The Use of History in Religion Clause Cases and Constitutional Interpretation

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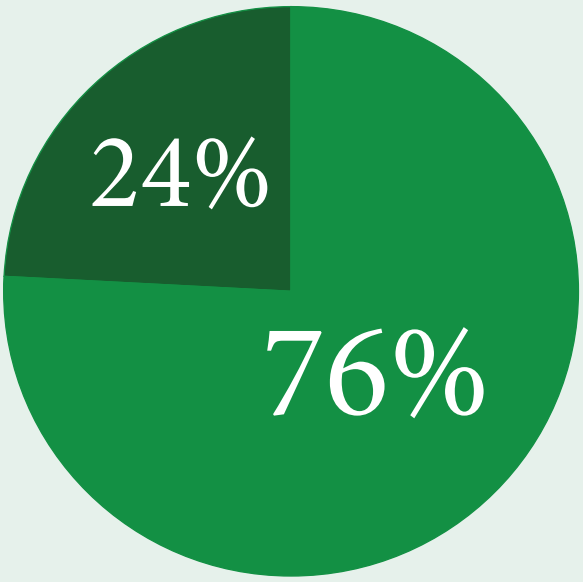
History is perhaps one of the most widely used tools in cases dealing with the religion clauses of the First Amendment, but should it be used as a definitive factor in answering constitutional questions? In this paper Molee argues that history should not be used for constitutional interpretation because of its contradictory nature, using Mark Hall and Steven Green's analysis the use of history in religion clause cases. Molee first briefly examines the complicated history behind the religion clauses of the First Amendment, focusing first on Thomas Jefferson and James Madison's interpretation, and then broadening the scope to the First Congress. Next, Molee examines key religion clause cases and the flawed application of history used. Molee then questions the broader use of originalism and intent-based interpretation in religion clause cases. Finally, Molee examines several case studies, first analyzed by Green and Hall, that show why history should not be used as justification in religion clause decisions. Molee concludes this paper by asserting that the use of history in religion clause cases is inherently flawed.

History is a tool widely used when interpreting the Religion Clauses of the Constitution. According to a comprehensive study of all religion clause cases, there are an average of 6.8 appeals to history in each case and more than 2.2 per opinion.[1] Following the re-emergence of religion clause cases with *Reynolds v.* United States, almost 76% of the Justices who have written at least one religion clause opinion have appealed to history, while all the Justices who have written more than four religion clause opinions have appealed to history, showing a pervasive use of history for religion clause adjudication.[2] The Religion Clauses can and have been interpreted correctly without the use of history, making a more consistent and applicable legal opinion. Justices are not historians and should not try to pass off a subjective account of history as fact. First, this paper will examine the contradictory historical record and the flawed application of history to the religion clauses through various court cases. Next, the paper will examine the merits of originalism and intent-based interpretation in relation to the application of history to religion clause cases, refuting the idea of originalism as a viable interpretation method. Lastly, this paper will examine several case studies, identifying history as ambiguous and subjective and explaining why history should not be used as a controlling legal tool, but perhaps should be used instead as relevant source material. History can be valuable as a source of information for some religion clause cases, but its effectiveness in constitutional interpretation should be questioned and refuted. History should be used, if at all, to inform not resolve, legal controversies, but ideally, history would not be used in deciding religion clause cases.

History is too contradictory within itself, too complicated, and too subjective to use as a basis for legal decisions. The phrase, "wall of separation," is perhaps the most widely used phrase applied to religion clause interpretations. It finds its origins, ironically, in the work of Baptist theologian Roger Williams, founder of the colony of Rhode Island, and was adopted by Thomas Jefferson in his letter to the Danbury Baptist Association.[34] Jefferson wrote, "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of



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separation between Church and State."[5]

This interpretation of the First Amendment has influenced religion clause doctrine and applied history related towards the First Amendment. In fact, in addition to using the phrase, "wall of separation" to interpret the founders' attitude towards the First Amendment, the Founders' perspectives have been narrowed interpreted as almost exclusively Thomas Jefferson and James Madison's interpretations of the religion clauses.[6] The phrase, "a wall of separation" can and has been interpreted in several ways by historians. Some critics of separationist thinking generally cite the fact that many aspects of church and state were intertwined during the ratification of the Constitution, and thus the current interpretation of strict separation could not have been intended by the Framers, also referencing the Declaration of Independence and its mention of a "Creator" to support their criticism.[7,8] Critics of the separationist position, including Justice Thomas, also question the incorporation of the First Amendment because most states had established churches at the time of ratification.[9,10] The interpretation of this phrase shows the broad and conflicting interpretations of history and the tendency to see history as binding on modernity, raising questions about the use of history in making legal assertions.

