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Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religion Clause Cases

In *Everson v. Board of Education*,¹ Justice Wiley Rutledge observed that “[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history.”² Scholars and activists argue about the relevance or irrelevance of the Supreme Court's use of history in general and the extent to which Justices are good historians.³ These debates have been particularly furi-

* Herbert Hoover Distinguished Professor of Political Science, George Fox University. He is grateful to Janna McKee for her contributions to this Article and to Daniel L. Dreisbach, Truman Stone, and Jonathan Griffin for their comments on it.

¹ 330 U.S. 1 (1947).

² *Id.* at 33 (Rutledge, J., dissenting).

³ By “history,” I mean general history that is external to the law, not legal history that concerns the particular background of a case, legal precedents, or the legislative history of a statute. Even more specifically, I am concerned with the Justices' use of history to shine light on the meaning of the Religion Clause, as opposed to the use of history to illuminate general American practices or mores. An example of the latter use of history is Justice Stewart's dissent in *Engel v. Vitale*, 370 U.S. 421, 446 (1962) (Stewart, J., dissenting), where he provided a lengthy list of examples to show that prayer has long been a part of American public life. For further elaboration on the distinction between general and legal history, see CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 20-28 (1969); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 119-32. For discussion and criticism of the Court's use of history, see MILLER, *supra*; Kelly, *supra*; William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227 (1988); and John G. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964).

Debates about the relevance of history are closely related to, and often overlap with, debates about originalism. See, for instance, the well-known exchange between Edwin Meese and William J. Brennan in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 1-25 (The Federalist Soc'y ed. 1986). DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM*

ous with respect to the Court's use of history in Religion Clause cases.⁴ Although broad claims are often made about the Court's use of history in these cases, they are either unsupported generalities or extrapolations from a careful reading of only a handful of the Court's many Free Exercise and Establishment Clause cases.⁵

In this Article, I offer a systematic analysis of every Religion Clause case decided by the Supreme Court. In Part I.A, I provide original data drawn from the Court's Religion Clause cases that clearly and succinctly address how Justices have used history in their Religion Clause opinions. I show the extent to which Justices have appealed to history and, when they do so, to whom or what they appeal. In Part I.B, I look at the distribution of Religion Clause cases over time and consider whether there are patterns with respect to the Court's use of history. In Part I.C, I consider individual Justices, particularly the extent to which they tend to write opinions in Religion Clause cases and how often they use history. In this discussion, I define what it means to be "liberal" or "conservative" in Religion Clause cases and place

(2005) discusses much of the literature published on this subject since the Meese–Brennan exchange.

⁴ The Court's use of history in Religion Clause cases has often been critiqued. See MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 1-31, 149-76 (1965); Edward S. Corwin, *The Supreme Court as National School Board*, 14 *LAW & CONTEMP. PROBS.* 3 (1949); John Phillip Reid, *Law and History*, 27 *LOY. L.A. L. REV.* 193, 220 (1993) ("There are no other decisions dealing with American constitutional law that owe more to violations of the canons of historical interpretation than those dealing with the establishment and free exercise of religion."). A good overview of this literature is provided by Daniel L. Dreisbach, *Everson and the Command of History: The Supreme Court, Lessons in History, and the Church-State Debate in America*, in *EVERSON REVISITED: RELIGION, EDUCATION, AND LAW AT THE CROSSROADS* 23-58 (Jo Renée Formicola & Hubert Morken eds., 1997).

⁵ For an example of an article that makes a number of unsubstantiated claims about the Court's use of history in Religion Clause cases, see David Reiss, *Jefferson and Madison as Icons in Judicial History: A Study of Religion Clause Jurisprudence*, 61 *MD. L. REV.* 94 (2002). For a good example of an article that provides careful consideration of the Court's use of history in a select number of Religion Clause cases, see John E. Joiner, Note, *A Page of History or a Volume of Logic?: Reassessing the Supreme Court's Establishment Clause Jurisprudence*, 73 *DENV. U. L. REV.* 507 (1996). The most thorough and broad examination of the Court's use of history in Religion Clause cases is ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982).

Martin S. Flaherty notes that "habits of poorly supported generalization—which at times fall below even the standards of undergraduate history—pervade the work of many of the most rigorous theorists when they invoke the past to talk about the Constitution." Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 *COLUM. L. REV.* 523, 526 (1995).

Justices on an ideological continuum based upon every vote cast between 1940 and 2005. I follow this with an examination of the extent to which jurisprudential liberals and conservatives differ in their use of history. In Part I.D, I offer a narrative account of the Court's use of history in Religion Clause cases with an emphasis on opinions where Justices consciously reflect on the relevance or irrelevance of history.

The primary purpose of this Article is to provide a systematic account of how Justices have used history to help them interpret the Religion Clause. I do not attempt to evaluate every aspect of the Court's use of history nor do I address the question of whether Justices should use history. In the concluding section, I do contend that if Justices are going to make historical arguments, they should make good ones. I also suggest ways in which their historical arguments in Religion Clause opinions could be significantly improved.

A Few Comments on Methodology

The United States Supreme Court has decided 115 cases in which at least four Justices considered the Free Exercise or Establishment Clause (or both) to raise substantial issues.⁶ This count does *not* include cases where religion played a significant role but that were decided upon other constitutional or statutory grounds.⁷ Nor does it include cases where a Religion Clause

⁶ Most lists of Religion Clause cases contain numerous cases that were not decided upon either Establishment or Free Exercise grounds. I combined several lists and read through each case, eliminating cases where fewer than four Justices considered one of the Religion Clauses to raise substantive issues. I adopted this "rule of four" because I wanted to include only cases where at least a substantial minority of Justices thought the case should be determined on Religion Clause grounds. This rule led me to exclude cases like *United States v. American Friends Service Committee*, 419 U.S. 7 (1974), and *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004), where only one and three Justices, respectively, believed the cases should be decided on the basis of the Free Exercise or Establishment Clause.

General lists of Supreme Court cases involving religion include CARL H. ESBECK, U.S. SUPREME COURT DECISIONS RELATING TO RELIGIOUS LIBERTY AND CHURCH-STATE RELATIONS (the January 2006 version was generously provided to me by the author) and JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 272-303 (2d ed. 2005). Esbeck's list contains 290 cases and Witte's contains 190. My list of 115 cases is in the Appendix.

⁷ For instance, it does not include cases involving church property that are decided upon non-Religion Clause grounds, *e.g.*, *Watson v. Jones*, 80 U.S. 679 (1871); significant religious claims that are decided upon statutory grounds, *e.g.*, *United States v. Seeger*, 380 U.S. 163 (1965); and cases involving religious speech if the decision is

claim is dismissed without serious consideration.⁸ Of these 115 cases, 60 primarily involve the Establishment Clause, 44 primarily involve the Free Exercise Clause, and 11 concern both clauses (and, of course, some of these cases contain other constitutional or statutory issues).⁹ Altogether, these cases generated 365 separate opinions.¹⁰

Having determined the relevant pool of cases, I carefully read each opinion and quantified distinct appeals to different Founders, documents, and events. In most instances the number of appeals was clear, but in cases rich with historical discussions the number can be difficult to determine. For instance, Justice Black, in his opinion in *Everson*, wrote:

The movement toward this end reached its dramatic climax in Virginia in 1785-86 when the Virginia legislative body was about to renew Virginia's tax levy for the support of the established church. Thomas Jefferson and James Madison led the fight against this tax. Madison wrote his great Memorial and Remonstrance against the law. In it, he eloquently argued that a true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions. Madison's Remonstrance received strong support throughout Virginia¹¹

based on freedom of speech or press, *e.g.*, *Lee v. Int'l Soc'y for Krishna Consciousness, Inc.*, 505 U.S. 830 (1992).

