MALBIN, *RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT* (1978).

49 472 U.S. 38, 91–114 (1985) (Rehnquist, J., dissenting).

which presented the first significant internal rebuttal to the Court's long-standing interpretation of the Founding period. Rehnquist minimized the significance of Jefferson (in France at the critical time)⁵⁰ and distinguished the Virginia struggle from the drafting of the First Amendment,⁵¹ concluding that there is "simply no historical foundation for the proposition that the Framers intended to build the 'wall of separation' that was constitutionalized in *Everson*."⁵² "The true meaning of the Establishment Clause can only be seen in its history,"⁵³ Rehnquist insisted, "but no amount of repetition of historical errors in judicial opinions can make the errors true."⁵⁴ Though stinging, Rehnquist's critique was half-hearted: he criticized the *Everson* account but acknowledged the command of history. He did not explain how to reconcile conflicting accounts of history (other than to accept his alternative version) or the weight that should be afforded historical evidence in constitutional adjudication.

The two most significant decisions applying a historical analysis during the 1980s were, of course, *Marsh v. Chambers*⁵⁵ and *Lynch v. Donnelly*.⁵⁶ In *Marsh*, Chief Justice Burger foreswore the established analytical standard (*Lemon v. Kurtzman*⁵⁷) to rely on historical evidence to validate the practice of legislative chaplains.⁵⁸ Highlighting that the First Congress authorized the appointment of paid chaplains only three days after approving the Bill of Rights, Burger concluded that "[c]learly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment."⁵⁹ Not only was that action conclusive for the legal inquiry; Burger found reinforcement from an "unambiguous and unbroken history of more than 200 years."⁶⁰ While historical patterns could not justify contemporary constitutional violations, here the historical record conclusively indicated "what the draftsmen

50 *Id.* at 92.

51 *Id.* at 92-99.

52 *Id.* at 106.

53 *Id.* at 113.

54 *Id.* at 107. Justice Rehnquist's polemic led Justice O'Connor to respond in her concurrence that "[a]lthough history provides a touchstone for constitutional problems, the Establishment Clause concern for religious liberty is dispositive here," suggesting that important religious liberty values exist independent of the historical experience. *Id.* at 81 (O'Connor, J., concurring).

55 463 U.S. 783 (1983).

56 465 U.S. 668 (1984).

57 403 U.S. 602 (1971).

58 *Marsh*, 463 U.S. at 786-92.

59 *Id.* at 788.

60 *Id.* at 792.

intended the Establishment Clause to mean," as if that intent was pellucid to any observer.⁶¹ The following year in *Lynch*—the crèche case—Burger again searched for what "history reveals," finding that there was "an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."⁶² "[C]ontemporaneous understanding[s]" of the Establishment Clause by the First Congress "take[] on special significance" for present-day application of the constitutional principles.⁶³

Both opinions represent egregious examples of bad history. By extrapolating meaning from general historical facts removed from their context and announcing their commanding relevance for current practices, Chief Justice Burger committed what Martin Flaherty has described as the error of "poorly supported generalization[s]."⁶⁴ Burger's opinions also assumed the Framers maintained an ever-present awareness of constitutional values and were forever consistent in applying those principles. As Justice Souter has noted more recently, "Although evidence of historical practice can indeed furnish valuable aid in the interpretation of contemporary language, [some official] acts . . . prove only that public officials, no matter when they serve, can turn a blind eye to constitutional principle."⁶⁵ And finally, both opinions presuppose that the Constitution is "a static document whose meaning on every detail is fixed for all time by the life experience of the Framers," which binds all future generations.⁶⁶

Despite relying on historical methods in lieu of the *Lemon* test, neither *Marsh* nor *Lynch* presented a direct challenge to the *Everson* rendition of the Founding. Still, both cases represented a watershed, inviting a reexamination of the accepted historical account. In addition to Cord's book,⁶⁷ revisionist studies by Gerard Bradley,⁶⁸ Michael McConnell,⁶⁹ Daniel Dreisbach,⁷⁰ Rodney Smith⁷¹ and others challenged the *Everson* rendition. Those critiques and the issues they

61 *Id.* at 790.

62 *Lynch*, 465 U.S. at 673–74.

63 *Id.*

64 Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 526 (1995).

65 *Lee v. Weisman*, 505 U.S. 577, 616 n.3 (1992) (Souter, J., concurring).

66 *Marsh*, 463 U.S. at 816 (Brennan, J., dissenting).

67 See *supra* notes 47–48 and accompanying text.

68 See GERARD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* (1987).

69 See Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986).

70 See DANIEL L. DREISBACH, *REAL THREAT AND MERE SHADOW: RELIGIOUS LIBERTY AND THE FIRST AMENDMENT* (1987).

71 See RODNEY K. SMITH, *PUBLIC PRAYER AND THE CONSTITUTION* 125–28 (1987).

raised influenced subsequent Court briefing and found their way into exchanges between the Justices. In *County of Allegheny v. ACLU*,⁷² Justice Kennedy argued that rather than *Marsh* representing an exception to the “otherwise broad sweep of the Establishment Clause,” it indicated that the Clause was “to be determined by reference to historical practices and understandings.”⁷³ This led Justice Blackmun to respond that regardless of strong evidence of earlier government actions endorsing religion, “history [could] not legitimate practices that demonstrate government’s allegiance to a particular sect or creed.”⁷⁴ Similar exchanges over the relevance of history for Establishment Clause adjudication and the proper interpretations to draw from the record appeared in *Lee v. Weisman* between Justices Souter and Scalia,⁷⁵ in *Rosenberger v. Rector & Visitors of University of Virginia* between Justices Thomas and Souter,⁷⁶ in *Mitchell v. Helms* between Justices Thomas and Souter,⁷⁷ and in *Zelman v. Simmons-Harris* between Justices Thomas and Souter.⁷⁸

Several factors are significant in these more recent exchanges. First, the Court’s earlier consensus of fealty to the *Everson* account is gone. Going a step beyond Justice Rehnquist’s *Wallace* critique, Justices Scalia and Thomas are now reinterpreting Jefferson and Madison’s works to allow for nonpreferential aid to religious institutions and for government acknowledgments of religion. According to Justice Scalia, history imposes no requirement that government be neutral between religion and nonreligion, and even supports preferential treatment of monotheism over other belief systems.⁷⁹ Under this truncated view, the prohibition on religious establishments extends only to government “‘coercion of religious orthodoxy and of

72 492 U.S. 573 (1989).

73 *Id.* at 670 (Kennedy, J., concurring in the judgment in part and dissenting in part).

74 *Id.* at 603 (majority opinion); *accord id.* at 630 (O’Connor, J., concurring in part and concurring in the judgment).

75 *Lee v. Weisman*, 505 U.S. 577, 612–26 (1992) (Souter, J., concurring); *id.* at 632–43 (Scalia, J., dissenting).

76 *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 852–63 (1995) (Thomas, J., concurring); *id.* at 868–74 (Souter, J., dissenting).

77 *Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000) (plurality opinion); *id.* at 870–72 (Souter, J., dissenting).

78 *Zelman v. Simmons-Harris*, 536 U.S. 639, 678–79 (2002) (Thomas, J., concurring); *id.* at 711–12 (Souter, J., dissenting).

79 *McCreary County v. ACLU*, 125 S. Ct. 2722, 2748–53 (2005) (Scalia, J., dissenting); *id.* at 2753 (“[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.”).

financial support *by force of law and threat of penalty.*"⁸⁰ Second, the Court's more conservative members are more comfortable relying on historical arguments and accepting the conclusiveness of historical authority. Most recently in *Van Orden v. Perry*,⁸¹ Justice Thomas confidently asserted that "our task would be far simpler if we returned to the original meaning of the word 'establishment' than it is under the various approaches this Court now uses,"⁸² while in *McCreary*, Justice Scalia defiantly claimed that contemporaneous "official actions show *what . . .* [the Establishment Clause] *meant.*"⁸³ And, relatedly, Justices Scalia and Thomas have asserted that an originalist approach is the correct way to interpret the historical record.⁸⁴

Finally, this new interpretation of the historical record surrounding the Religion Clauses has received support from two recent influential works, Philip Hamburger's *Separation of Church and State*,⁸⁵ and Daniel Dreisbach's *Thomas Jefferson and the Wall of Separation Between Church and State*.⁸⁶ Both books are thorough in their coverage and meticulously researched. But both works are highly revisionist in their interpretations and conclusions, asserting that the *Everson* version of church-state separation was alien not only to contemporaries of the Founding but also to Jefferson and Madison themselves (except in their more extreme moments). A full critique of both works would take more space than is available and would only repeat many of the comments contained in Douglas Laycock's thorough analysis of Hamburger's book.⁸⁷ The important point here is that both works have received considerable attention in the press, the academy and, more significantly, in Court briefings and opinions.⁸⁸ The positive reception of Hamburger and Dreisbach's books further indicates the

80 *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 52 (2004) (Thomas, J., concurring in the judgment) (quoting *Lee*, 505 U.S. at 640 (Scalia, J., dissenting)).