Jefferson and Madison have long been interpreted by the Court to hold separationist views regarding the religion clauses, due in large part to Madison's *Memorial and Remonstrance* and Jefferson's letters to Danbury Baptists, as well as both their actions regarding their home state of Virginia.[11] The use of Madison and Jefferson to judge the intentions of all of the Founders would be a careless reading

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of history even if Madison and Jefferson were consistent in their views and actions, but they show many contradictions to their seemingly separationist position. Critics of the separationist position question if Jefferson and Madison actually were strictly separatists, using the two Founders' contradictory actions to justify their critique. Jefferson and Madison's conceptions of "separation" have long been debated because of conflicting evidence. As President, Jefferson refused to issue Proclamations of Thanksgiving, though he did so as the Governor of Virginia, while President Madison issued four religious proclamations, but vetoed two bills he thought violated the first amendment.[12,13] After his retirement from the presidency, Madison took a seemingly more separationist view and wrote of total separation of the church and state.[14] In his original draft of the Bill of Rights, he had provisions prohibiting the States from the establishment of religion along with the Federal government, but they were not passed.[15] It seems that Madison and Jefferson had complicated ideas on how religion and government should mix, providing a contradictory and narrow historical narrative at best, and paving the way for broad and sometimes conflicting interpretations of the First Amendment. The contradictions of history and historical figures, such as Madison and Jefferson, paint a cloudy picture of the First Amendment

and its original supporting intent. This conflict shows the problems behind using history to interpret the religion clauses.

Even if the Court bases its opinions on the larger and broader First Congress and its deliberations on the religion clauses in order to define the intentions of the Founders, the historical record is lacking in substance and fraught with ambiguity.[16] Thomas Jefferson can barely be considered in this interpretation because of his absence and the intense secrecy of the proceedings that precluded him from knowledge of the exact nature of the debates.[17] The legislative history is unhelpful in determining intent because of the scarcity of official records, but some notes do shed light on the Founders' thoughts and feelings towards the place of religion in society and its relation to the government.[18] However, much like Madison and Jefferson's various contradictions, the First Congress is even more contradictory in their deliberations; the only common ground agreed upon was that the text be included within the Constitution.[19] Madison, significant in the debates for sure, wanted to include a provision banning the establishment of a "national religion." The House, in favor of more general language, rejected this suggestion.[20] Some Framers opposed the Establishment Clause altogether, deeming it unnecessary or too dangerous to the rights of the states, while other Framers wanted a more narrowly tailored clause. One version read, "Congress shall make no law establishing one religious sect or society in preference to others, nor shall freedom of conscience be infringed," while another read, "Congress shall make no law establishing one particular religious denomination in preference to others."[21] Ultimately, the religion clauses that are included in the Constitution were a result of significant compromise between all members of the Congress. Therefore, making the use of one opinion from the First Congress as representative of the entirety of the Framers' opinions is woefully inadequate because the historical record is inherently contradictory.[22] The records from the debates surrounding the religion clauses are either missing (from the Senate debates) or, as Madison himself described about the records from the House debates he chaired, "not to be relied upon," claiming the record keeper "was indolent and sometimes filled up blanks in his notes from memory or imagination."[23] The insufficient record creates problems in using history as an interpretive tool.

It would seem that through the intense debates over each and every word included or not included in the religion clauses that the Framers "believed that the constitutional interpretation should be drawn from the express

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language of the document, not from the statements of those who drafted the language… shar[ing] the traditional common law view… 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," (Laycock 586).[24] As Douglas Laycock writes, "we have inferred… the intent of the Founders… but such arguments come from our own heads. What we get from the Founders is the broad contours of principle," (Laycock 589).[25] As has been examined, the only really credible and uniform source of religious doctrine in the United States is the written Constitution and, more specifically, the religion clauses.

The flawed application of history based solely on Jefferson and Madison is first seen in *Reynolds v. United States,* an 1879 case on polygamy, in which the Court declared that Jefferson's comments on the wall of separation "may be accepted almost as an authoritative declaration of the scope and effect of the [First] Amendment."[26] This was the first time Jefferson's letter entered American jurisprudence, with the Court citing Jefferson and Madison in its quest to seek a legal definition for the word religion. Justice Waite declared that religion must be understood in light of "the background and environment of the period in which that constitutional language was fashioned and adopted," opening the religion clauses up to historical interpretation, and particularly regarding Jefferson and Madison.[27,28] Perhaps the most definitive case in terms of determining how the Religion Clauses are interpreted, *Everson v. Board of Education* sets the precedent for the way history is used in relation to the First Amendment and Religion Clause cases. *Everson* is widely regarded as a premier example of a flawed application of history by both the majority and the dissenters. In his dissent, Justice Rutledge writes, "[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history."[29,30] The overwhelming use of history in order to interpret religion clause cases stems from this declaration and the assertion of the significance of history behind the religion clauses.

The historical precedent set by *Everson*, defined by Hall as the "*Everson* syllogism," is the flawed record of history that much of religion clause precedent is based upon.[31] Everson marked a decisive moment in the interpretation of religion clause cases, incorporating the Establishment Clause and offering an influential method of interpretation for First Amendment cases that prioritized the intent of the Founders and the historical record.[32] Justice Black, writing for the majority, agreed with Justice Waite that interpretation of the religion clauses must rest in history, and argued that the Founders' views are summarized well in Madison's *Memorial and Remonstrance* and Jefferson's letter to the Danbury Baptist Association along with his Virginia Bill for Religious Liberty.[33] Black interprets these documents in a simplified and stark manner, and his use of history did not raise dissent within the Court. Justice Rutledge, writing for the dissent, also appeals to history (a whopping sixty-two times, the most of any opinions before or after) to support his conclusion that the Founders, by which he means Madison