⁸ For example, in the Selective Draft Law Cases Chief Justice Edward White wrote in his majority opinion that "we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more." *Arver v. United States*, 245 U.S. 366, 389-90 (1918). Nor do I include cases in which petitions for certiorari are denied or that are summarily affirmed, even if the cases involve Religion Clause issues. *E.g.*, *Heisey v. County of Alameda*, 352 U.S. 921 (1956) (mem.), *denying cert. to Lundberg v. County of Alameda*, 298 P.2d 1 (Cal. 1956); *Luetkemeyer v. Kaufmann*, 419 U.S. 888 (1974) (mem.), *aff'g* 364 F. Supp. 376 (W.D. Mo. 1973).

⁹ Only cases where at least four members of the Court believed the case involves significant Establishment and Free Exercise issues are classified as "both." As suggested in note 4, *supra*, if Justices mention but do not treat seriously issues raised by one of the Clauses, the case is not counted as involving that Clause. See, for example, Chief Justice Rehnquist's treatment of the Establishment Clause claim in *Locke v. Davey*, 540 U.S. 712, 719 (2004).

¹⁰ I include in this number opinions of Justices who simply concur or dissent without opinion or who explicitly deny that the case should be decided upon Religion Clause grounds.

¹¹ *Everson v. Bd. of Educ.*, 330 U.S. 1, 11-12 (1947) (footnotes omitted).

Although Madison's name is mentioned three times in this passage, two pronouns refer to him, and *The Writings of James Madison* is referenced in a footnote, I consider Black to have appealed to Madison only one time in the passage. However, when Black proceeds on the next page of his opinion to refer to Madison's role in drafting and authoring the First Amendment, I count this as an additional appeal to Madison.¹² Altogether I conclude that Black made five separate appeals to Madison in *Everson*, even though Madison's name appears twelve times in his opinion.

My decision to separate distinct appeals to particular Founders and events introduces more ambiguity into this study than if I had simply counted references to them, but I believe it more accurately reflects the extent of these appeals. As well, it avoids counting references in which something or someone is criticized or that have nothing to do with the Religion Clause. As a point of comparison, a simple LexisNexis search of Religion Clause opinions reveals 419 references to Madison, 303 to Jefferson, 63 to George Washington, and 17 to George Mason. In contrast, by my count, Justices appealed to Madison 189 times, Jefferson 112 times, Washington 21 times, and Mason 6 times.

I

OVERVIEW OF APPEALS TO HISTORY

From the Supreme Court's first Religion Clause case, *Reynolds v. United States*,¹³ to the most recent one considered in this study, *Cutter v. Wilkinson*,¹⁴ Justices have appealed to the history surrounding the writing of the First Amendment, the Founders generally, and specific Founders to shine light upon the meaning of the Establishment and Free Exercise Clauses. An appeal to the "Founders" includes any general reference to "the Founders," "the Framers," or "the First Congress." An appeal to "context" includes references to the "Founding era," the political culture of the time, or laws, constitutions, and similar documents from the era that purport to illustrate general concerns of the time.¹⁵ Fi-

¹² *Id.* at 13.

¹³ 98 U.S. 145 (1878).

¹⁴ 544 U.S. 709 (2005).

¹⁵ If the author of an opinion clearly associates a statute with someone's name (e.g., "Thomas Jefferson's Virginia Statute for Religious Liberty"), I consider the phrase to be an appeal to the person. However, if the bill is referred to without a name (e.g., "Virginia Statute for Religious Liberty"), I count it as an appeal to "con-

nally, appeals to specific Founders include combined references to Founders and documents that they authored (e.g., “Jefferson’s Letter to the Danbury Baptists” or “Letter from George Washington to the Religious Society Called Quakers”).¹⁶ The following table provides a broad overview of the basic trends:

TABLE 1
OVERVIEW OF APPEALS TO HISTORY IN RELIGION
CLAUSE CASES

Reference	Establishment Cases	Free Exercise Cases	Combined Establishment and Free Exercise Cases	Total
Founders	177	35	3	215
Context	120	68	2	190
Madison	173	16	0	189
Jefferson	94	18	0	112
Washington	19	2	0	21
J. Adams	6	1	0	7
G. Mason	4	2	0	6
R. Williams ^a	5	1	0	6
Sherman	3	0	0	3
Ellsworth	1	2	0	3
Gerry	3	0	0	3
D. Carroll	3	0	0	3
Franklin	1	1	0	2
Iredell	2	0	0	2
Huntington	2	0	0	2

text.” I have not categorized appeals to specific laws, constitutional provisions, and documents. Books and essays that trace the influence of individual texts include DANIEL L. DREISBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* 97-106 (2002) and Cushing Strout, *Jeffersonian Religious Liberty and American Pluralism*, in *THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM: ITS EVOLUTION AND CONSEQUENCES IN AMERICAN HISTORY* 201-35 (Merrill D. Peterson & Robert C. Vaughan eds., 1988).

¹⁶ Because the phrase “a wall of separation between church and state” is so identified with Jefferson in the context of Religion Clause cases, I consider its use without Jefferson’s name to still be an appeal to him. On the other hand, I do not count the broader phrase, “separation of church and state,” as an appeal to Jefferson, specifically, or history, more generally.

If the author of an opinion mentions someone negatively, or cites evidence that goes against his or her historical argument, I do not count these as appeals to history. For instance, when Justice Rutledge wrote about Patrick Henry’s general assessment bill in *Everson*, he did so not to shine light on the meaning of the First Amendment but to set the stage for a discussion of Madison’s *Memorial and Remonstrance*, which he believed was “the most concise and the most accurate statement of the views of the First Amendment’s author concerning what is ‘an establishment of religion.’” *Everson*, 330 U.S. at 37 (Rutledge, J., dissenting).

TABLE 1 (CONTINUED)

Reference	Establishment Cases	Free Exercise Cases	Combined Establishment and Free Exercise Cases	Total
Livermore	2	0	0	2
J. Allen	1	0	0	1
S. Adams	1	0	0	1
F. Ames	1	0	0	1
I. Backus	0	1	0	1
Benson	0	1	0	1
Boudinot	1	0	0	1
Hamilton	1	0	0	1
P. Henry	1	0	0	1
R.H. Lee	1	0	0	1
J. Jay	1	0	0	1
Pendleton	1	0	0	1
Spence	1	0	0	1
Wythe	1	0	0	1
Witherspoon	0	1	0	1
Sylvester	1	0	0	1
J. Marshall	1	0	0	1
Rutledge	1	0	0	1
Sullivan	1	0	0	1
Vining	1	0	0	1
Total	631	149	5	785

^aIt is a stretch to count Roger Williams as a Founder, and I otherwise avoid including individuals who fall outside the Founding era—even figures far closer to it such as Joseph Story. However, I include Williams because of the significant role some Justices believed he played in forming the American conception of religious liberty and church–state relations. See, for example, Justice Clark’s opinion in *Abington School District v. Schempp*, 374 U.S. 203, 214 (1963), in which he noted the incorporation of “the views of Madison and Jefferson, preceded by Roger Williams” in the Federal Constitution and most state constitutions.

Table 1 shows that Justices have been far more likely to appeal to history to inform their interpretation of the Establishment Clause than the Free Exercise Clause (although, intriguingly, not when both clauses are at issue). They clearly prefer general appeals to the Founders or the general historical context, although, as we shall see, they often flesh out these general appeals with quotations from or references to documents by specific Founders. When doing so, in the aggregate they favor appeals to Jefferson and Madison over the other thirty-one Founders who appear in Religion Clause opinions by a ratio of almost four-to-one. As discussed below, appeals to history are not evenly distributed among Justices, but it is worth noting that in Religion Clause

cases there are an average of 6.8 appeals to history per case and more than 2.2 per opinion.