81 125 S. Ct. 2854 (2005).

82 *Id.* at 2865 (Thomas, J., concurring).

83 125 S. Ct. at 2754 (Scalia, J., dissenting).

84 *Van Orden*, 125 S. Ct. at 2865 (Thomas, J., concurring); *McCreary*, 125 S. Ct. at 2754–56 (Scalia, J., dissenting).

85 HAMBURGER, *supra* note 6, at 3 (arguing that Americans "transformed their religious liberty" by shifting the meaning of the Establishment Clause from disestablishment to separation).

86 DREISBACH, *supra* note 6, at 5 (arguing that Jefferson's "wall" metaphor never attained "great currency" until the mid-twentieth century).

87 See Douglas Laycock, *The Many Meanings of Separation*, 70 U. CHI. L. REV. 1667 (2003) (reviewing HAMBURGER, *supra* note 6).

88 See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 54 (2004) (Thomas, J., concurring in the judgment).

about-face in the way in which history is being used in Establishment Clause adjudication today.

II. IN SEARCH OF A USABLE HISTORY

“Experience is the oracle of truth; and where its responses are unequivocal, they ought to be conclusive and sacred.”⁸⁹

The lure of history for constitutional adjudication is irresistible. History legitimizes legal arguments and judicial decisionmaking by offering an aura of authority and objectivity.⁹⁰ Relatedly, history purportedly serves as an external constraint on judicial subjectivity by providing an independent and apolitical source of information from which all parties can draw and upon which all people can agree.⁹¹ History also serves an important symbolic and rhetorical function by “reconcil[ing] the American faith in popular sovereignty with the justice-seeking Constitution.”⁹² And as noted above, constitutional adjudication relies on interpreting a 215-year-old document. As a result, modern constitutional theory can fairly be described—in the words of Larry Kramer—as “‘Founding obsessed’ in its use of history.”⁹³ The Founding has become that incomparable and seminal event in American history, such that we treat it as “conclusive and sacred”⁹⁴ and the Constitution’s authors and ratifiers as special and privileged in their apparent understanding of its contents.⁹⁵

Whether we ask about these Foundings because what the Founders thought binds us today, or because we need to translate their assumptions and values to present circumstances, or in order to syn-

89 THE FEDERALIST NO. 20, at 138 (James Madison & Alexander Hamilton) (Clinton Rossiter ed., 1961).

90 See HOWE, *supra* note 15, at 167–68; H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 660 (1987); Scalia, *supra* note 14, at 864.

91 As one of the few points upon which Justice Scalia and Erwin Chemerinsky apparently agree, judges “want very much to make it appear that their decisions are not based on their personal opinions, but instead are derived from an external source.” Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901, 908 (1993); see Scalia, *supra* note 14, at 852.

92 Eisgruber, *supra* note 16, at 1622; see also Jack N. Rakove, *Fidelity Through History (Or to It)*, 65 FORDHAM L. REV. 1587, 1594 (1997) (“We can think of the role that appeals to history play in the composition of judicial opinions not as the reasons driving decisions, but as an attractive rhetorical method of reassuring citizens that courts are acting consistently with deeply held values.”).

93 Larry Kramer, *Fidelity to History—And Through It*, 65 FORDHAM L. REV. 1627, 1628 (1997).

94 THE FEDERALIST NO. 20 (James Madison & Alexander Hamilton), *supra* note 89, at 138.

95 Kramer, *supra* note 93, at 1627.

thesize them with commitments made during other Foundings, the historical inquiry in constitutional interpretation is disproportionately devoted to understanding these discrete moments.⁹⁶

As a result, modern Americans are "held captive by the success of the eighteenth-century Founding Fathers."⁹⁷ When it comes to the Religion Clauses, the accepted wisdom—at least until recently—was that no one was more important than Jefferson and Madison, the two high priests of religious liberty, with their sacred texts, the *Memorial* and Virginia Bill, becoming the Decalogue (albeit now with fifteen pronouncements) and Great Commission of the First Amendment. As discussed above, although that account is now being called into question, the Founding still retains its controlling significance.

Not only do we treat the Founding as unique and special; we tend to see it as a static and completed event. It is as if all human knowledge and wisdom came together for one brief fifteen-year moment; that long-developing notions of democracy, freedom, equality, and civic virtue reached their apex between 1775 and 1790 and ceased developing, particularly from the perspective of the Founders. The Founding, it seems, is that moment in time when the Founders "bequeathed their values and deeds to the present."⁹⁸ But this perspective is triply flawed, first by ignoring the long development of ideas and the myriad, incremental experiences that shaped eighteenth-century Republican theory.⁹⁹ Second, it suggests a past that was *unified* and *positive*—that we can capture those "agreed-upon historical truths" if only they can be identified (and that its "truths" should be accepted uncritically).¹⁰⁰ Finally, such a perspective is untrue to the Founders themselves who saw history and the political theories they were espousing as a process, not something static.¹⁰¹

A fundamental point of departure between historians and jurists is the notion of "historical truths." Historians, with their canon of objectivity, do not mine the pages of historical information to uncover "truths"; the study of history is not to provide "answers" to modern questions but to provide understanding of our past in the hope it may

96 *Id.* at 1628.

97 MILLER, *supra* note 2, at 174; accord Kramer, *supra* note 93, at 1627 (noting that many jurists treat the Founding as "special and privileged . . . without making it fully determinative or conclusive").

98 MILLER, *supra* note 2, at 175.

99 See generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (1969).

100 See MILLER, *supra* note 2, at 176.

101 *Id.* at 172–73.

illuminate the present.¹⁰² In contrast, constitutional lawyers primarily approach history as advocates seeking authority for the propositions they hope to prove. The lure of uncovering “truths” in that record is irresistible. Not that this difference in purpose and approach renders the lawyer’s craft invalid; the practical application of historical inquiries can serve legitimate and important ends.¹⁰³ However, the important starting point is to recognize that historians—through their product upon which constitutional lawyers often rely—do not set out “to answer the kinds of questions that constitutional interpreters must resolve.”¹⁰⁴

Despite their commitment to objectivity, historians also understand—in a manner that is apparently incongruous to many jurists—that history is not objective. Any exploration into history is selective, and all (good) accounts of history are interpretive.¹⁰⁵ The difference is that historians recognize the selective and interpretive aspect to their craft—jurists often act as if such “shortcomings” are inconsistent with a historical analysis instead of being part of the undertaking.¹⁰⁶ The misplaced search for historical “facts” prevents any acknowledgment of the inherently selective and interpretive nature of historical research. Relatedly, jurists often fail to understand the indeterminacy of the historical record. Again, concrete historical “facts” or “truths” rarely exist.¹⁰⁷

The drawbacks to primary reliance on historical records are many. First, it must be recognized that the historical record of any period—the Founding period being no exception—is always incomplete. We have only those documents that have survived the ravages of time and have been transcribed, compiled, and published.¹⁰⁸ There can be no doubt that other important, unrecorded conversa-

102 See generally DAVID HACKETT FISCHER, *HISTORIANS’ FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT* 314–17 (1970) (discussing what history can and cannot teach people about how to order their lives in the present and stating that “[i]f we continue to pursue the ideological objectives of the nineteenth century in the middle of the twentieth, the prospects for the twenty-first are increasingly dim”).

103 See Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601, 602 (1995).

104 Rebecca L. Brown, *History for the Non-Originalist*, 26 HARV. J.L. & PUB. POL’Y 69, 71 (2003).

105 R. G. COLLINGWOOD, *THE IDEA OF HISTORY* 9–11 (1946); FISCHER, *supra* note 102, at 4–5.

106 See Powell, *supra* note 90, at 660–61 (“Historical judgments . . . necessarily involve elements of creativity and interpretative choice.”).

107 FISCHER, *supra* note 102, at 4–5.

108 See James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 38 (1986).

tions and discussions about the purpose and meaning of the Establishment Clause took place during meetings of the House Committee on Style (which Madison chaired), in the House debates, and in the unrecorded Senate debate that accompanied the proposals recorded in the Senate Journal. And this does not include the possible host of letters, pamphlets, and important notations written on loose scraps of paper that are lost to time. In addition, the records that do exist may be woefully inaccurate, as they were transcribed by people who made mistakes and self-edited as they went along (not to mention allegations that the transcriber for the *Annals of Congress* was frequently inebriated).¹⁰⁹ Madison stated that the accuracy of the reported debates of the First Congress was "not to be relied on."¹¹⁰

The face of the debates shews that they are defective, and desultory, where not revised, or written out by the Speakers. In some instances, he makes them inconsistent with themselves, by erroneous reports of their speeches at different times on the same subject. [The reporter] was indolent and sometimes filled up blanks in his notes from memory or *imagination*.¹¹¹

The recorded debates of the state ratifying conventions—which, according to Jack Rakove,¹¹² are the more authoritative source of an original understanding—are even less reliable.¹¹³

In addition, remarks contained within documents whose accuracy can be presumed can easily be misunderstood. The Framers used terms and phrases familiar to the late eighteenth century, and frequently employed rhetoric that was intentionally vague, hyperbolic, or duplicitous (or, at times, merely sloppy).¹¹⁴ Their remarks and letters also arose within particular contexts that may not be apparent from the documents themselves. Therefore, the precise meanings of recorded statements may be ambiguous at best.¹¹⁵ Also, persuasive evi-

109 See *id.* at 36 (discussing the excessive drinking of the reporter, Thomas Lloyd, and relating that his notes were described as "frequently 'garbled' and that he neglected to report speeches whose texts are known to exist elsewhere").