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and Jefferson, intended to "erect a high wall of separation between church and state."[34,35] As if the sheer number of his appeals to history were not enough to convey his opinion that history, particularly Madison, was conclusively separationist, he attached a copy of Madison's *Memorial and Remonstrance* to his dissent in order to fully convey his point.[36] Both the majority and dissent formed a precedent based on flawed and oversimplified history that would form what Mark Hall deems the "*Everson* syllogism" that describes the flawed application of history to religion clause cases that would plague the Court in the future.[37] The "*Everson* syllogism," as defined by Hall, holds that history must be used in interpreting Establishment clause cases, particularly the Madison and Jefferson's intent, meaning that, because Madison and Jefferson are thought to be separationists, the Establishment Clause "requires the strict separation of the church."[38] This syllogism is flawed in several of its premises, invalidating its conclusion and revealing the futility of using Madison and Jefferson as conclusive voices on the Establishment clause. Though the majority and dissent came to different conclusions, they both enumerate the authority of history in the interpretation of the religion clauses and base legal decisions on poor interpretations of history.

Everson's history remains, for many Justices, the definitive account of the origins of the religion clause, and has been used in several subsequent cases. The "bad history" of *Everson* used in subsequent cases is a dangerous precedent that is set, causing religion clause doctrine to be based in incomplete historical record. *Everson* turned Madison's *Memorial and Remonstrance* and Jefferson's Virginia Bill for Religious Freedom into "constitutional canon" and made them "authoritative expositors on the meaning of non-establishment and free exercise as found in the First Amendment."[39] Justice Reed, in the subsequent case *McCollum v. Board of Education,* questions the narrowness of the history of *Everson,* writing, "rule of law should not be drawn from a figure of speech," (referencing the phrase, "wall of separation").[40,41] Although the writings of Madison and Jefferson are important, they are not at all definitive, and certainly not always applicable to questions that would not have come to Jefferson or Madison's attention during their era.[42] Justice Scalia, referencing

the tradition of legislative prayer and Thanksgiving proclamations, has suggested that acts performed by federal officials are more relevant than Madison and Jefferson's private thoughts before they held office, meaning he finds *Everson*'s reliance on Jefferson and Madison's personal writings problematic.[43] However, subsequent Court cases after Everson used the "bad history" it had labeled as indisputable and conclusive to justify their rulings. In *Engel v. Vitale,* Justice Black, once again speaking for the majority, used the state of Virginia's religious debates as the most relevant history in deciding the case, disregarding other states, and made it clear that Jefferson and Madison's authority on these matters was predominant.[44,45] Black never explained why Virginia legislation is more relevant than any other state legislation, but perhaps his reverence for Jefferson and Madison transferred to their home state.[46] In this case, dealing with school prayer, separationist Justices chose to disregard that religion had once been used in the public school system, a historical fact that would contradict their preferred separationist narrative.[47] This acceptance of some facts and rejection or ignorance of others to support their opinion shows the inconsistency of using history that is contradictory and vague. Adding onto the precedent set by *Engel*, *Abington School District v. Schempp* once again used Jefferson and Madison's views in order to define the Establishment Clause. Justice Clark, writing for the majority, further codifies Madison and Jefferson's role as the prevailing voices on Establishment clause history and meaning.[48] Clark's majority opinion is the most clearly articulated evidence that the appeal to history relies exclusively on Madison and Jefferson in understanding the religion clauses.

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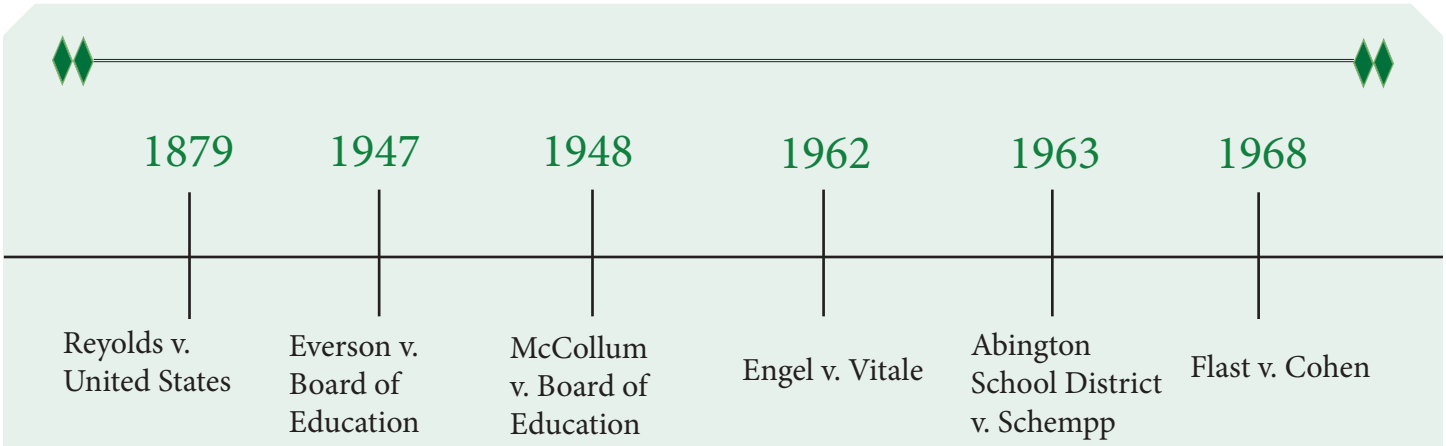
Even religion clause cases that are grounded in history and do not rely on *Everson* can be seen as examples of bad history, especially when they are oversimplified and fallaciously treated as binding for modern times. Justice Rehnquist in *Wallace v. Jaffree* agreed with the general idea of *Everson,* stating that "the true meaning of the Establishment Clause can only [be] seen in its history… As drafters of our Bill of Rights, the Farmers inscribed the principles that control today."[49] Rehnquist disagreed, however, with the reliance on Madison and Jefferson and instead wanted to rely on other Founders. In order to do this he created his own interpretation of history, committing the fallacy of generalization, along with other Justices who disagreed with the Madison and Jefferson's reign over religious clause history.[50] Oversimplification occurred significantly in *Marsh v. Chambers,* a case disputing the practice of legislative chaplains and legislative prayer. Chief Justice Burger, writing for the majority, relied almost solely on historical evidence to justify the practice. Burger used the actions of the First Congress to defend legislative prayer, pointing out that the First Congress "authorized the appointment of paid