B. Historical Trends

The Supreme Court heard few Religion Clause cases until the Free Exercise and Establishment Clauses were applied to the states in 1940 and 1947, respectively.¹⁷ As indicated by the following tables, the Court decided only five Establishment Clause cases prior to 1961, and virtually all references to history from these cases are contained in one opinion, *Everson*.¹⁸ Since 1961, however, the Court has faced a constant stream of Establishment Clause cases and has been fairly consistent in its appeals to history.

By contrast, the Court resolved sixteen cases involving the Free Exercise Clause in the 1940s, but since then the Court has addressed an average of five cases per decade. As noted above, Justices seldom appeal to history to shine light on this clause. This fact was noted by Justice Souter in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,¹⁹ and led to historically rich responses by Justices O'Connor and Scalia in *City of Boerne v. Flores*.²⁰ These two opinions account for fifty-nine of the seventy historical references in Free Exercise Clause cases from the 1990s—and more than forty percent of the historical references made in all Free Exercise cases combined. The following tables illustrate historical references by decade.

C. Individual Justices

Tables 1 through 4 show Court trends with respect to Religion Clause cases in general, but it could merely reflect the proclivity of a few Justices to write Religion Clause cases and appeal to history. Table 5 lists Justices in order of the number of opinions they have written in Religion Clause cases. Because some Justices serve longer than others or in eras when more Religion Clause cases came before the Court, the third column lists the

¹⁷ *Id.* at 15 (majority opinion) (applying Establishment Clause to states under Fourteenth Amendment); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940) (applying Free Exercise Clause to states under Fourteenth Amendment).

¹⁸ I discuss *Everson* in detail in Part I.D.1.

¹⁹ 508 U.S. 520, 575 (1993) (Souter, J., concurring in part and concurring in the judgment).

²⁰ 521 U.S. 507, 537-44 (1997) (Scalia, J., concurring in part); *id.* at 544-65 (O'Connor, J., dissenting).

TABLE 2
ESTABLISHMENT CLAUSE CASES

Decade	No. of Cases	Context	Founders	Jefferson	Madison	Other Founders
Pre-1940	2	0	0	0	0	0
1940s	2	20	8	24	37	7
1950s	1	1	0	1	0	0
1960s	8	18	27	21	25	11
1970s	12	15	16	9	28	1
1980s	20	23	56	9	25	26
1990s	8	29	37	16	36	8
2000-2005	7	14	33	14	22	14
Total	60	120	177	94	173	67

number of Religion Clause cases in which written opinions were issued during each Justice's tenure. I also delineate exactly to what or whom these Justices appeal. The final column lists the

TABLE 3
FREE EXERCISE CLAUSE CASES

Decade	No. of Cases	Context	Founders	Jefferson	Madison	Other Founders
Pre-1940	2	2	0	2	2	0
1940s	16	16	12	9	4	4
1950s	4	0	0	0	0	0
1960s	3	2	0	1	0	1
1970s	6	7	2	3	4	2
1980s	8	1	4	0	1	0
1990s	3	40	17	3	5	5
2000-2005	2	0	0	0	0	0
Total	44	68	35	18	16	12

average number of historical references per opinion for each Justice.

Data in column two of Table 5 suggests that Justices are drawn to write opinions in Religion Clause cases. Overall, since 1946 Justices have penned opinions in 25% of the cases in which written opinions were issued.²¹ In roughly the same period, Justices wrote opinions for 38% of the Religion Clause cases that came

²¹ LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 597-99* tbl.6-11 (3d ed. 2003). This figure covers 1946 to 2001.

TABLE 4
ESTABLISHMENT AND FREE EXERCISE CLAUSE CASES

Decade	No. of Cases	Context	Founders	Jefferson	Madison	Other Founders
Pre-1940	1	1	1	0	0	0
1960s	1	0	0	0	0	0
1970s	2	1	0	0	0	0
1980s	6	0	2	0	0	0
1990s	1	0	0	0	0	0
Total	11	2	3	0	0	0

before them.²² With some Justices this may simply reflect judicial productivity.²³ With others it seems to be a result of a Justice's innovative or unique approach to the Free Exercise or Establishment Clause cases, which may lead the Justice to write a greater percentage of concurring or dissenting opinions advocating his or her position.²⁴

Most Justices who write Religion Clause opinions have appealed to history to shine light on the meaning of the Clause. Specifically, 76% of the Justices who have written at least one Religion Clause opinion have appealed to history, and every one of the twenty-three Justices who authored more than four Religion Clause opinions have done so. Of course even among these Justices, some have utilized history significantly more often than others. Of the twenty-three Justices who authored more than four Religion Clause opinions, six made an average of less than

²² This figure, derived from my calculations, includes cases decided in and after 1940 (thus excluding five earlier cases). I limit my discussion to these cases because the earlier cases were so spread out that most Justices only had one or two cases come before them. As such, the percentage of cases in which they did or did not write opinions is artificially high or low. As well, the earlier jurists served in an era where concurring and dissenting opinions were less common.

²³ For instance, Justice William O. Douglas issued almost thirty-six opinions a year as contrasted with Justice Charles E. Whittaker, who wrote slightly more than four opinions per year during his five years on the Court and issued no opinion in the five Religion Clause cases that came before him as a Justice. Of course these are extreme cases. Indeed, Henry J. Abraham reports that Douglas drafted a majority opinion for Whittaker in a case in which Douglas was dissenting. HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON* 204 (rev. ed. 1999).

²⁴ For example, Justice O'Connor repeatedly concurred or dissented to promote her endorsement test, and in the late 1970s and mid-1980s Justice Rehnquist's originalist approach to the Establishment Clause often left him at odds with his colleagues.

TABLE 5
USE OF HISTORY BY INDIVIDUAL JUSTICES

Justice	No. of Religion Opinions ^a	No. of Religion Cases During Tenure ^b	Context	Reference			Total	Average No. of References Per Opinion
				Founding Fathers	Thomas Jefferson	James Madison			Other Founders
Brennan	30 (44)	68	13	36	10	14	80	2.7
Burger	27 (61)	44	18	29	3	6	64	2.4
O'Connor	26 (52)	50	24	13	2	5	47	1.8
Rehnquist	26 (39)	67	4	16	1	10	47	1.8
Stevens	25 (42)	60	5	5	10	5	27	1.1
White	23 (34)	67	1	1	0	0	2	0.1
Douglas	22 (44)	50	2	3	1	23	29	1.3
Blackmun	19 (32)	60	2	5	3	3	15	0.7
Scalia	14 (45)	31	23	23	5	5	71	5.1
Black	13 (34)	38	13	6	13	11	48	3.7

TABLE 5 (CONTINUED)

Justice	No. of Religion Opinions ^a	No. of Religion Cases During Tenure ^b	Reference				Total	Average No. of References Per Opinion
			Context	Founding Fathers	Thomas Jefferson	James Madison			Other Founders
Stewart	13 (35)	37	1	1	0	0	2	0.2
Powell	13 (31)	42	7	3	5	8	26	2
Souter	12 (67)	18	11	33	15	41	104	8.7
Frankfurter	12 (43)	28	9	3	10	8	33	2.8
Jackson	9 (53)	17	1	2	0	0	3	0.3
Kennedy	9 (43)	21	8	5	0	2	16	1.8
Reed	8 (36)	22	10	8	4	3	26	3.3
Marshall	8 (12)	65	0	0	1	0	1	0.1
Thomas	8 (53)	15	8	10	1	4	23	2.9
Murphy	6 (30)	20	1	0	5	1	7	1.2

TABLE 5 (CONTINUED)