110 *Id.* at 38 (quoting Letter from James Madison to Edward Everett (Jan. 7, 1832)).

111 *Id.* (quoting Letter from James Madison to Edward Everett (Jan. 7, 1832)).

112 See Jack N. Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMMENT. 159, 160 (1996).

113 See Hutson, *supra* note 108, at 12–24 (noting the records are incomplete and reveal politically motivated editing).

114 See Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 412 (1986).

115 See *Sch. Dist. v. Schempp*, 374 U.S. 203, 237 (1963) (Brennan, J., concurring) ("[T]he historical record is at best ambiguous, and statements can readily be found to support either side of the proposition. The ambiguity of history is understandable if

dence exists that the Framers believed that constitutional interpretation should be drawn from the express language of the document, not from the statements of those who drafted the language.¹¹⁶ Thus, as Justice Brennan once remarked, “too literal quest for the advice of the Founding Fathers upon the issues of these cases seems . . . futile and misdirected.”¹¹⁷

Constitutional lawyers and judges must also recognize that all historical evidence is not of equal merit or susceptible to the same forms of analysis. Putting aside the argument that the Framers intended certain clauses of the Constitution to be open-ended and interpreted according to contemporary values,¹¹⁸ a casual reading of the text indicates that some provisions lend themselves more readily to exact meanings (e.g., that the President shall have attained the age of thirty-five years) than other vague clauses like the Establishment Clause. As Justice Frankfurter stated, “Some words are confined to their history; some are starting points for history.”¹¹⁹ When it comes to interpreting those vague provisions in light of current controversies, some historical evidence is more authoritative than others. Material that is internal to a provision or law—such as comments by a drafter or specific debate—deserves different attention than general historical material that is external to the provision or law.¹²⁰ The problem with the Court’s use of general history as authority—as it did in *Marsh*, *Lynch*, and *Van Orden*—is that it offers greater flexibility to select historical data that supports its conclusions. At the same time the Court ventures into general history for authority, it extends the Court’s expertise as an accurate expositor of historical events.¹²¹ Reliance on

we recall the nature of the problems uppermost in the thinking of the statesmen who fashioned the religious guarantees; they were concerned with far more flagrant intrusions of government into the realm of religion than any that our century has witnessed.”).

116 See Powell, *supra* note 15, at 903–04 (“The Framers shared the traditional common law view—so foreign to much hermeneutical thought in more recent years—that the import of the document they were framing would be determined by reference to the intrinsic meaning of its words or through the usual judicial process of case-by-case interpretation.”).

117 *Schempp*, 374 U.S. at 237 (Brennan, J., concurring).

118 See Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1127 (1987) (“The Framers thus intended courts to look outside the Constitution in determining the validity of certain government actions . . .”).

119 Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

120 MILLER, *supra* note 2, at 21.

121 *Id.* at 25 (“General history not only takes the justices into fields where their training and knowledge may be limited, but it also invites the avoidance of the more strictly legal principles of decision.”).

general history invites the Court to commit the fallacy of overgeneralization while it presents the real danger of the Court getting history wrong. As Mark DeWolfe Howe observed, when the Court "endeavors to write an authoritative chapter in the intellectual history of the American people, as it does when it lays historical foundations beneath its readings of the First Amendment, then any distortion becomes a matter of consequence."¹²²

What does this say about the value of the history for modern Religion Clause interpretation? First and foremost, judges and lawyers must recognize the appropriate uses and corresponding limitations of history for constitutional adjudication. Judges and lawyers should avoid scouring the record for answers to modern questions that the Framers may not have asked. As Philip Kurland has commented, history should not be expected "to provide specific answers to the specific problems that bedevil the Court."¹²³ Rather, "[h]istory should provide the perimeters within which the choice of meaning may be made."¹²⁴ Also, "the Founding is a starting place, not a fixed reference point" that necessarily binds future generations.¹²⁵ "History should figure in constitutional interpretation as an aid to the pursuit of justice, not a constraint upon it."¹²⁶

Second, judges and lawyers must acknowledge that all historical accounts are selective and interpretive—that "objective facts" or "historical truths" do not exist. By so doing, jurists will place the appropriate emphasis on historical material while affording history its essential autonomy from the present.¹²⁷

Third, lawyers and judges should resist drawing conclusions from particular statements or events in the record. Even if we could agree that history should bind us through the answers it provides, the meaning of many events is too indeterminate to be of help. As Thomas Curry has written, "[T]he meaning of the First Amendment must arise out of its historical context rather than from a literalist reading [of the documentary record]."¹²⁸ That context, moreover, must be viewed in its entirety, and not by emphasizing particular "facts" (e.g., that the First Congress created a chaplain within three days of approving the

122 HOWE, *supra* note 15, at 4.

123 Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 842 (1986).

124 *Id.* at 841–42.

125 Kramer, *supra* note 93, at 1639.

126 Eisgruber, *supra* note 16, at 1611–12.

127 Powell, *supra* note 90, at 669.

128 THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 222 (1986).

language of the First Amendment) independent from their contemporary meaning. The Framers must also be afforded the privilege we give to modern politicians of being obtuse, ambiguous, insincere, incomplete, and contradictory in their rhetoric.

This does not mean, however, that no meaning can be drawn from history. Recurring and consistent statements that reflect broad principles or points of consensus can be instructive for modern application of the Religion Clauses. Indeterminacy aside, it is not necessary that the Framers reached any particular consensus on the meaning and/or application of the Religion Clauses; it is sufficient that they agreed on broad, general principles and viewed the Establishment Clause as facilitating those ends. Those principles that emerge from the ratification debate and drafting of the Bill of Rights include concerns for rights of conscience, no compelled support of religion, no delegation of government authority to religious institutions, and equal treatment of all sects.¹²⁹ As Thomas Curry has summed up those shared concerns:

[T]he people of almost every state that ratified the First Amendment believed that religion should be maintained and supported voluntarily. They saw government attempts to organize and regulate such support as a usurpation of power and a violation of liberty of conscience and free exercise of religion, and as falling within the scope of what they termed an establishment of religion.¹³⁰

In essence, “our use of the history of their time must limit itself to broad purposes, not specific practices.”¹³¹

III. CURRENT HISTORICAL APPLICATIONS

Applying the above observations, this Part considers and critiques four recent examples of the Court’s susceptibility to bad history.

A. *Originalism*

Originalism or “interpretivism” represents the substructure of historical-legal analysis today; to one degree or another, all historical analysis incorporates arguments that earlier understandings about constitutional provisions matter today. But originalism is not so encompassing. Arising out of a desire to find an objective constitutional methodology, originalism espouses a view that the meaning of consti-

129 See Steven K. Green, *Of (Un)Equal Jurisprudential Pedigree: Rectifying the Imbalance Between Neutrality and Separationism*, 43 B.C. L. REV. 1111, 1122–25 (2002) (identifying various values underlying nonestablishment).

130 CURRY, *supra* note 128, at 222.

131 *Sch. Dist. v. Schempp*, 374 U.S. 203, 241 (1963) (Brennan, J., concurring).

tutional provisions is limited to the textual language and/or the "intentions" of the Framers.¹³² The issue raised by such a methodology is to what extent those original intentions and understandings can be accurately deciphered and the extent to which they should control current constitutional interpretation. The modern version of originalism was made popular by Professor Raoul Berger,¹³³ Judge Robert Bork,¹³⁴ and former Attorney General Edward Meese.¹³⁵ Although the legal and historical academies quickly (and convincingly) excoriated the originalist approach, it has maintained a loyal following, primarily among legal conservatives.¹³⁶ Today, most "originalist" scholars may be characterized as "weak originalists," according to Larry Kramer: "[t]hat is, they treat the Founding as special and privileged in some sense without making it fully determinative or conclusive."¹³⁷ On the Court, however, Justices Scalia and Thomas espouse a stricter originalist line: that we can determine what the Framers intended a particular constitutional provision to mean, and that revealed understanding should control our interpretation and application of that provision today.¹³⁸ According to Scalia, an

132 See William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1240 (1986) (defining interpretivism as "the judicial practice of giving meaning to a legal text in accordance with the original purposes or intentions of those who enacted it"). However, no single definition of originalism exists. See Brown, *supra* note 104, at 69–70 ("Even though there is no unanimity about what originalism actually means, or what it calls upon judges to do in a close case, its adherents gain a great deal by sharing one name that offers the appearance, if not the reality, of agreement. They also gain the strategic advantage of claiming, by virtue of their name alone, the baseline from which all departures must be justified.").