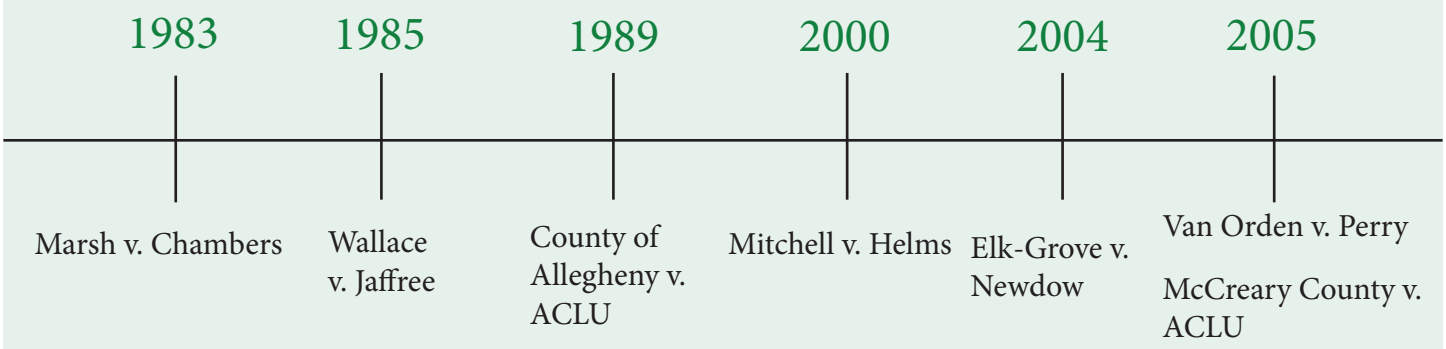
chaplains only three days after approving the Bill of Rights," meaning that, "clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment."[51,52] Burger emphasized the consistency of the historical record on legislative prayer as "unbroken… [for] more than 200 years."[5354] This is once again an example of the Court relying on "bad history," because it takes a historical event out of context and infers meaning from general historical facts. This is an example of a fallacy in how the Court views the Founders. Burger views the Founders as infallible and aware of and concerned about the constitutionality (or unconstitutionality) of their actions, instead of politicians capable of behaving unconstitutionally.[55] Burger also assumes that the Constitution is a document that's meaning is "static" and unchangingly based on the experiences and perceptions of the Framers, unadaptable to future situations and generations.[56] Steven Green and Douglas Laycock outline the need to take events and statements of history completely in context, by not over-emphasizing particular facts that are "independent from their contemporary meaning," like the fact that the First Congress created a chaplain within three days of approving the language of the First Amendment.[57] As exemplified by *Marsh,* history cannot be taken piece by piece, but rather it should be taken all together, if taken as a factor at all. *Marsh's* holding is based on piecemeal historical facts, making the legal precedent based in falsity, a dangerous problem for legal interpretation. *Marsh* exposes the flawed logic of using history to interpret religion clause cases, even if the history is not based in the history enshrined in *Everson,* and in viewing the Constitution as a static, unchangeable document.

The use of history in First Amendment interpretations, particularly *Everson's* account of history, has been sometimes been questioned by other Justices. In his *Nyquist* opinion, Justice White noted that, "one cannot seriously believe that the history of the First Amendment furnishes unequivocal answers to many of the fundamental issues of church-state relations."[58,59,60] In *County of Allegheny v. ACLU,* a case dealing with the constitutionality of a display of the Ten Commandments, Justice Blackmun acknowledged the problem present in *Marsh*'s interpretation of history that assumes that modernity is bound by the Founders' actions.[61] The Founders may have sanctioned a display of the Ten Commandments, but the "bedrock Establishment Clause principle [is] that, regardless of history government may not demonstrate a preference for a particular faith."[62,63] Here, Justice Blackmun interprets the Establishment Clause without regarding history and using other tests to determine constitutionality, thus writing a decision that can more easily be used as precedent.[64] Justice Stevens and Justice Brennan seem to be some of the most outspoken Justices against the use of history in religion clause cases, with Justice Stevens arguing in his *Van Orden v. Perry* dissent that history is too "indeterminate to serve as an interpretive North Star."[65] Justice Brennan, in his concurring opinion in *Abington,* warned against relying on an "ambiguous" historical record, calling the use of history "[a] too literal quest for the advice of the founding fathers."[66,67] Some Justices have called attention to some of the problems with using history to interpret religious clause



cases and suggest that there is better method of interpretation than reliance on history.