Justice	No. of Religion Opinions ^a	No. of Religion Cases During Tenure ^b	Reference				Total	Average No. of References Per Opinion
			Context	Founding Fathers	Thomas Jefferson	James Madison			Other Founders
Harlan II	6 (38)	16	1	0	0	0	0	0.2
Warren	5 (42)	12	6	1	5	7	2	4.2
Breyer	5 (38)	13	4	3	0	0	0	1.4
Stone	4 (27)	15	1	1	0	0	0	0.5
Rutledge	3 (25)	12	13	4	11	28	6	20.7
Fortas	3 (75)	4	1	1	1	0	0	1
Ginsburg	3 (21)	14	0	0	0	0	0	0
Roberts	2 (18)	11	0	0	0	0	0	0
Per Curiam	2 (...)	NA	0	0	0	0	0	0
Goldberg	1 (50)	2	0	0	0	0	0	0

TABLE 5 (CONTINUED)

Justice	No. of Religion Opinions ^a	No. of Religion Cases During Tenure ^b	Reference					Total	Average No. of References Per Opinion
			Context	Founding Fathers	Thomas Jefferson	James Madison	Other Founders		
Vinson	1 (13)	8	0	0	0	0	0	0	0
Clark	1 (8)	12	0	2	4	3	1	10	10
Hughes	1 (33)	3	0	0	0	0	0	0	0
Bradley	1 (25)	4	0	0	0	0	0	0	0
Field	1 (33)	3	1	1	0	0	0	2	2
Fuller	1 (33)	3	0	0	0	0	0	0	0
Peckham	1 (50)	2	0	0	0	0	0	0	0
Waite	1 (50)	2	2	0	2	2	0	6	6
Total	365	956	190	215	112	189	79	785	...

^a The percentage of Religious Clause cases in which each Justice wrote an opinion is included in parentheses.

^b This figure includes all cases in which a Justice cast a vote. If a Justice missed a case or recused himself or herself from it, the case is not counted.

one historical reference per opinion as opposed to nine who average more than two historical references per opinion.

Why are some Justices more likely to appeal to history than others? One possibility is that conservative Justices (who are presumably concerned with original intent) are more likely to appeal to history than are liberals. To test this hypothesis, however, it is necessary to define what it means to be a judicial “conservative” and a judicial “liberal.”

For the purposes of this Article, I consider a liberal vote in a Free Exercise Clause case to be one that favors an individual or group over the state. In Establishment Clause cases, a liberal vote is one that prohibits the government from supporting religious activities or groups. When both clauses are at issue, a liberal vote is one that favors the individual or group against the state *unless* the question involves government support of a religious individual or organization. In that case, a liberal vote is one that favors separation.²⁵ Table 6 considers all votes on Religion Clause cases cast in and after *Cantwell v. Connecticut*.²⁶ Labeling votes in complicated cases over a span of decades as liberal or conservative obviously does not reflect the nuanced opinions of many Justices, but it has the virtue of providing a clear and objective measure for liberalness or conservativeness with respect to the Religion Clause.²⁷

²⁵ This definition is compatible with that used in the United States Supreme Court database. See EPSTEIN ET AL., *supra* note 21, at 489. Table 6-2 of this volume provides a breakdown of votes cast by Justices between 1946 and 2001 on First Amendment issues generally, but not specifically on Religion Clause cases. *Id.* at 486-89 tbl.6-2.

²⁶ 310 U.S. 296 (1940). I begin in 1940 rather than with the five preceding Religion Clause cases for reasons mentioned in note 22 and, in this case, because the votes in these cases were unanimously conservative with the exception of three dissenting votes in *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890). As well, adding so many individuals to the table makes it unwieldy. The twenty-two Justices who voted on Religion Clause cases who are not included in the table as well as the number of votes they cast and the percentage of liberal votes are as follows: Bradley (3, 0%), Peckham (2, 0%), Waite (1, 0%), Brown (1, 0%), Shiras (1, 0%), E. White (2, 0%), McKenna (2, 0%), Holmes (1, 0%), Day (1, 0%), Moody (1, 0%), Brewer (4, 0%), Blatchford (2, 0%), Gray (3, 0%), Harlan I (4, 0%), Hunt (1, 0%), Strong (1, 0%), Miller (2, 0%), Swayne (1, 0%), Clifford (1, 0%), Field (3, 33%), Fuller (4, 25%), and Lamar (2, 50%).

²⁷ Of course just because a Justice is liberal or conservative in one area of jurisprudence does not mean he or she is liberal or conservative in other areas. As well, combining all Religion Clause votes may obscure the extent to which jurists shift their approach to these clauses over their careers.

TABLE 6
 USE OF HISTORY BY JUDICIAL LIBERALS AND CONSERVATIVES

Justice	Party of Nominating President	Total No. of Religion Clause Votes		Combined Free Exercise and Establishment	% of Liberal Votes in Free Exercise Cases	% of Liberal Votes in Establishment Cases	% of Liberal Votes in Combined Free Exercise and Establishment Cases	% of Liberal Votes in All Religion Clause Cases
		Free Exercise	Establishment					
Fortas	D	1	3	...	100	100	...	100
Goldberg	D	1	1	...	100	100	...	100
Douglas	D	26	21	3	81	86	100	84
Brennan	R	18	41	9	78	83	56	78
Ginsburg	D	3	11	...	33	91	...	79
Stevens	R	16	38	6	44	92	67	77
Rutledge	D	9	3	...	78	67	...	75
Minton	D	4	...	...	75	...	...	75
Black	D	23	14	1	74	71	0	74
Marshall	D	21	35	9	57	86	56	72
Souter	R	4	14	...	75	71	...	72
Murphy	D	17	3	...	76	33	...	70
Clark	D	6	5	1	67	60	0	67
Blackmun	R	15	36	9	73	64	56	65
Breyer	D	3	10	...	67	50	...	61
Stewart	R	10	23	4	80	43	75	57
Stone	R	15	...	...	53	...	...	53
Harlan II	R	4	11	1	50	45	0	53
Warren	R	3	8	1	67	50	0	50

TABLE 6 (CONTINUED)

Justice	Party of Nominating President	Total No. of Religion Clause Votes				% of Liberal Votes in Free Exercise Cases	% of Liberal Votes in Combined Free Exercise and Establishment Cases	% of Liberal Votes in Establishment Cases	% of Liberal Votes in Combined Free Exercise and Establishment Cases	% of Liberal Votes in All Religion Clause Cases
		Free Exercise	Establishment	Free Exercise and Establishment	Establishment					
Hughes	R	2	...	...	50	...	...	...	50
Vinson	D	5	3	...	60	...	...	...	50
Burton	D	7	3	...	43	...	...	...	50
Frankfurter	D	21	6	1	38	1	67	0	46	
Powell	R	10	26	6	40	6	46	50	45	
Reed	D	20	2	...	40	...	0	...	45	
White	D	18	40	9	67	...	23	78	42	
Jackson	D	14	3	...	29	...	100	...	41	
Whittaker	R	1	3	1	100	6	33	0	40	
O'Connor	R	12	32	6	50	...	38	17	38	
McReynolds	D	3	...	...	33	...	...	...	33
Burger	R	10	27	7	50	7	15	43	27	
Thomas	R	3	12	...	67	...	17	...	27	
O. Roberts	R	11	...	...	27	...	...	...	27
Kennedy	R	6	14	1	50	...	21	100	24	
Scalia	R	9	20	2	56	2	5	50	23	
Rehnquist	R	18	41	8	17	8	2	38	10	
Byrnes	D	2	...	...	0	...	...	...	0

Having ranked Justices on a spectrum of liberal to conservative, it remains to be seen to what extent their votes correlate with their use or neglect of history. Justices who wrote opinions in Religion Clause cases in or after *Cantwell* (i.e., all of the Justices in Table 6 except Minton, Burton, Whittaker, McReynolds, and Byrnes) appealed to history to shine light on the meaning of the Free Exercise or Establishment Clause an average of 2.2 times per opinion. Among these Justices, those with a liberal voting record of 66.6% or higher made an average of 2.9 historical references per opinion. By contrast, the six Justices with a conservative voting record of 66.6% or higher made 2.6 historical references per opinion. The fourteen Justices who fell in the middle made significantly fewer appeals to history—just 1.3 per opinion. Somewhat counterintuitively, jurisprudential conservatives are actually slightly less likely to appeal to history than liberals, although both conservatives and liberals do so more than moderates.