133 See RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 4 (2d ed. Liberty Fund 1997) (1977) (arguing that the "'original intention' of the Framers" is binding on the Supreme Court).

134 See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971) ("Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed value to any other. The judge must stick close to the text and the history . . . and not construct new rights.").

135 See Edwin Meese, III, U.S. Attorney Gen., *The Supreme Court of the United States: Bulwark of a Limited Constitution*, Address to the American Bar Association (July 9, 1985), in 27 S. TEX. L. REV. 455, 456 (1986) (publishing Meese's speech to the American Bar Association in Washington, D.C., on July 9, 1985, in which Meese states that the Founders intended for judges to "resist any political effort to depart from the literal provisions of the Constitution").

136 See generally Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77 (1988) (discussing the role for original intent in constitutional interpretation); Powell, *supra* note 15 (discussing the Framers' understanding of "original intention").

137 Kramer, *supra* note 93, at 1627.

138 See generally Scalia, *supra* note 14 (describing his personal view of originalism).

originalist approach is tied to the legitimacy of judicial review;¹³⁹ its legal appeal rests on an argument that popular sovereignty is the supreme authority in a constitutional democracy.¹⁴⁰ Originalism leads to consistency, predictability, and, most important for originalists, judicial fidelity to the text rather than to a judge's own ideological predilections.¹⁴¹

Aspects of an originalist methodology have been present in many Establishment Clause decisions that have relied on historical analysis—to an extent, it is evident in *Everson*. The view that an “original understanding” does not simply *inform* constitutional decisionmaking but *predetermines* outcomes is found most readily in *Marsh*, *Lynch*, and Justice Rehnquist's *Wallace* dissent.¹⁴² Though expressing fealty to original understandings of the Religion Clauses, Rehnquist was no hard core originalist, demonstrating a willingness to rely also on precedent and more general principles espoused by the Framers.¹⁴³ It is Justices Scalia and Thomas who have pushed the stricter originalist line in establishment cases.¹⁴⁴ In his *Lee* dissent, Scalia declared his willingness to go wherever the formal interpretivist approach led. Not only was “coercion” the appropriate model for judging Establishment Clause injuries resulting from exposure to school prayer; Scalia saw “no warrant for expanding the concept of coercion beyond [those] acts backed by threat of penalty” that would have been familiar during the revolutionary era—“a brand of coercion that, happily, is readily discernible to those of us who have made a career of reading the disciples of Blackstone rather than of Freud.”¹⁴⁵ As Scalia has acknowl-

139 *Id.* at 854, 862.

140 *See* Rakove, *supra* note 92, at 1602–03.

141 Scalia, *supra* note 14, at 855, 864.

142 *See* *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) (“The true meaning of the Establishment Clause can only be seen in its history. . . . Any deviation from [the Framers’] intentions frustrates the permanence of that Charter and will only lead to the type of unprincipled decisionmaking that has plagued our Establishment Clause cases since *Everson*.”).

143 *Id.* (“As drafters of our Bill of Rights, the Framers inscribed the *principles* that control today.” (emphasis added)); *see also* *Locke v. Davey*, 540 U.S. 712, 722 (2004) (relying on *Everson* and the *Memorial and Remonstrance* to establish that states may exclude the funding of clergy from general funding programs).

144 *See, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 854–56 (1995) (Thomas, J., concurring) (arguing that Madison's writings support a position of nonpreferential treatment of religion, but then distinguishing Madison's “more extreme notions of the separation of church and state,” observing that “the views of one man do not establish the original understanding of the First Amendment”).

145 *Lee v. Weisman*, 505 U.S. 577, 642 (1992) (Scalia, J., dissenting); *id.* (“The Framers were indeed opposed to coercion of religious worship by the National Government; but, as their own sponsorship of nonsectarian prayer in public events dem-

edged in the Eighth Amendment context, his brand of originalism is not for the "faint-hearted."¹⁴⁶ More recently in the Ten Commandments cases, Justices Scalia and Thomas have reasserted their fealty to an originalist approach. After documenting religious acknowledgments by early public officials, Scalia asserted in his *McCreary* dissent that the Establishment Clause "*was* enshrined in the Constitution's text, and these official actions show *what it meant*. . . . What is more probative of the meaning of the Establishment Clause than the actions of the very Congress that proposed it, and of the first President charged with observing it?"¹⁴⁷ Thomas was equally explicit in his call for a "return to the original meaning" of the Establishment Clause, writing in his *Van Orden* concurrence that

our task would be far simpler if we returned to the original meaning of the word "establishment" than it is under the various approaches this Court now uses. The Framers understood an establishment "necessarily [to] involve actual legal coercion." . . . There is no question that, based on the original meaning of the Establishment Clause, the Ten Commandments display at issue here is constitutional.¹⁴⁸

The problems with an originalist approach in Establishment Clause adjudication are legend and well documented.¹⁴⁹ In a nutshell, originalism makes a false claim of judicial objectivity and passivity when, in reality, the methodology is as subjective and activist as the approaches originalists disclaim.¹⁵⁰ It asserts the ability to identify and decipher the most relevant sources, translate the discourse into understandable terms, and account for contextual matters.¹⁵¹ Then, it

onstrates, they understood that '[s]peech is not coercive; the listener may do as he likes.'" (quoting *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 132 (7th Cir. 1987) (Easterbrook, J., dissenting)).

146 Scalia, *supra* note 14, at 864.

147 *McCreary County v. ACLU*, 125 S. Ct. 2722, 2754–55 (2005) (Scalia, J., dissenting).

148 *Van Orden v. Perry*, 125 S. Ct. 2854, 2865 (2005) (Thomas, J., concurring) (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 52 (2004) (Thomas, J., concurring in the judgment)).

149 See generally Kent Greenawalt, *Originalism and the Religion Clauses: A Response to Professor George*, 32 *LOY. L.A. L. REV.* 51 (1998) (describing the application of originalism to the Establishment Clause); Powell, *supra* note 90 (discussing problems with the originalist approach).

150 Chemerinsky, *supra* note 91, at 918 ("History cannot serve the Court's goal of constraining decisionmaking. At most, it provides an objective-sounding basis for the Justices' subjective choices.").

151 Eisgruber, *supra* note 16, at 1623–24 ("Originalism supposes that historical facts can be used to select among multiple, competing interpretations of the Constitution. The rhetorical treatment of popular sovereignty uses conclusions about consti-

makes the claim that those deciphered pearls are not only relevant but determinative for resolving current church-state conflicts. It refuses to acknowledge what H. Jefferson Powell has termed the “most fundamental of historical errors,” that being “the failure to recognize that the thoughts, concerns, motivations, and ideals of other eras were not identical with our own and that, as a consequence, the actions of past persons often were undertaken or understood in ways we would regard as peculiar or even irrational.”¹⁵²

That the Framers and their contemporaries used religious rhetoric and discourse is hardly surprising considering the earlier influence of religion on education and intellectual thought.¹⁵³ The Bible was one of the few widely available books during the eighteenth century and religious imagery and symbolism were common modes of communication.¹⁵⁴ A recent book by Library of Congress historian James Hutson documents the ubiquity of religious rhetoric among leading figures during the Founding era.¹⁵⁵ The more common such language was during the Founding period, the less significance we can attach to any particular statements; neither should we draw any conclusions from the aggregate use of religious language other than it reflected contemporary eighteenth-century practices. The point is that reliance on such material can be misleading for resolving present legal conflicts.

The other problem with an originalist approach to the Establishment Clause—assuming the earlier problems can be surmounted—is that eighteenth-century views of religious liberty, equality, and church-state interactions are simply ill suited for twenty-first-century America. Originalists (and nonseparationists) may be correct that certain

tutional justice to select among multiple, competing interpretations of American history.”).

152 Powell, *supra* note 90, at 668.

153 See generally EDWIN S. GAUSTAD, *FAITH OF THE FOUNDERS: RELIGION AND THE NEW NATION, 1776–1826* (2004) (exploring the role of religion during the Founding); James T. Kloppenberg, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 J. AM. HIST. 9 (1987) (discussing the history and influence of religion on American culture and the American political system); Harry S. Stout, *Religion, Communications, and the Ideological Origins of the American Revolution*, 34 WM. & MARY Q. 519, 521–30 (1977) (discussing competing historical accounts of the role of revivals and evangelical religion in shaping republican ideology).

154 See generally *THE BIBLE IN AMERICA: ESSAYS IN CULTURAL HISTORY* (Nathan O. Hatch & Mark A. Noll eds., 1982) (providing a collection of essays on the influence of the Bible on a range of American cultural traits).