The glorification of the Founding period and Founders leads to problems in the uses of history. Larry Kramer describes modern constitutional interpretation as "'Founding obsessed' in its use of history."[68] The perceived sacredness of the founding has influenced the use of history and given it an aura of objectivity and authority that legitimizes legal arguments. Because the Court's adjudication relies on the interpretation of a 228-year-old document, the history surrounding that document obviously becomes important to understanding the context and the events surrounding it.[69] Although the *Everson* premise proposing that Jefferson and Madison represent all the Founders is challenged and changing, the Founding "still retains its controlling significance" over religion clause adjudication.[70] By glorifying the Founding period and the men associated with it, it is neglected that the Framers are politicians much like politicians in the modern sense. As Steve Green writes, "The Framers must also be afforded the privilege we give to modern politicians of being obtuse, ambiguous, insincere, incomplete, and contradictory in their rhetoric."[71] Much like originalists treat the Constitution as static, the Founding is also treated as an event that is is clearly defined and completed within a certain period of time. However Green also notes, "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." This point of view ignores the long development of ideas before the event of the Founding and goes against the beliefs of the Founders themselves, who saw their political theories as constantly developing.[72] The idea that the Founding represents the peak of democratic thought disregards the necessity and inevitability of the evolution of ideas. History cannot really be used to answer modern questions that the Framers may not have asked, and the Founding is, as Philip Kurland has commented, "a starting place, not a fixed reference point that necessarily binds future generations… History should figure in constitutional interpretation as an aid to the pursuit of justice, not a constraint upon it."[73] It is a fallacy to think of the Founding period and history as an authority that controls modernity. As stated before, Justice Brennan says that the historical record cannot be taken to be the absolute truth, because that rarely exists.[74,75] The glorification of



the Founding period combined with the tendency to take history as authoritative truth causes problems in Court interpretation, and, as seen in *Marsh* and *Van Orden,* tends to make the Court commit the error of overgeneralization of history, potentially getting history wrong and basing legal opinion in false facts.

The idea of originalism and a static Constitution is a problematic way to interpret the constitution as it allows history to govern modern times, glorifies the Founding period, and attempts to use history to answer modern questions the Founders neither faced nor considered. Originalism combines the two different interpretation methods of textualism and intentionalism, creating a system of interpretation that is "fatally ambiguous at best."[76] Douglas Laycock claims that "we cannot directly know the intent of Founders who are long dead."[77] A critical question that arises from the use of originalism in interpreting the Constitution is "to what extent those original intentions and understandings can be accurately deciphered and the extent to which they should control current constitutional interpretation."[78] Originalism holds that the intentions of the founders dictates how the constitution should be interpreted - an understanding that is present in originalist decisions such as *Marsh* and Rehnquist's dissent in *Wallace*.

The most extreme applications of history and originalism come through Justices Scalia and Thomas's opinions. According to Justice Scalia in *McCreary County v. ACLU,* history does not require the government be neutral between religion and secularism. Instead it stresses a "preferential treatment of monotheism over other belief systems," because of the existence of primarily monotheistic religion during the Founding era, an inaccurate application of history to a modern question that does not take into account the context of the times or the increasing religious diversity in America.[79] Scalia asserted "that the Establishment Clause was enshrined in the Constitution's text, and these official actions show what it meant," so Justices should only interpret the Establishment Clause in light of the First Congress and their intentions behind the clause.[80] The fact that some Framers thought Christianity should be a favored religion over others should not bind modern day interpretations of the religion clauses, even if Justice Scalia thinks they should. In a simultaneously released opinion, *Van Orden v. Perry,* Justice Thomas also advocated for originalism, writing, "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."[8182] Thomas also makes the argument against incorporation using originalism and the history of state-established churches at the time of ratification, but this view once again assumes that the founding time was constitutionally unimpeachable. As Laycock writes, "it would be…naive to think that all vestiges of religious establishment and religious intolerance instantly disappeared when the Religion Clauses were ratified, or that their survival fixes the meaning of the Religion Clauses."[83] Ongoing racist policies and codified subjugation of African-Americans continued after the Thirteenth, Fourteenth, and Fifteenth Amendments were ratified and were later declared unconstitutional; the same thinking can be applied to the religious institutions established at the time of ratification of the First Amendment. The state institutions of religion were continued until their constitutionality was challenged or they were phased out by law, but that does not mean that they were not always unconstitutional.