Although Justices on both the right and the left routinely appeal to history to support their opinions, they do not necessarily appeal to the *same* history. As shown by Tables 7 and 8, when comparing Justices listed as jurisprudential liberals or conservatives as defined in the previous paragraph to the types of references these Justices make, the most striking element is the liberal block's overwhelming number of appeals to Thomas Jefferson and James Madison. Indeed, Table 7 shows that 54% of all of their appeals are to these two men—more than their appeals to the historical context, the Founders in general, and all other Founders *combined*.

By contrast, Table 8 shows that conservative Justices are significantly more likely to appeal to a wide range of historical sources. Only 17% of these Justices' historical references are to Thomas Jefferson and James Madison—a full 37% fewer references than those made by the liberal block. As well, conservative Justices are more than twice as likely as liberals to refer to other Founding Fathers.

Also problematic is deciding how to count votes where a Justice votes to uphold some programs and strike down others in the same case (e.g., Justice Stewart's vote in *Meek v. Pittenger*, 421 U.S. 349 (1975)) or where cases are combined and Justices vote in a seemingly contradictory manner (e.g., Justice O'Connor's votes in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989)). In these relatively rare instances, I characterized the votes as liberal or conservative based on the overall context.

TABLE 7
LIBERAL JUSTICES AND APPEALS TO HISTORY

	Context	Founding Fathers	Thomas Jefferson	James Madison	Other Founding Fathers	Total
Fortas	1	1	1	0	0	3
Goldberg	0	0	0	0	0	0
Douglas	2	3	1	23	0	29
Brennan	13	36	10	14	7	80
Ginsburg	0	0	0	0	0	0
Stevens	5	5	10	5	2	27
Rutledge	13	4	11	28	6	62
Black	13	6	13	11	5	48
Marshall	0	0	1	0	0	1
Souter	11	33	15	41	4	104
Murphy	1	0	5	1	0	7
Clark	0	2	4	3	1	10
Total	59	90	71	126	25	371
% of Appeals Made to Each Reference ^a	16%	24%	19%	35%	7%	...

^a Percentages do not add up to 100% due to rounding.

D. Religion Clause Cases and the Use of History

The above data show that the vast majority of Justices who have written Religion Clause opinions have used history to shine light upon the Clause's meaning. This has been particularly true with respect to the Establishment Clause, in which appeals to history have been steady throughout the Court's cases. Justices have been far less likely to appeal to history to illuminate the Free Exercise Clause, but recent opinions suggest that history may become increasingly important for understanding this clause as well. Moreover, the data show that liberal Justices are slightly more likely to appeal to history than conservatives, although they do not necessarily appeal to the same history.

Quantitative data are useful for supporting generalizations about the Court's use of history, but qualitative analysis helps answer questions such as how, why, and when Justices appeal to history. The following discussion provides a narrative overview of the Court's use of history in Religion Clause cases with a particular focus on cases where Justices consciously reflect upon their use of history. I assume a general familiarity with these

TABLE 8
CONSERVATIVE JUSTICES AND APPEALS TO HISTORY

	Context	Founding Fathers	Thomas Jefferson	James Madison	Other Founding Fathers	Total
Rehnquist	4	16	1	10	16	47
Scalia	23	23	5	5	15	71
Kennedy	8	5	0	2	1	16
O. Roberts	0	0	0	0	0	0
Thomas	8	10	1	4	0	23
Burger	18	29	3	6	8	64
Total	61	83	10	27	40	221
% of Appeals Made to Each Reference ^a	28%	38%	5%	12%	18%	...

^a Percentages do not add up to 100% due to rounding.

cases and make no effort to summarize every important Religion Clause case or even to describe the development of Free Exercise or Establishment Clause jurisprudence.

1. Reynolds to Everson

The Court inaugurated its use of history in its first Religion Clause case, *Reynolds v. United States*.²⁸ Asked to decide whether the First Amendment protects the right of a member of the Church of Jesus Christ of Latter-day Saints to commit polygamy, the Court responded with a resounding no. In his opinion, Justice Waite noted that

“religion” is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guaranteed.²⁹

Waite began his discussion of history by exploring early colonial attempts to regulate religious practice and belief.³⁰ He then considered reactions against these regulations, particularly those in Virginia.³¹ Specifically, he reasoned that the First Amendment

²⁸ 98 U.S. 145 (1878).

²⁹ *Id.* at 162.

³⁰ *Id.* at 162-63.

³¹ *Id.* at 163-64.

must be understood in light of James Madison's and Thomas Jefferson's opposition to Patrick Henry's general assessment bill.³² To explain these Founders' views on church-state relations, he relied heavily on Madison's *Memorial and Remonstrance*, Jefferson's *Bill for Establishing Religious Freedom*, and Jefferson's 1802 letter to the Danbury Baptists.³³ Waite concluded that the Founders intended the Free Exercise Clause to deprive Congress "of all legislative power over mere opinion" but left Congress free "to reach actions which were in violation of social duties or subversive of good order."³⁴

The four church-state cases decided between *Reynolds* and *Cantwell v. Connecticut*³⁵ contain no judicial innovations and virtually no discussion of history. This changed rapidly after the Supreme Court applied the Free Exercise Clause to the states in 1940.³⁶ Between 1940 and 1946, the Court decided sixteen cases involving the free exercise of religion (usually in cases involving freedom of speech as well), often overturning local ordinances. This aggressive expansion of the Court's power to promote liberty was seldom defended by appeals to the Founders' intent. In fact, the opposite was true. Of the forty-five historical references in these cases, thirty-one of them are from three opinions favoring restrictions on religious speech or action (or inaction, in the case of *West Virginia State Board of Education v. Barnette*³⁷).³⁸ Thus, with respect to the Free Exercise Clause, most Justices were not particularly interested in the Founders' views, and the few who cited them did so to support a restrictive conception of religious liberty.

Everson v. Board of Education marks a critical turning point in the Court's Religion Clause jurisprudence. The case applied the Establishment Clause to the states and offered an interpretive approach to the First Amendment that has exercised enormous influence. Justice Black, in his majority opinion, accepted Justice Waite's claim that the Religion Clause must be understood in

³² See *id.* at 163.

³³ *Id.* at 162-64.

³⁴ *Id.* at 164.

³⁵ 310 U.S. 296 (1940).

³⁶ See *id.*

³⁷ 319 U.S. 624 (1943).