155 *THE FOUNDERS ON RELIGION: A BOOK OF QUOTATIONS* (James H. Hutson ed., 2005).

church-state relationships existed in the late eighteenth and early nineteenth centuries that do not conform to the *Everson* rendition of history or to popular attitudes in a secular, postmodern society. My own research has documented the prevalence of blasphemy prosecutions and witness/jury disqualifications on account of religious belief during the early nineteenth century.¹⁵⁶ As Justice Stevens noted in his *Van Orden* dissent, there are many early official practices and attitudes toward religion that we are no longer "willing to accept."¹⁵⁷ Justice Story's oft-repeated statement about restricting First Amendment protection to Christians to the exclusion of other faiths stands as exhibit number one.¹⁵⁸ The fact that several of the Framers supported government favoritism of Christianity over other faith traditions¹⁵⁹—something that Justice Scalia is willing to accept¹⁶⁰—should not bind our present interpretations of the Religion Clauses.

B. *The Significance of the Blaine Amendment*

Justice Thomas's plurality opinion in *Mitchell v. Helms*¹⁶¹ set the stage for the most recent revival of interest in a historical approach to Establishment Clause jurisprudence. There, after proposing a truncated approach for resolving funding controversies—asking simply whether the government aid in question is distributed in a neutral manner¹⁶²—Thomas launched into a blistering critique of the Court's past funding jurisprudence, particularly the use of the "pervasively sectarian" standard.¹⁶³ After demonstrating (correctly) that the standard has never been rigorously applied to exclude religious participants in government programs, Thomas asserted (somewhat inconsistently) that the standard has a religious or sect-specific bias that the Court

156 See Steven K. Green, *The Rhetoric and Reality of the "Christian Nation" Maxim in American Law, 1810–1920*, at 1–2, 26–28, 116, 149–59 (1997) (unpublished Ph.D. dissertation, University of North Carolina) (on file with author); see also MORTON BORDEN, *JEWS, TURKS, AND INFIDELS* 98–100 (1984) (discussing the imposition of Christian values on American common law).

157 *Van Orden v. Perry*, 125 S. Ct. 2854, 2885 (2005) (Stevens, J., dissenting).

158 See 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1871 (Fred B. Rothman & Co. 1991) (1833).

159 *Van Orden*, 125 S. Ct. at 2885 (Stevens, J. dissenting); STORY, *supra* note 158, § 1871.

160 *McCreary County v. ACLU*, 125 S. Ct. 2722, 2753 (2005) (Scalia, J., dissenting).

161 530 U.S. 793 (2000).

162 "In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion." *Id.* at 809 (plurality opinion).

163 *Id.* at 826–29.

should now “disavow.”¹⁶⁴ According to Thomas, the exclusionary standard had been applied almost exclusively to Catholic parochial schools and found its origins in the failed Blaine Amendment of 1876 which would have prohibited constitutionally the public funding of religious schools.¹⁶⁵ The Blaine Amendment, Thomas wrote, “arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that ‘sectarian’ was code for ‘Catholic. . . .’ This doctrine, born of bigotry, should be buried now.”¹⁶⁶

The Blaine Amendment, though unsuccessful for its original target, was purportedly influential and instrumental in the adoption of no-funding provisions in several state constitutions.¹⁶⁷ (I say “purportedly,” as many claims of a connection are based on assumptions and are not extensively documented. Nevertheless, the timing of the adoption of several state provisions and similarities in language suggest, at a minimum, a purpose among many state drafters to incorporate the legal principles represented in the Blaine Amendment.) And the Amendment—and the school funding controversy of the nineteenth century—has long been criticized for the presence of anti-Catholic animus.¹⁶⁸ Attacks on state no-funding provisions modeled on the Blaine Amendment had already entered into the voucher litigation in several states and became a side issue in the *Zelman* case.¹⁶⁹ Stated simply, the argument is that such provisions are invalid based on the discriminatory motives of the framers of and advocates for the measures, based on this historical evidence of Catholic bias.¹⁷⁰

164 *Id.* at 828.

165 *Id.* at 828–29.

166 *Id.* (citing Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38 (1992)).

167 See Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL’Y 551, 573–76 (2003); Kyle Duncan, *Secularism’s Laws: State Blaine Amendments and Religious Persecution*, 72 FORDHAM L. REV. 493, 512–23 (2003).

168 See HAMBURGER, *supra* note 6, at 14, 193–251, 324–26; LLOYD P. JORGENSEN, *THE STATE AND THE NON-PUBLIC SCHOOL, 1825–1925*, at 216–17 (1987); JOSEPH P. VITERITTI, *CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY* 18, 152–54 (1999); Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 134–40 (2000).

169 See Brief of State Petitioners at 45–46, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2001) (Nos. 00-1751, 00-1777, 00-1779).

170 As one critic has argued:

[T]he [no-funding] policy was not justified by any appeal to the abstract principle of separation of church and state. The argument of the common school leaders was simple and blunt: the growth of Catholicism was a menace to republican institutions and must be curbed. Catholic schools, as a

The relevance of this "bad history" came to a head in *Locke v. Davey*.¹⁷¹ The State of Washington has a constitutional provision and accompanying statute that prohibit public monies from being applied to religious instruction, including barring financial aid to college students studying theology.¹⁷² When an otherwise qualified student was denied a state scholarship based on his theological degree plans, he sued claiming the state constitution and statute infringed on his free exercise, free expression, and equal protection rights¹⁷³ (and was inconsistent with the *Zelman* Court's approval of private choice funding mechanisms).¹⁷⁴ One line of attack was that Washington's two constitutional provisions barring state financial assistance to religious schools and degree programs reflected the influence if not command of the Blaine Amendment and its accompanying anti-Catholic fervor.¹⁷⁵ The Supreme Court, via Chief Justice Rehnquist, sidestepped the issue, noting that the constitutional provision at issue—Article I, § 11—was unrelated to the 1889 Enabling Act which had required Washington's Founders to include an express provision in the state constitution ensuring that public school "funds shall be . . . free from sectarian control or influence."¹⁷⁶ Rehnquist related that the prohibition on the funding of clergy found support in several early state constitutions, reflecting a widespread belief that such exclusions are consistent with nonestablishment principles.¹⁷⁷ Still, Rehnquist threw a bone to Blaine Amendment critics, repeating the assertion that the Amendment "has been linked to anti-Catholicism."¹⁷⁸

What now is the relevance of the Blaine Amendment for constitutional adjudication? Has the Court *conclusively* determined the meaning of the measure (and the pervasively sectarian doctrine) such that

contributing factor to the growth of the Church, must be restricted and, if possible, suppressed.

JORGENSEN, *supra* note 168, at 216.

171 540 U.S. 712 (2004).

172 *Id.* at 715–16.

173 *Id.* at 718.

174 *Id.* at 719 ("[T]he link between government funds and religious training is broken by the independent and private choice of recipients." (citing *Zelman*, 536 U.S. at 652)).

175 See WASH. CONST. art. I, § 11; *id.* art. IX, § 4.

176 *Locke*, 540 U.S. at 724 n.7 (quoting Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676, 677) ("Neither Davey nor amici have established a credible connection between the Blaine Amendment and Article I, § 11, the relevant constitutional provision. Accordingly, the Blaine Amendment's history is simply not before us."); see also WASH. CONST. art. IX, § 4.

177 *Locke*, 540 U.S. at 722–23.

178 *Id.* at 723 n.7.

all that is left is to establish a “credible connection” between the Amendment and a state provision.¹⁷⁹ At least one Blaine critic has claimed in court filings that the Court has settled the historical interpretation of the Amendment and the pervasively sectarian doctrine, such that lower courts are obligated to follow that interpretation.¹⁸⁰ Does this judicial interpretation of history now act as legal precedent? Has the Court not only determined the law but the history as well?

Although there is little doubt that anti-Catholicism informed later applications of the nonsectarian principle and the larger debate surrounding the Blaine Amendment, that account is incomplete. Justice Thomas arrived at his conclusion in *Mitchell* based primarily on the historical arguments contained in one amicus brief.¹⁸¹ However, my own research and that by Professor Noah Feldman indicates that history provides no definitive conclusions about the rationales behind the Amendment and the no-funding principle.¹⁸² The principle of nonsectarian education and its corollary against funding sectarian education evolved prior to the influx of Irish Catholics in the late 1830s and early 1840s.¹⁸³ Several states enacted no-funding constitutional provisions before or independent of the nativist and Know-Nothing fervor of the 1850s.¹⁸⁴ To be sure, nativists expropriated the concept of church-state separation as a tool for Catholic suppression, but that abuse did not hamstring others from embracing the concept on principle.¹⁸⁵ And too, as John Jeffries and James Ryan have observed, “[t]he divide between Protestants and Catholics was not merely theological; it was also political, cultural, and in some sense racial.”¹⁸⁶

179 See generally Complaint para. 1, Puckett v. Rounds, Civ. No. 03-5033 (D.S.D. Apr. 23, 2003), 2003 WL 23808470 (arguing that denying busing to school children who attend religious schools violates “federal constitutional guarantees against religious discrimination”).

180 See Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of Appellants and of Reversal at 11, Bush v. Holmes, 919 So. 2d 392 (Fla. 2006) (Nos. SC04-2323, SC04-2324, SC04-2325), 2005 WL 425133.