The originalist view of history and its application to the interpretation of the religion clauses is flawed in several aspects. Originalists tend to draw on history that is contradictory and revisionist, running into several problems when using history to interpret the answer to a modern question. The version of history that originalists use in application to religion clauses is often out of context and misunderstood, with most originalists making what H. Jefferson Powell calls the "most fundamental of historical errors," which is "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," much like the influence of religion on education and intellectual thought that now seems out of place.[84] For the most part, "eighteenth-century views of religious liberty, equality, and church-state interactions are simply ill suited for twenty-first-century America," and so the application of history to a modern question is often misguided and non-applicable.[85] When one looks to the Founders for the answer to a modern question, one risks the overgeneralization of the wide array of views of the Founders, taking the Founder's thoughts out of context to apply it to a modern setting, and creation of a wide gap between intent and text. For example, many critics reject the separationist ideas behind the Establishment Clause because they deem them a by-product of the anti-Catholicism of the time.[86] However, because the Court should interpret the religion clauses in the context of the debate, the anti-Catholicism should be rejected because their "intent is subordinate to the text," and "they did not… write their anti-Catholicism into the text."[87] Because anti-Catholicism was not actually written into the text, Laycock argues that the anti-Catholicism of the time can not be assumed to be intended through the text.[88] Originalism is not a viable interpretative method because of its over reliance on the unreliable historical record.

The use of the Blaine Amendment and anti-Catholicism in America as a historical justification for the Court's support for non-preferential government aid can be looked at as a case study for misuse of history in interpretation of the Establishment Clause. Green uses

the Blaine Amendments and the history behind them as a case study to explain how they have been used by Justice Thomas in cases on government funding for public programs, specifically schools. Thomas uses anti-Catholicism as justification to question laws against public funding of religious schools. The Blaine Amendment, a failed amendment that would not have allowed for funding of religious schools and one that was drafted during a time of anti-Catholic discrimination, has supposedly been influential in the adoption of state constitutional amendments that ban funding to parochial schools.[89] The Blaine Amendment is used in public funding cases, significantly *Zelman v. Simmons-Harris* and *Locke v. Davey* to justify government funding of public and private programs, such as vouchers or religious education. Thomas condemns the influence of the Blaine Amendments in *Mitchell v. Helms* and uses historical arguments to justify the allowance of "private choice" funding on the basis of the anti-Catholic opinions that seemingly influenced the law, which he claims invalidates the Blaine Amendments.[90] In *Mitchell,* Thomas argues that since the Blaine Amendments were an influencing factor in laws that govern public funding of religious schools, this "doctrine, born of bigotry, should be buried now."[91] However, this inaccurately identifies only one motive behind the amendments prohibiting public funding for religious schools. There are several factors contributing to the sentiment against funding for private schools that extend beyond anti-Catholicism, bringing into question the thoroughness of Justice Thomas's historical analysis in *Mitchell.* Additionally, this historical context of anti-Catholicism does not necessarily invalidate the law, especially since it is insufficient history. Though the Blaine Amendments and application of the "nonsectarian principle" were certainly influenced by anti-Catholic sentiment, this does not invalidate the amendments or fully account for the complete history behind the amendments or the nonsectarian principle.[92] Historian Noah Feldman says that, "history provides no definitive conclusions about the rationales behind the Amendment and the no-funding principle."[93] Thus, Thomas's rejection of the Blaine Amendment and subsequent bans on public funding on the basis of solely anti-Catholicism is not an entirely accurate historical record, and by using a potentially false historical record, it bases the law in inaccurate history, showing a misuse of history in jurisprudence.

18th-century views

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21st-century America.

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Cases dealing with the Ten Commandments are other case studies enumerated by Green that can be examined to see the pervasive use of history to justify legal decisions and the dangers of the misuse of the application of history. As previously discussed, in *McCreary* and *Van Orden,* history was used to justify both decisions.[94] *Van Orden* went a bit further than *McCreary*, equating the historical public reaction (or lack thereof) to the monument with constitutionality, drawing on the arguments made by Burger before in *Marsh*. These Ten Commandment cases make the same mistake *Marsh* makes, equating a popular practice and an unchallenged historical record with constitutionality of the practice. The concurring opinion in *Van Orden* relies on comments and acknowledgments of religion by historical leading public figures to prove that the practice is consistent with the constitution.[95] In these cases, the Court once again assumes that the historical figures their decision is based on know that what they are doing has constitutional consequences.[96] Additionally, it assumes a truly originalist argument: that the law does not change with the times because of supposed intent of its inscribers. The Ten Commandments, Justice Scalia claims, have a direct influence on and correlation with American law.[97] This is historically unsupported, basing binding legal opinions on highly debatable facts. If these facts are highly debatable, then the decisions emitting from these facts set bad precedents and an unreliable test for future religion clause questions. The misuse of history is obvious in the dissents of Scalia and Souter in their respective *McCreary* and *Van Orden* dissents, where the two justices provide two different accounts of history, both asserting their history is the more relevant source.[98] As Green argues, the pervasive use of history in the Ten Commandment cases only invites further use of history in relevant cases, continuing the *Marsh* tradition of basing legal precedent in false or oversimplified historical data.