³⁸ These opinions include Justice Frankfurter's opinions in *Minersville School District v. Gobitis*, 310 U.S. 586, 591 (1940), *overruled by Barnette*, 319 U.S. 624, and *Barnette*, 319 U.S. at 646 (Frankfurter, J., dissenting), and Justice Reed's dissent in *Murdock v. Pennsylvania*, 319 U.S. 105, 117 (1943) (Reed, J., dissenting).

light of “the background and environment of the period in which that constitutional language was fashioned and adopted.”³⁹ Like Waite, Black argued that the Founders’ views are summarized well in Madison’s *Memorial and Remonstrance*, the then-recently discovered *Detached Memoranda*, Thomas Jefferson’s *Virginia Bill for Religious Liberty*, and his 1802 letter to the Danbury Baptist Association.⁴⁰ In his opinion, Black made several general historical claims, but he fleshed them out with specific examples involving Jefferson and Madison. Indeed, he made five distinct references each to Jefferson and Madison but appealed to only one other founder, Patrick Henry, in his capacity as an attorney in the famous “Parson’s Case.”⁴¹

Despite Black’s strong separationist language, the majority affirmed the constitutionality of a New Jersey program that reimbursed parents for the cost of transporting their children to private religious schools.⁴² In his dissenting opinion, Justice Jackson famously quipped that Black reminded him of “Julia who, according to Byron’s reports, ‘whispering “I will ne’er consent,”—consented.”⁴³ More significant for our purposes, however, is Justice Rutledge’s dissenting opinion, which was joined by Justices Frankfurter, Jackson, and Burton. In a record unbeaten to this day, Rutledge made sixty-two distinct historical appeals to support his conclusion that the Founders intended to erect a high wall of separation between church and state.

Rutledge began his opinion by quoting the Religion Clause and several sentences from Jefferson’s *A Bill for Establishing Religious Freedom*.⁴⁴ The bulk of his opinion rests on the proposition that

[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history. This history includes not only Madison’s authorship and the proceedings before the First Congress, but also the long and intensive struggle for religious freedom in America, more especially in Virginia, of which the Amendment was the direct culmination. In the documents of the times, particularly of Madison, who

³⁹ *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947).

⁴⁰ *Id.* at 12 & nn.12-13, 16.

⁴¹ *Id.* at 11 n.10.

⁴² *Id.* at 18.

⁴³ *Id.* at 19 (Jackson, J., dissenting).

⁴⁴ *Id.* at 28-29 (Rutledge, J., dissenting).

was [the] leader in the Virginia struggle before he became the Amendment's sponsor, but also in the writings of Jefferson and others and in the issues which engendered them is to be found irrefutable confirmation of the Amendment's sweeping content.⁴⁵

Rutledge followed this passage with an extensive discussion of church-state struggles in Virginia and a short examination of the framing of the First Amendment.⁴⁶ Altogether he made sixty-two distinct historical references—including eleven to Thomas Jefferson and twenty-eight to James Madison. Lest anyone miss Madison's significance, Rutledge attached a copy of his *Memorial and Remonstrance* as an appendix to his opinion.⁴⁷

In *Everson*, Black and Rutledge presented an argument that has had a tremendous influence on the Court's Religion Clause jurisprudence. Although not formally a syllogism, it has the appearance of one, and I will refer to it throughout this Article as "*Everson's* syllogism." It goes as follows:

The Establishment Clause must be interpreted in light of the Founders' intent.

Thomas Jefferson and James Madison represent the Founders.

Jefferson and Madison favored the strict separation of church and state.

Therefore, the Establishment Clause requires the strict separation of church and state.⁴⁸

Of course Justices do not always agree on what the strict separation of church and state requires, and occasionally a Justice would challenge or attempt to qualify a premise or the conclusion of this syllogism. But for forty years this syllogism reigned supreme in Establishment Clause cases, and it often impacted Free Exercise Clause cases as well. As noted above, numerous scholars have criticized the accuracy of *Everson's* history,⁴⁹ but for many Justices and students of church-state relations it remains the definitive account of the origins of the Religion Clause.

⁴⁵ *Id.* at 33-34 (footnotes omitted).

⁴⁶ *Id.* at 34-44.

⁴⁷ *Id.* at 63-72 app.

⁴⁸ Daniel L. Dreisbach offers a different syllogism explaining *Everson's* historical argument in his essay, *A Lively and Fair Experiment: Religion and the American Constitutional Tradition*, 49 EMORY L.J. 223, 230 (2000).

⁴⁹ See *supra* note 3.

2. *McCollum to McGowan*

Illinois ex rel. McCollum v. Board of Education,⁵⁰ the next Religion Clause case decided by the Court, illustrates well the impact of *Everson* on future church–state cases. Although in *McCollum* Black and Frankfurter made four and five historical references respectively, their arguments primarily rely upon the historical account of the origins of the First Amendment offered by Black and Rutledge in *Everson*. These two opinions cite *Everson* eleven times, and *Everson* is cited as the source for many of the historical quotations in *McCollum*.⁵¹ It is, of course, not surprising that the Court would rely on an earlier account of history as Justices can hardly make extensive historical arguments in every Religion Clause opinion. Yet it is important to recognize the proclivity of Justices to rely upon *Everson*'s history if one is to grasp its full impact on the Court's Religion Clause jurisprudence.

Justice Reed, dissenting by himself in *McCollum*, offered the first response by a Supreme Court Justice to *Everson*'s history. Reed began his historical discussion with the suggestion that “[t]he phrase ‘an establishment of religion’ may have been intended by Congress to be aimed only at a state church.”⁵² He conceded that the Clause's meaning may have expanded over time; however, he contended that nothing in the Founding era suggests that it should be interpreted so broadly as to prevent Illinois from allowing school children to receive voluntary religious training from ministers in public schools during school hours.⁵³ Indeed, he attempted to turn the tables on Black and Rutledge by showing that Jefferson and Madison supported religious education at the University of Virginia.⁵⁴ As well, he argued that texts such as Madison's *Memorial and Remonstrance* do not require *McCollum*'s outcome.⁵⁵

Reed's dissent is notable for offering the first sustained effort by a Justice to make a historical argument to support what later became known as the accommodationist or nonpreferentialist interpretation of the Establishment Clause. It is significant as well

⁵⁰ 333 U.S. 203 (1948).

⁵¹ *See id.* at 205-33.

⁵² *Id.* at 244 (Reed, J., dissenting).

⁵³ *Id.*

⁵⁴ *Id.* at 244-47.

⁵⁵ *Id.* at 246-48.

insofar as he did not challenge the Court's reliance on history but only its interpretation thereof.

Of the ten church–state cases decided between *McCullum* and *Engel v. Vitale*,⁵⁶ only *McGowan v. Maryland*⁵⁷ contains an extensive discussion of history. Chief Justice Warren, in his majority opinion, and Justice Frankfurter, in his concurring opinion, apparently felt compelled to explain how state recognition and protection of the Christian Sabbath (and discrimination against those who worship on other days) could be squared with the high wall of separation between church and state described in *Everson*.⁵⁸ Each Justice showed that states had historically banned unnecessary labor on Sunday, but a critical part of their historical argument is that these laws are constitutional because Jefferson and Madison did not oppose similar legislation.⁵⁹ Specifically, both Warren and Frankfurter emphasized that Jefferson authored and Madison supported in the Virginia General Assembly “A Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers,” which, among other things, fined individuals who worked on Sunday.⁶⁰

3. *Engel to Marsh*

Engel remains one of the most controversial church–state cases ever decided. Justice Black, in his majority opinion declaring teacher-led devotional exercises in public schools to be unconstitutional, deviated little from *Everson*'s syllogism. As in *Everson*, he argued that Virginia's experience is particularly relevant:

In 1785-1786, those opposed to the established Church, led by James Madison and Thomas Jefferson, who, though themselves not members of any of these dissenting religious groups, opposed all religious establishments by law on grounds of principle, obtained the enactment of the famous “Virginia Bill for Religious Liberty” by which all religious groups were placed on an equal footing so far as the State was concerned. Similar though less far-reaching legislation was being considered and passed in other States.⁶¹

⁵⁶ 370 U.S. 421 (1962).

⁵⁷ 366 U.S. 420 (1961).

⁵⁸ See *id.* at 437-39; *id.* at 492-95 (Frankfurter, J., concurring).