181 See Brief of the Becket Fund for Religious Liberty as Amicus Curiae in Support of Petitioners, *Mitchell v. Helms*, 530 U.S. 793 (2000) (No. 98-1648), 1999 WL 638630.

182 See Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & POL. 65, 92–110 (2002); Steven K. Green, “Blaming Blaine”: *Understanding the Blaine Amendment and the “No-Funding” Principle*, 2 FIRST AMEND. L. REV. 107 (2003).

183 Green, *supra* note 182, at 118–124.

184 *Id.* at 118–28.

185 Feldman, *supra* note 182, at 112.

186 John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 302 (2001).

In addition, multiple interests influenced those who supported the various versions of the Blaine Amendment. The Blaine Amendment was not solely about Catholic bigotry; it was part of a larger controversy over the responsibility and role of government in public education: of which level of government—local, state, or national—should direct its operation; whether that education should be truly universal for all social and economic classes and races (including its extension to the children of recently freed slaves); and whether that education should be secular, nonsectarian, or more religious.¹⁸⁷ Not solely Catholics and nativists were involved in the controversy; other groups and individuals became vested in the school question: evangelical Protestants who sought to preserve the religious character of the public schools, including the daily prayer and readings from the *King James Bible*, liberal Protestants, free thinkers, and Jews who opposed the religious exercises and nonsectarian character of the nation's schools; conservative Protestants who viewed nonsectarian public schooling as too secular and sought to *increase* its religious character; and education and civil rights reformers who urged a larger government role in funding and regulating public education.¹⁸⁸ Identifying a singular motive for the Blaine Amendment is impossible.

Moreover, nineteenth-century opposition to public funding of religious schooling (or even contemporary concerns about the compatibility of Catholic schooling and democracy) should not be equated with anti-Catholicism. With public schooling still in its nascent stage, supporters of public education had legitimate concerns—both constitutional and practical—about the affect of funding religious education. As Stephen Macedo has written:

[I]t would be wrong to attribute the civic anxieties of this period to racism alone, or to a simple desire to use public institutions to promote Protestantism for its own sake. It was not unreasonable for Americans to worry about the fragility of their experiment in self-government. There were also civic, secular reasons for fearing that an education in orthodox Catholicism could be hostile to republican attitudes and aspirations. Racism and anti-Catholic prejudice were not the all-consuming motives of the era.¹⁸⁹

187 See WARD M. McAFEE, *RELIGION, RACE, AND RECONSTRUCTION: THE PUBLIC SCHOOL IN THE POLITICS OF THE 1870s*, at 105–24 (1998).

188 Green, *supra* note 182, at 129–31.

189 STEPHEN MACEDO, *DIVERSITY AND DISTRUST* 63 (2000); see also Marc D. Stern, *Blaine Amendments, Anti-Catholicism, and Catholic Dogma*, 2 *FIRST AMEND. L. REV.* 153, 176 (2003) (discussing the “legitimate” fears about the anti-democratic policies of the nineteenth-century Catholic Church).

All of this raises questions about the thoroughness of Justice Thomas's *Mitchell* analysis. If the no-funding principle has a basis independent from the history of anti-Catholicism, how should the latter event affect the legitimacy of the former principle? Even assuming anti-Catholicism was the driving force motivating supporters of non-sectarian education (with its pervasively sectarian exclusion) and the Blaine Amendments, how should that "fact" affect subsequent applications of the principle by the Court? Are those bad motives attributable to later generations of judges, lawmakers and public school officials?¹⁹⁰ These are questions that a selective and incomplete reference to history cannot answer.

C. *The Ten Commandments and Pledge Cases*

The belief that history can be a cipher for modern church-state conflicts is best expressed in the types of conflicts represented in Ten Commandments and Pledge of Allegiance cases. In both conflicts history played a crucial and recurrent role, involving not only the claimed relationship of the practices to other historical acknowledgments of religion but also the historical origins and longevity of the practices themselves. Added to the lure of the historical life preserver was the claim, made defiantly in *McCreary* and subtly in *Van Orden*, of an indisputable historical relationship between the Ten Commandments and American law and government.¹⁹¹ And, significantly in *Van Orden*, the recent history of public reaction to the monolith became determinative of public perceptions of religious endorsement and, so it seems, constitutionality.¹⁹²

The Ten Commandments and Pledge cases present essentially the same conflict: how to reconcile official government uses of religion that go beyond transitory acknowledgments of the nation's religious heritage with the command against government endorsements of religion? Here is *Marsh*-redux, but without a specific historical exception to grandfather the ubiquitous and highly popular practices. *Van Orden* and the *Newdow* concurring opinions reflect the same analysis, here ungenerously termed "*Marsh*-light," relying on utterances and acknowledgments of religion by early, leading public figures to prove

190 See *Wirzburger v. Galvin*, 412 F.3d 271, 281–82 (1st Cir. 2005).

191 The comment accompanying the third rendition of the display in *McCreary* read: "The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. . . . The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition." *McCreary County v. ACLU*, 125 S. Ct. 2722, 2731 (2005).

192 See *Van Orden v. Perry*, 125 S. Ct. 2854, 2870–71 (2005) (Breyer, J., concurring in the judgment).

the practices are consistent with our constitutional traditions.¹⁹³ The apparent argument is that if George Washington, John Adams, Abraham Lincoln et al., and early Congresses made religious statements and issued religious proclamations, then: (1) those "facts" reflect the prevailing early perspective about the appropriateness of such official acknowledgments (i.e., these are the singularly important and relevant reference points); (2) that these evidences further reflect an early consensus about the constitutionality of such practices; (3) that this consensus about acknowledgments generally can be applied to the specific practice in issue; and (4) that that early opinion as to constitutionality is relevant to, if not determinative of, current controversies.

As can be seen, this analysis suffers from several of the fallacies discussed above. (In truth, the opinions do not engage in "analysis" in that they analyze the context or social and political dynamics surrounding the statements and proclamations, but merely engage in a selective listing of data.) Provided these are *the* relevant statements and we can divine their meanings after accounting for rhetoric, motive and context, the Court's analysis assumes that the speakers spoke with an awareness of the constitutional implications and potential future applications of the practices in which they were engaged. In essence, it requires that the Framers' actions were perpetually consistent with their fealty to constitutional principles.¹⁹⁴ Moreover, it assumes that the Framers saw those principles as firmly established and static—that the early conceptions of nonestablishment were fully developed at the time the Framers spoke religiously, such that they would not have desired a later opportunity to reevaluate their statements in light of evolving notions of religious liberty. Also, it assumes that twenty-first-century lawyers and judges can readily appreciate the full significance of religious discourse during the eighteenth century. Apparently, what historians have demonstrated about the ubiquity and indeterminacy of religious language and imagery in eighteenth-century political discourse is irrelevant.¹⁹⁵ We should be cautious about

193 *Id.* at 2862–63; *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 26–30 (2004) (Rehnquist, C.J., concurring in the judgment).

194 *See* *Lee v. Weisman*, 505 U.S. 577, 616 n.3 (1992) (Souter, J., concurring).

195 *See generally* DEREK H. DAVIS, *RELIGION AND THE CONTINENTAL CONGRESS, 1774–1789*, at 55 (2000) ("The convergence of the citizens' religious outlooks with those of their political representatives was a combination that proved to make religious impulse one of the driving forces of the Continental Congress as it led the country through the . . . American Revolution."); GAUSTAD, *supra* note 153, at 134 (exploring the role of religion during the late eighteenth century and observing that "in the realm of religion the opinions of men and women in those days varied

putting much stock in isolated statements of early political figures who may have mixed motives for choosing certain language.

Underlying the *Van Orden* Court's reliance on history was the claim—presented most clearly in *McCreary*—about the unique historical relationship between the Ten Commandments and the development of American law. Chief Justice Rehnquist did not directly address the issue in his opinion, other than to mention that all three branches of government have “acknowledged the historical role of the Ten Commandments.”¹⁹⁶ However, Justice Scalia in his *McCreary* dissent restated the accepted view that the Ten Commandments have made a “unique contribution to the development of the legal system.”¹⁹⁷ The problem is that, regardless of the popularity of this belief of a unique status, it lacks historical support.¹⁹⁸ There is no evidence that early political and legal figures saw the Decalogue as singularly (or even significantly) important or influential to American law.¹⁹⁹ Early references to the Ten Commandments in legal documents, cases, and treatises are few and far between; where such references appear, they are primarily illustrative or allegorical.²⁰⁰ The popular notion that the “Ten Commandments have profoundly influenced the formation of Western legal thought” and serve as “the foundation of our legal tradition” is unsubstantiated.²⁰¹ Where this belief becomes problematic is when members of the Court repeat it as an

widely”); Paul F. Boller, Jr., *George Washington and Religious Liberty*, 17 WM. & MARY Q. 486 (1960) (describing how many of Washington's statements extolling the virtues of religious tolerance had very practical motivations, such as preventing dissension among soldiers of different religious faiths and soliciting military aid from Canadian Catholics); Kloppenberg, *supra* note 153, at 10 (discussing “the two themes of individual autonomy and popular sovereignty at the center of the American vision of politics during the [eighteenth century]”); Isaac Kremnick, *The “Great National Discussion”: The Discourse of Politics in 1787*, 45 WM. & MARY Q. 3, 4 (1988) (discussing four “distinguishable idioms” which coexisted in the discourse of politics from 1787 to 1788); Stout, *supra* note 153, at 521 (claiming that movements around the time of the Revolution “exhibited a close rhetorical affinity that infused religious and political ideas with powerful social significance and ideological urgency”).