Lastly, Justice Thomas's call for a "federalist" approach to religion clause questions is an interesting case study that Green uses to examine the relevance of history and answer the question of the use of history.[99] Justice Thomas has written several opinions arguing that the Establishment Clause is meant to be a "federalism provision" and therefore should not be incorporated, meaning that because the Establishment Clause only mentions Congress, it does not apply to state governments.[100] He writes in *Elk Grove v. 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]," a claim that is not new since the Establishment Clause's incorporation in *Everson* in 1947.[101] Thomas disregards the diversity of the Framer's opinions and claims that the Framers, as a uniformed body, consciously designed the

Establishment Clause to allow the states to establish and retain religion.[102] This interpretation of the Establishment Clause would mean that all other Establishment Clause cases including and since the incorporation would lack legitimacy, and would allow states to establish a religion or a church, or at the very least give aid or preference to a particular religion. Thomas's arguments hold some weight in terms of historical support, but that does not mean that federalism was the only concern of the Framers in the writing of the Establishment Clause, and that type of disregard for the entire context of history is a fallacy of using history for the basis of a legal opinion.[103] The Framers did allow for state governments to retain established religions at the time of the ratification of the First Amendment, but using this fact to justify a federalist view of the Establishment Clause falls under the same problems as *Marsh*, reducing the evidence to an oversimplified view of history. This interpretation of the Establishment Clause is another example of the problems with using history in interpreting the religion clauses, and is a weak on which concept to base legal decisions. It looks at history as binding and definitive, and does not allow for the development and evolution of political theories or ideas. Justice Thomas, in basing his legal opinions off a narrow and truncated version of history, follows *Marsh*'s fallacy, and shows once again that history is an unreliable tool on which to base legal decisions.

Despite the long list of evidence showing the flaws of history in religion clause jurisprudence, history is not entirely useless in adjudication as it can be used for informational purposes. However, it is dangerous as the basis of constitutional decisions, especially precedent setting decisions, because a historical fact can be found to support every opinion. It is evident that the use of history in religion clause interpretation as it has been used is flawed, and, as Hall says, "it is perhaps therefore an opportune time for Justices and scholars to reconsider the relevance or irrelevance of history for Religion Clause jurisprudence."[104] At the very least, it must be recognized that relying purely on Thomas Jefferson and James Madison to represent the entire Founders' intent is bad history. Though both were significant Founders, the First Amendment did not spring from their consciousness onto paper, but went through a rather rigourous debate and ratification process.[105] The *Everson* account merely follows Madison on his "good days" and abandons him on days where he is inconsistent.[106] Any attempt to deduce the Founders' intent must go beyond Jefferson and Madison, and rely on more than their writings and their home state of Virginia. Even if a wider scope of history is used, it has been shown that most history used in religion clause jurisprudence is flawed or oversimplified in one way or another. The way history is used now is not how history should be used. History cannot answer modern controversies because history is subjective, inexhaustible, and contradictory; it is not made up of absolute truths. The issues with using history to answer modern historical controversies are abundant. Green explains history's role in adjudicating religion clause cases when he writes, "at best, history is a handmaiden to judicial decision making, not a taskmaster."[107] There are many fallacious conclusions a Justice draws when basing his or her legal decision in history, and so history is an unreliable and fallacious tool to use to base legal decisions in.

This essay seeks to examine the flaws of the application of history in religion clause cases ranging from the misuse of history in *Everson* to the consequences of the originalist inter-

pretation of the First Amendment. This essay deals mostly with Establishment Clause cases, as judges and scholars have not examined the Free Exercise Clause as thoroughly. In the precedent set by *Everson,* history has been deemed essential in interpretation of the religion clauses, and Madison and Jefferson have been looked at as the definitive representatives of the Founders and the last word on religion clause cases. This logic is flawed because it oversimplifies history and uses this simplified version to make general claims about the intent of the Founders. However, as the "*Everson* syllogism" coined by Hall becomes less relevant, even basing constitutional interpretation from the First Congress is flawed because it is contradictory and inconsistent. The use of history is fallacious because it is used as a determinative factor in answering modern day questions, it glorifies the Founding period, and it does not treat the Founders as what they are: politicians capable of error. The method of constitutional interpretation called originalism is a flawed application of history to constitutional interpretation for those reasons. Several case studies demonstrate the problems associated with using history to interpret the religion clauses, including the reliance of the Blaine Amendments and anti-Catholicism to support private choice funding, the adjudication of Ten Commandment cases, and the federalist interpretation of the Establishment Clause. Because of all the evidence presented, it is clear that history is a problematic tool for interpreting the religion clauses and should not be used in a binding way.