⁵⁹ See *id.* at 437-39 (majority opinion); *id.* at 492-95 (Frankfurter, J., concurring).

⁶⁰ *Id.* at 438-39 (majority opinion); *id.* at 494-95 & nn.67-68 (Frankfurter, J., concurring).

⁶¹ *Engel*, 370 U.S. at 428-29 (footnote omitted).

Black never explained why legislation in other states is less relevant than that of Virginia, but he made it clear that he considered Jefferson and Madison to be the key Founders.⁶² He also introduced readers for the first time to a new “Founder”—Roger Williams of Rhode Island.⁶³ Williams, of course, appealed to Black as “one of the earliest exponents of the doctrine of separation of church and state.”⁶⁴ Other than Madison, Jefferson, and Williams, Black mentioned no other Founder.

The most intriguing element of *Engel* from the perspective of the Justices’ use of history is Justice Douglas’s admission in his concurring opinion that “I cannot say that to authorize this prayer is to establish a religion in the strictly historic meaning of those words.”⁶⁵ Douglas even conceded that “[r]eligion was once deemed to be a function of the public school system.”⁶⁶ Few separationists on the Court have been willing to concede that the Founders wanted anything other than the strict separation of church and state. Despite this departure from *Everson’s* argument, Douglas had no doubt that school prayer was unconstitutional, at least in part because “once government finances a religious exercise it inserts a divisive influence into our communities.”⁶⁷

The Court’s holding in *Abington School District v. Schempp*,⁶⁸ is a logical extension of *Engel*. For the purposes of this Article, it is notable for two reasons. First, Justice Clark’s opinion contains the most concise (albeit slightly expanded) statement of *Everson’s* premise that Jefferson’s and Madison’s views define the Establishment Clause: “[T]he views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States.”⁶⁹

More significantly, Justice Brennan’s concurring opinion contains the first sustained argument against relying on “[a] too literal quest for the advice of the founding fathers” to interpret the

⁶² See *id.* at 428-32.

⁶³ *Id.* at 434 n.20; see also discussion of Roger Williams’s role as a “Founder,” *supra* table 1, note a.

⁶⁴ *Id.*

⁶⁵ *Id.* at 442 (Douglas, J., concurring).

⁶⁶ *Id.* at 443 n.9. Douglas quoted Article III of the Northwest Ordinance to support this claim. *Id.*

⁶⁷ *Id.* at 442.

⁶⁸ 374 U.S. 203 (1963).

⁶⁹ *Id.* at 214 (footnote omitted).

Establishment Clause.⁷⁰ In several much-quoted passages, he contended that such a quest is misdirected for the following reasons:

[T]he historical record is at best ambiguous, and statements can readily be found to support either side of the proposition.

... [T]he structure of American education has greatly changed since the First Amendment was adopted.

... [O]ur religious composition makes us a vastly more diverse people than were our forefathers.

... [T]he American experiment in free public education available to all children has been guided in large measure by the dramatic evolution of the religious diversity among the population which our public schools serve.⁷¹

Brennan's concerns are often referred to, quoted, or excerpted in such a way so as to suggest that he believed the Court should abandon altogether the use of history in Religion Clause cases.⁷² However, the core of his argument is that Justices should avoid focusing on specific practices that the Founders did or did not favor and instead explore the principles they embraced. These principles, rather than specific policies, appropriately guide the Court's jurisprudence. After a sweeping discussion of a wide range of historical documents and church-state cases, Brennan concluded:

Specifically, I believe that the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers. It is a line which the Court has consistently sought to mark in its decisions expounding the religious guarantees of the First Amendment. What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice. When the secular and religious institutions become involved in such a manner, there inhere in the relationship precisely those dangers—as much to church as

⁷⁰ *Id.* at 237 (Brennan, J., concurring).

⁷¹ *Id.* at 237-38, 240-41.

⁷² *See, e.g.*, GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 1466 (13th ed. 1997); DAVID M. O'BRIEN, *2 CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES* 731-33 (6th ed. 2005).

to state—which the Framers feared would subvert religious liberty and the strength of a system of secular government.⁷³

Brennan also noted that there are “myriad forms of involvements of government with religion” that do not violate the Establishment Clause.⁷⁴ Details about his views are not important here, but his qualifications as to how the Court should use history are. It is critical to emphasize that Brennan did not abandon *Everson*’s commitment to history—indeed, he appealed to “the Founders” as a group in this opinion more than any other Justice in any other Religion Clause opinion.

Between *Schempp* and *Walz v. Tax Commission of New York City*,⁷⁵ Justices primarily relied upon precedents in Religion Clause cases, and, to the extent to which they appealed to history, they grounded these appeals in previous historical discussions.⁷⁶ In *Walz*, Brennan issued a concurring opinion in which he agreed with the majority that it is constitutionally permissible to exempt churches from certain taxes.⁷⁷ In explaining this relatively rare accommodationist vote, Brennan seemed to abandon *Everson*’s tenet that the only Founders who matter are Jefferson and Madison. Of his ten references to history, only two are to these men.⁷⁸ Douglas, dissenting in *Walz*, would have none of this—of Douglas’s eleven appeals to history, all are to James Madison.⁷⁹ And to make sure no one missed Madison’s significance he, like Rutledge in *Everson*, included as an appendix to his opinion a copy of *Memorial and Remonstrance*.⁸⁰

During the 1960s and 1970s, no Justice offered an extensive or detailed rejection of *Everson*’s history, but it was occasionally challenged. For instance, Justice Harlan, in his solo dissent in *Flast v. Cohen*,⁸¹ noted “that the First Amendment was not in-

⁷³ *Schempp*, 374 U.S. at 294-95 (Brennan, J., concurring).

⁷⁴ *Id.* at 295.

⁷⁵ 397 U.S. 664 (1970).

⁷⁶ See, e.g., Justice Powell’s opinion in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 770 (1973) (“The history of the Establishment Clause has been recounted frequently and need not be repeated here.” (citing *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947))). Although primarily relying on *Everson* and precedents, Powell, a proud son of Virginia, did include a defense of the centrality of debates about religious liberty in Virginia for interpreting the First Amendment. *Id.* at 770 n.28.

⁷⁷ *Walz*, 397 U.S. at 692-93 (Brennan, J., concurring).

⁷⁸ *Id.* at 684-85.

⁷⁹ *Id.* at 704-17 (Douglas, J., dissenting).

⁸⁰ *Id.* at 719-27 app.

⁸¹ 392 U.S. 83 (1968).

tended simply to enact the terms of Madison's Memorial and Remonstrance."⁸² More fundamentally, in *Nyquist*, Justice White contended 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."⁸³ Few Justices have accepted White's proposition, although he religiously followed it himself, appealing to history only one time in his twenty-three Religion Clause case opinions.

In the richest historical opinion since Brennan's concurrence in *Schempp*, Chief Justice Burger made a sweeping argument to uphold the constitutionality of legislative chaplains and prayer in *Marsh v. Chambers*.⁸⁴ Drawing from a range of documents, actions, and Founders, Burger contended that legislative chaplains and prayer were widespread in the Founding era.⁸⁵ Moreover, he emphasized that the very men who drafted and approved the First Amendment also agreed to hire legislative chaplains and approved of legislative prayer.⁸⁶ Even in the case of Virginia, he noted that the state continued the "practice of opening legislative sessions with prayer."⁸⁷

Altogether Burger made twenty-five distinct appeals to history in *Marsh*, although only one of these appeals was to Madison and he did not mention Jefferson at all. By virtually ignoring Madison and Jefferson, he implicitly challenged *Everson's* premise that these two men represent all of the Founders. Significantly, Burger did not attack the Court's Establishment Clause jurisprudence in general but merely focused on the constitutionality of the law in question. A broad challenge to the reign of *Everson* would have to wait for another two years.