196 *Van Orden*, 125 S. Ct. at 2863.

197 *McCreary County v. ACLU*, 125 S. Ct. 2722, 2759 (Scalia, J., dissenting); *see also id.* (noting the “contribution that religion in general, and the Ten Commandments in particular, have made to our Nation's legal and governmental heritage”).

198 *See* Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 FORDHAM L. REV. 1477, 1500–16 (2005); Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 J. L. & RELIGION 525, 558 (1999–2000).

199 Finkelman, *supra* note 198, at 1500–20.

200 Green, *supra* note 198, at 531–58.

201 *McCreary*, 125 S. Ct. at 2731.

established maxim,²⁰² such that the Court is again creating not only law, but history.²⁰³

What is most revealing about the Court's inability to deal adequately with history is the colloquy between Justices Scalia and Stevens in their respective *McCreary* and *Van Orden* dissents. The two dissents become a tit-for-tat over who has the better historical evidence at his disposal. After relating many of the same official statements and proclamations found in Rehnquist's *Van Orden* opinion, Scalia jabs at Stevens, claiming the latter can appeal "to no official or even quasi-official action in support of [his] view of the Establishment Clause" other than Madison's *Memorial and Remonstrance*, "written before the federal Constitution had even been proposed, two letters written by Madison long after he was President, and the quasi-official *inaction* of Thomas Jefferson in refusing to issue a Thanksgiving Proclamation."²⁰⁴ Now the arbiter of relevant historical evidence, Madison's *Memorial* is "irrelevant" while Jefferson's action is "notoriously self-contradicting."²⁰⁵ Touché! According to Scalia, "official actions [affirming religion] show *what* . . . [the Establishment Clause] *meant*."²⁰⁶ Scalia's superior historical skills are limited, as he does not acknowledge his own sins of generality, the selectivity of sources, the failure of explaining context, and his insistence on static concepts.

In response, Stevens also seeks to cabin the development of constitutional thought by insisting that the only relevant views were of those who were present at the Constitutional Convention of 1787.²⁰⁷ Despite his stumble, Stevens makes the stronger historical argument, questioning Rehnquist and Scalia's selectivity of general sources and their relevance. Disputing the tendency to portray a unified historical narrative, Stevens demonstrates that the historical record is neither uniform nor pellucid.²⁰⁸ Stevens correctly recognizes the limitations of reliance on history, noting that narrow perspectives of many of the Founders would be rejected by people today. "Fortunately," Stevens asserts, "we are not bound by the Framers' expectations—we are

202 *Id.* at 2759–60 (Scalia, J., dissenting); *Stone v. Graham*, 449 U.S. 39, 45 (1980) (Rehnquist, J., dissenting).

203 HOWE, *supra* note 15, at 3; *see also* MILLER, *supra* note 2, at 196 ("The distortion of precedent is the concern particularly of lawyers. . . . History, however, belongs to the public memory. Its use and misuse affects the political values of the nation. This is especially so when it is the Supreme Court that is declaring the meaning of the past, for it speaks with special public authority.")

204 *McCreary*, 125 S. Ct. at 2754 (Scalia, J., dissenting).

205 *Id.*

206 *Id.*

207 *Van Orden v. Perry*, 125 S. Ct. 2854, 2883 (2005) (Stevens, J., dissenting).

208 *Id.* at 2884.

bound by the legal principles they enshrined in our Constitution.”²⁰⁹ But unfortunately, Stevens is on the losing end of the debate. The use of general history in *Van Orden* and the *McCreary* dissent will only invite increased reliance on such unrelated or unexplained historical sources. *Van Orden* and the *McCreary* and *Newdow* dissents sadly confirm Justice Kennedy’s observation that the *Marsh* approach was not an exception to Establishment Clause decisionmaking²¹⁰ but that it is becoming a substitute for the endorsement standard in religious symbolism cases.

D. Federalism

A fourth area that demonstrates the renewed interest in using history to resolve Establishment Clause disputes is Justice Thomas’s call for a federalism interpretation of the Religion Clauses.²¹¹ In several recent concurring opinions Justice Thomas has resurrected the argument that “the Establishment Clause is a federalism provision, which, for this reason, resists incorporation.”²¹² As he explained in *Newdow*, the “text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments [of religion].”²¹³ Under this approach,

it may well be that state action [in the Establishment Clause context] should be evaluated on different terms than similar action by the Federal Government. . . . Thus, while the Federal Government may “make no law respecting an establishment of religion,” the States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest.²¹⁴

Thomas’s call for a federalism constraint on the application of the Establishment Clause is, of course, not new; ever since the Court incorporated the clause in 1947²¹⁵ critics have charged that freedom from religious establishments does not constitute an individual liberty interest protected by the Due Process Clause of the Fourteenth

209 *Id.* at 2890.

210 *County of Allegheny v. ACLU*, 492 U.S. 573, 670 (Kennedy, J., dissenting).

211 *See Van Orden*, 125 S. Ct. at 2865 (Thomas, J., concurring); *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2125–28 (2005) (Thomas, J., concurring); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45–46 (2004) (Thomas, J., concurring in the judgment); *Zelman v. Simmons-Harris*, 536 U.S. 639, 678–79 (2002) (Thomas, J., concurring).

212 *Newdow*, 542 U.S. at 45–46 (Thomas, J., concurring in the judgment).

213 *Id.* at 49.

214 *Zelman*, 536 U.S. at 678–79 (Thomas, J., concurring).

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

Amendment.²¹⁶ A few, like Justice Thomas, have gone further to argue that rather than intending for the Establishment Clause to forbid a host of government practices "respecting an establishment of religion," the Framers consciously designed the clause to leave the then existing state of religious establishments intact.²¹⁷

Following *Everson*, the popularity of the federalism interpretation waned under the weight of subsequent Establishment Clause holdings.²¹⁸ Most scholars acknowledged an original federalism aspect to the Religion Clauses—disabling federal authority over religious matters—but argued that the Framers likely believed the clause served other purposes, such that federalism was only one of several possible understandings.²¹⁹ Indeed, scholars who otherwise supported the Court's separationist holdings conceded that, based on the existence of state establishments in 1789, federalism considerations likely informed the Framers' thinking.²²⁰ However, in the late 1980s a new round of federalism critiques arose, this time by authors who claimed that federalism concerns represented the *sole* or *overriding* consideration of those who drafted the Establishment Clause.²²¹ Gerard Brad-

216 See HOWE, *supra* note 15, at 19–20; WILBER G. KATZ, *RELIGION AND AMERICAN CONSTITUTIONS* 9 (1964); Corwin, *supra* note 32, at 19; Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371.

217 According to one critic writing in 1954, the First Amendment "is not only an express guarantee of personal religious freedom against the threat of federal action, but also an application of the principle of federalism. . . . The two [religion] clauses together were intended to remove the subject of religion completely from the federal competence." Snee, *supra* note 216, at 389.

218 See *Sch. Dist. v. Schempp*, 374 U.S. 203, 254–55 (1963) (Brennan, J., concurring) ("It has been suggested, with some support in history, that absorption of the First Amendment's ban against congressional legislation 'respecting an establishment of religion' is conceptually impossible because the Framers meant the Establishment Clause also to foreclose any attempt by Congress to disestablish the existing official state churches. Whether or not such was the understanding of the Framers . . . are questions not dispositive of our present inquiry. . . . Any such objective of the First Amendment, having become historical anachronism by 1868, cannot be thought to have deterred the absorption of the Establishment Clause [T]he Fourteenth Amendment created a panoply of new federal rights for the protection of citizens of the various states. And among those rights was freedom from such state governmental involvement in the affairs of religion as the Establishment Clause had originally foreclosed on the part of Congress.").

219 See HOWE, *supra* note 15, at 29; Snee, *supra* note 216, at 389.

220 See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-3, at 1161 (2d ed. 1988); Laycock, *supra* note 114, at 416; William Van Alstyne, Comment, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 773.