Endnotes

1 Mark David Hall, "Jeffersonian Walls and Madisonian Lines: The Supreme Court's Interpretation of the First Amendment Religion Clauses" (2009). APSA 2009 Toronto Meeting Paper. 7.
2 Ibid. 11.
3 Ibid. 20.
4 "Letters between Thomas Jefferson and the Danbury Baptists"
5 Ibid.
6 Hall, "Jeffersonian Walls and Madisonian Lines," 20.
7 Steven K Green, "Bad History: The Lure of History in Establishment Clause Adjudication" Notre Dame Law Review 81, no. 5 (June 2006): 1718.
8 Committee for Public Education & Religious Liberty v. Nyquist, 413 US 756 (1973) (White B. dissenting in part/concurring in part)
9 Green, "Bad History," 1751.
10 Hall, "Jeffersonian Walls and Madisonian Lines," 31.
11 Everson v. Board of Education of the Township of Ewing, 330 U.S. 1 (1947)
12 Green, "Bad History," 1747.
13 Irving Brant, "On the Separation of Church and State," The William and Mary Quarterly 8, no. 1 (January 1951) 23.
14 Ibid. 2.
15 Ibid. 18-19.
16 Green, "Bad History," 1731
17 Ibid. 1731
18 Ibid. 1721
19 Ibid. 1732
20 James E. Wood. "Original Intent and the Constitution Today." in Religious Liberty, ed. Douglas Laycock (Grand Rapids, Michigan: William B. Eerdmans Publishing Company, 2010) 607.
21 Ibid. 607.
22 Ibid. 610.
23 Green, "Bad History," 1731
24 Douglas Laycock. "Text, Intent, and the Religion Clauses." in Religious Liberty, ed. Douglas Laycock (Grand Rapids, Michigan: William B. Eerdmans Publishing Company, 2010) 586.
25 Ibid. 589.
26 Reynolds v. United States, 98 US 145 (1879)
27 Hall, "Jeffersonian Walls and Madisonian Lines," 16
28 Everson v. Board of Education of the Township of Ewing, 330 U.S. 1 (1947) (Rutledge W. dissenting opinion)
29 Ibid.
30 Hall, "Jeffersonian Walls and Madisonian Lines," 2.

31 Ibid. 18
32 Ibid. 16.
33 Everson v. Board of Education of the Township of Ewing, 330 U.S. 1 (1947)
34 Ibid.
35 Hall, "Jeffersonian Walls and Madisonian Lines," 17.
36 Ibid. 18.
37 Ibid. 18.
38 Ibid. 18.
39 Green, "Bad History," 1720-1721
40 McCollum v. Board of Education, 333 U.S. 203 (1948)
41 Green, "Bad History," 1721.
42 Ibid. 1721
43 Hall, "Jeffersonian Walls and Madisonian Lines," 31
44 Ibid. 20.
45 Engel v. Vitale, 370 U.S. 421 (1962)
46 Hall, "Jeffersonian Walls and Madisonian Lines," 20.
47 Engel v. Vitale, 370 U.S. 421 (1962)
48 School District of Abington Township, Pennsylvania v. Schempp, 374 US 203 (1963)
49 Green, "Bad History," 1720.
50 Wallace v. Jaffree, 472 U.S. 38 (1985)
51 Green, "Bad History," 1724.
52 Marsh v. Chambers, 463 U.S. 783 (1983)
53 Marsh v. Chambers, 463 U.S. 783 (1983)
54 Green, "Bad History," 1724.
55 Ibid. 1725.
56 Ibid. 1725.
57 Laycock. "Text, Intent, and the Religion Clauses." 587.
58 Flast v. Cohen, 392 U.S. 83 (1968)
59 Committee for Public Education & Religious Liberty v. Nyquist, 413 US 756 (1973) (White B. dissenting in part/concurring in part)
60 Hall, "Jeffersonian Walls and Madisonian Lines," 22.
61 County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989)
62 Ibid.
63 Hall, "Jeffersonian Walls and Madisonian Lines," 26.
64 County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989).
65 Van Orden v. Perry, 545 U.S. 677 (2005) (Stevens, dissenting opinion)
66 Hall, "Jeffersonian Walls and Madisonian Lines," 20.
67 School District of Abington Township, Pennsylvania v. Schempp, 374 US 203 (1963)
68 Green, "Bad History," 1728.

69 Ibid. 1717.
70 Ibid.1729.
71 Ibid. 1733.
72 Ibid. 1733.
73 Ibid. 1733.
74 Ibid. 1731.
75 School District of Abington Township, Pennsylvania v. Schempp, 374 US 203 (1963)
76 Laycock. "Text, Intent, and the Religion Clauses." 582.
77 Ibid. 583.
78 Green, "Bad History,"1735.
79 McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005)
80 Ibid.
81 Van Orden v. Perry, 545 U.S. 677 (2005)
82 Green, "Bad History," 1727.
83 Laycock. "Text, Intent, and the Religion Clauses."581.
84 Green, "Bad History," 1738.
85 Ibid. 1738.
86 Ibid. 1741.
87 Laycock. "Text, Intent, and the Religion Clauses." 589.
88 Ibid. 590.
89 Green, "Bad History," 1739.
90 Mitchell v. Helms, 530 U.S. 793 (2000)
91 Mitchell v. Helms, 530 U.S. 793 (2000)
92 Green, "Bad History," 1741.
93 Ibid. 1742.
94 Hall, "Jeffersonian Walls and Madisonian Lines," 29.
95 Van Orden v. Perry, 545 U.S. 677 (2005)
96 Green, "Bad History," 1745.
97 Ibid. 1746.
98 Ibid. 1746.
99 Van Orden v. Perry, 545 U.S. 677 (2005)
100 Green, "Bad History," 1748.
101 Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004)
102 Hall, "Jeffersonian Walls and Madisonian Lines," 32.
103 Green, "Bad History," 1751.
104 Hall, "Jeffersonian Walls and Madisonian Lines," 32.
105 Ibid. 33.
106 Ibid. 34.
107 Green, "Bad History," 1753.

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