221 BRADLEY, *supra* note 68, at 92; Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1133–34 (1988).

ley wrote in 1987 that the final language of the Religion Clauses “tracked the federalist view that Congress had no enumerated authority over religion in the first place, as well as the basic antifederalist endeavor to preserve existing state constitutional regimes from intermeddling federal legislation.”²²² According to this new critique, the only point of consensus among the disparate factions during drafting and ratification was one of federalism: to exclude federal authority over all religious matters, leaving all regulation, pro and con, to the states.²²³ Moreover, due to the impossibility of consensus on a meaning among the Framers, this critique argues the clause lacks a substantive quality—that it is primarily, if not solely, a jurisdictional device. As Steven Smith wrote in the mid-1990s, “The religion clauses were understood as a federalist measure, not as the enactment of any substantive principle of religious freedom.”²²⁴

The implications of this federalism critique are obvious. If there is no substantive meaning to the Establishment Clause, then all of the Court’s church-state holdings—at least those where the Court has relied on the Jeffersonian-Madisonian interpretation of the clause—lack legitimacy. But more significantly, the federalism critique argues that incorporation of the Establishment Clause should be rolled back, along with many of the Court decisions restricting state practices sup-

222 BRADLEY, *supra* note 68, at 92.

223 Conkle, *supra* note 221, at 1133–34.

224 STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 30 (1995). Additionally, Smith wrote, “[T]he religion clauses were purely jurisdictional in nature; they did not adopt any substantive right or principle of religious freedom.” *Id.* at 17; accord AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 246 (1998) (“[A]s originally written, [the Establishment Clause] stood as a pure federalism provision. . . . [T]he clause was utterly agnostic on the substantive issue of establishment; it simply mandated that the issue be decided state by state and that Congress keep its hands off, that Congress make no law ‘respecting’ the vexed question.”); see also DREISBACH, *supra* note 6, at 61 (arguing that the “prevailing interpretation” of the Establishment Clause was that it was not meant to apply to state governments); James J. Knicely, “*First Principles*” and the Misplacement of the “Wall of Separation”: *Too Late in the Day for a Cure?*, 52 *DRAKE L. REV.* 171, 174–75 (2003) (recognizing the renewal of doubts in recent years concerning the Supreme Court’s incorporation of the Establishment Clause against the states); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 *ARIZ. ST. L.J.* 1085, 1089–92 (1995) (recognizing the federal government’s role of remaining agnostic concerning religious establishments under the Establishment Clause); William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 *DEPAUL L. REV.* 1191, 1198–202 (1990) (arguing that the government should not be involved in religious establishment).

porting religion.²²⁵ "[A]bandoning [incorporation] would certainly give the states far more latitude to acknowledge, accommodate, and promote religion than current doctrine allows."²²⁶ And potentially, "[i]f the Establishment Clause were *not* applied to the states, states would ostensibly be free to establish a state church or to give aid or preference to a particular religion."²²⁷ While a tax assessment for Methodists in Oregon would likely succumb to an equal protection or free exercise challenge, let alone to state nonestablishment provisions,²²⁸ there would be no federal bar to official acknowledgments of religion, nonsectarian school prayer, or many forms of nonpreferential aid to religion. As Justice Thomas remarked in *Van Orden*, "If the Establishment Clause does not restrain the States, then it has no application here, where only state action is at issue."²²⁹

While not all advocates call for disincorporation, most argue that the historical record indicates that the Framers believed the states should have leeway in their own church-state relationships, such that rights could take on different meanings vis-à-vis the federal and state governments. Like Justice Thomas, they insist that states should be able to fashion funding and other supportive relationships with religious institutions, constrained only by free exercise or equal protection interests.²³⁰ States and locales would be able to design laws and poli-

225 See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45–46 (2004) (Thomas, J., concurring in the judgment) ("I would acknowledge that the Establishment Clause is a federalism provision, which, for this reason, resists incorporation."); see also Knicely, *supra* note 224, at 225–27 (noting the presumption of regularity granted to state actions in Establishment Clause decisions); Lietzau, *supra* note 224, at 1193 (arguing that incorporating the Establishment Clause against the states is not mandated or permitted); Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1714–17 (1992) (arguing that no great harm would result from abandoning *Everson*, but the states could gain several advantages by abandoning the case).

226 Note, *supra* note 225, at 1715.

227 Knicely, *supra* note 224, at 220.

228 See OR. CONST. art. I, § 5 ("No money shall be drawn from the Treasury for the benefit of any religeous [sic] or theological institution . . .").

229 *Van Orden v. Perry*, 125 S. Ct. 2854, 2865 (2005) (Thomas, J., concurring). Another manifestation of this federalism trend, although not tied directly to the Establishment Clause and producing an opposite result, is the outcome in *Locke v. Davey*, 540 U.S. 712 (2004), where the Court held that "we have long said that 'there is room for play in the joints' between [the Religion Clauses]" that provides state flexibility in legislating on religious matters. *Id.* at 718 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970)). Thus a greater emphasis on federalism may allow states to provide greater guarantees of separation of church and state.

230 *Newdow*, 542 U.S. at 49–50 (Thomas, J., concurring in the judgment); *Zelman v. Simmons-Harris*, 536 U.S. 639, 679 (2002) (Thomas, J., concurring).

cies to satisfy the religious preferences of the prevailing majorities while allowing for greater experimentation in education and public benefits programs.²³¹ Separationism, if it continued to exist as a concept, would be up to each state.

This renewed emphasis on a federalism interpretation of the Establishment Clause is another example of bad history. It takes an issue of undeniable importance to the drafters and ratifiers of the Bill of Rights and gives it meaning that the Framers likely did not possess.²³² That the drafters of the First Amendment were concerned about limiting federal power is hardly profound; the entire purpose of the Bill of Rights was to limit federal authority in relation to individual's and state's rights. It is an entirely different question whether the Framers were also of the opinion that: (1) the Establishment Clause had no additional meaning other than that of federalism; or (2) that they intended the Establishment Clause to *protect* and *preserve* the existing state establishments, rather than have them die on their own accord.²³³

The federalism argument relies to a large degree on the "fact" that six or seven states maintained religious establishments at the time of the ratification of the Constitution and drafting of the First Amendment. Members of Congress from those states would not have agreed to any provision that could have been used to dismantle those existing church-state arrangements.²³⁴ The problem with this interpretation is that it imposes a modern view of what constitutes an establishment on the historical record and fails to take into account the diversity of practices that existed within the various states. Federalism advocates wrongfully assume that because the practices in the early state establishments are inconsistent with modern concepts of nonestablishment, late eighteenth-century observers would have viewed them as similarly inconsistent. However, representatives from states with active assessment systems generally claimed that their states did not maintain religious establishments because they were: (1) not exclusive but non-preferential; (2) that public support of religion was for the benefit of civil society, not religion; and (3) that their assessment systems did not

231 Note, *supra* note 225, at 1715.

232 See Steven K. Green, *Federalism and the Establishment Clause: A Reassessment*, 38 CREIGHTON L. REV. 761, 774–94 (2005).

233 See *Newdow*, 542 U.S. at 51 (Thomas, J., concurring in the judgment) (“[I]ncorporation . . . would prohibit precisely what the Establishment Clause was intended to protect—state establishments of religion.”).

234 See Green, *supra* note 232, at 774–80.

violate rights of conscience.²³⁵ Only Connecticut officially acknowledged its establishment in its charter, though its officials, like those in Massachusetts and New Hampshire would have been reticent to admit to one due to the negative connotation the term carried with its association to hated European establishments.²³⁶ As such, when the First Congress convened and considered proposed amendments to the Constitution, there was little reason for delegates to be concerned about *preserving* state religious "establishments" against federal intermeddling. Moreover, because disestablishment was the clear trend among the states, there was little reason for the drafters to secure state establishments through the First Amendment (or to waste political capital on the issue of state establishments). Finally, the vast majority of calls for a religious provision in the federal constitution centered on protecting rights of conscience and ensuring sect equality, not on securing existing state religious establishments.²³⁷ All of this suggests that the Framers' federalism concerns were limited to disabling the national government from involvement in religious affairs, not with maintaining state establishments.

Federalism was thus an issue in the drafting of the Establishment Clause, but primarily in the sense that all of the proposed amendments reflected a shared desire to limit the powers of the general government vis-à-vis the states. But an amendment to restrict federal power by prohibiting federal involvement in religious matters is not the same thing as an amendment *designed to preserve state establishments*. By focusing on this one impulse to the exclusion of other animating influences, Justice Thomas has again engaged in bad history.

CONCLUSION

History can be an indispensable tool for resolving Religion Clause conflicts. It can instruct and enlighten our understandings about our constitutional structure and relationships. It can inform us of our past so that we can learn from and build on those experiences. But history cannot provide answers to modern constitutional questions because history can never provide "answers" any more than it can provide "truths." At best, history is a handmaiden to judicial decisionmaking, not a taskmaster. Considered from this perspective, the recent emphasis on history as a panacea for Religion Clause decisionmaking is

235 CURRY, *supra* note 128, at 174–75, 184; I WILLIAM G. MCLOUGHLIN, *NEW ENGLAND DISSENT, 1630–1883*, at 610–11 (1971).

236 Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 906 (1986).

237 See Green, *supra* note 232, at 783–85.

troubling. The problems with relying on a historical methodology have been known for a long time, but apparently the lure of history is too great for some to resist. The ongoing resort to history for resolving Religion Clause conflicts only confirms the adage that those who do not learn the lessons from the misuse of the past are condemned to repeat them.