Justice Brennan, dissenting in *Marsh*, seemed to acknowledge that *Everson's* account of history was in jeopardy. After criticizing Burger for not relying on the legislative history of the Establishment Clause (even though few Justices have discussed its legislative history), he dismissed his reliance on the actions of the First Congress, arguing that they may not have reflected the

⁸² *Id.* at 126 (Harlan, J., dissenting).

⁸³ *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 820 (1973) (White, J., dissenting).

⁸⁴ 463 U.S. 783 (1983).

⁸⁵ *Id.* at 786-95.

⁸⁶ *Id.* at 787-88.

⁸⁷ *Id.* at 788 n.5.

Founders' views on church and state.⁸⁸ Instead, he suggested that "the passions and exigencies of the moment, the pressure of constituents and colleagues, and the press of business" may have led them to pass legislation that violated principles enshrined in the Establishment Clause.⁸⁹ As evidence he pointed to Madison, who "voted for the bill authorizing the payment of the first congressional chaplains" but "later expressed the view that the practice was unconstitutional."⁹⁰ Brennan did not explain why Madison's unpublished reflections written at least twenty-four years after his vote should be preferred to Congress' overwhelming support of the practice, but the conclusion makes some sense in light of *Everson's* premise that Madison and Jefferson speak for the Founders. Brennan's commitment to this premise is suggested as well by the fact that four of his seven appeals to history are to these men and that he appealed to no other Founder.

Brennan's opinion did not completely reject the use of history for Establishment Clause jurisprudence, but it significantly downplayed its relevance. Critically for our purposes, Brennan contended:

[T]he argument tendered by the Court is misguided because the Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers. We have recognized in a wide variety of constitutional contexts that the practices that were in place at the time any particular guarantee was enacted into the Constitution do not necessarily fix forever the meaning of that guarantee. To be truly faithful to the Framers, "our use of the history of their time must limit itself to broad purposes, not specific practices." Our primary task must be to translate "the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century"⁹¹

In this passage, Brennan moved significantly beyond his concurrence in *Schempp* to more aggressively contend that the Constitution is a living document that must change with the times—an argument that he fleshed out in the mid-1980s.⁹² Although he

⁸⁸ *Id.* at 814 (Brennan, J., dissenting).

⁸⁹ *Id.*

⁹⁰ *Id.* at 815.

⁹¹ *Id.* at 816-17 (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 241 (1963) (Brennan, J., concurring); and *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943)) (footnote omitted).

⁹² In the Court's next term, Brennan continued his retreat from history in his dis-

conceded that history is not irrelevant for constitutional interpretation, his use of it fell off dramatically in his remaining eleven Religion Clause opinions, which contain an average of only 0.8 appeals per opinion. This contrasts with his first 19 opinions where he appealed to history 69 times with an average of 3.6 appeals per case. Clearly something had changed.

4. Wallace to Cutter

In *Everson*, the Court embraced a syllogism that defined its Religion Clause jurisprudence—especially in Establishment Clause cases—for almost forty years. Although this syllogism was occasionally criticized—either tacitly or in short, separate opinions by individual Justices—it did not receive a sustained and substantial challenge until Justice Rehnquist’s dissenting opinion in *Wallace v. Jaffree*.⁹³ In this case Justice Stevens, for the majority, declared Alabama’s moment of silence law to be unconstitutional.⁹⁴ He conceded that there is evidence that the Founders did not oppose government support of general Christian practices.⁹⁵ However, he contended that the Court had rejected the Founders’ views in favor of a broader conception of religious liberty.⁹⁶ Ironically, he supported this proposition with citations to *Everson* and *Schempp* (cases that rely heavily on his-

senting opinion in *Lynch v. Donnelly*, 465 U.S. 668 (1984). Arguing that the Court had theretofore “limited its historical inquiry to the particular practice under review” (a highly questionable characterization of the Court’s use of history in Religion Clause cases), he contended that the multitude of religious practices engaged in by governments in the Founding era are irrelevant to the question of whether or not religious displays are permissible on public land. *Id.* at 719 (Brennan, J., dissenting). For instance, Brennan noted, “[T]he widespread celebration of Christmas did not emerge in its present form until well into the nineteenth century.” *Id.* at 720.

Brennan’s most significant nonjudicial statement on this subject is his 1985 speech at Georgetown University. There he contended:

We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of the framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.

Justice William J. Brennan, Jr., Address to the Text and Teaching Symposium at Georgetown University (Oct. 12, 1985), reprinted in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION*, *supra* note 3, at 17.

⁹³ 472 U.S. 38 (1985).

⁹⁴ *Id.* at 61.

⁹⁵ *Id.* at 52.

⁹⁶ *Id.* at 52-53.

tory) and quotations from Madison's *Memorial and Remonstrance*.⁹⁷ Similarly, Justice O'Connor, in her concurring opinion, acknowledged the value of using history to illuminate the Religion Clause but argued that "[w]hen the intent of the Framers is unclear, I believe we must employ both history and reason in our analysis."⁹⁸

Justice Rehnquist, in his dissenting opinion, unequivocally endorsed the first premise of *Everson's* syllogism: "The true meaning of the Establishment Clause can only be seen in its history. . . . As drafters of our Bill of Rights, the Framers inscribed the principles that control today."⁹⁹ From his perspective, the problem was not with relying on history but that "[t]here is simply no historical foundation for the proposition that the Framers intended to build the 'wall of separation' that was constitutionalized in *Everson*."¹⁰⁰ In short, according to Rehnquist, the critical error in the Court's approach to history was its proclivity to focus on a few select documents written by Madison and Jefferson—particularly Jefferson's letter to the Danbury Baptists—rather than the Founders more generally.¹⁰¹

Three other Religion Clause opinions contain more appeals to history than Rehnquist's dissent in *Wallace*, but none come close to drawing from as many different sources. Among other things, Rehnquist leads his readers through the most extensive discussion to date of the framing of the First Amendment's Religion Clause. In doing so, and in setting the broader context by examining in detail the actions of the First Congress, he discussed a more diverse group of Founders than any other Religion Clause opinion ever written. Throughout his dissent he appealed to the beliefs or actions of twelve different Founders—including indisputably significant ones such as John Adams and George Washington (who had collectively been cited in only five Religion Clause opinions)¹⁰² and important but neglected Founders such

⁹⁷ *Id.* at 52-55.

⁹⁸ *Id.* at 81 (O'Connor, J., concurring).

⁹⁹ *Id.* at 113 (Rehnquist, J., dissenting) (citations omitted).

¹⁰⁰ *Id.* at 106.

¹⁰¹ *Id.* at 91-114.

¹⁰² John Adams is referenced by Frankfurter in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 653 (1943) (Frankfurter, J., dissenting); Brennan in *Larson v. Valente*, 456 U.S. 228, 244 n.19 (1982); and Burger in *Lynch v. Donnelly*, 465 U.S. 668, 675 n.2 (1984). Washington is appealed to two times by Brennan in *Abington School District v. Schempp*, 374 U.S. 203, 296 n.71 (1963) (Brennan, J., concurring); and Burger in *Lynch*, 465 U.S. at 675.

as Roger Sherman, Elias Boudinot, and Daniel Carroll.¹⁰³ Rehnquist did appeal to Madison nine different times, but never to his *Memorial and Remonstrance*.

Rehnquist agreed with *Everson's* premise that history is relevant for interpreting the Religion Clause, but he disagreed with Black's and Rutledge's interpretations of history. Recognizing that he was challenging almost forty years of precedents, he poignantly noted that "*stare decisis* may bind courts as to matters of law, but it cannot bind them as to matters of history."¹⁰⁴ To be faithful to this history, he concluded, the Court should abandon attempts to create a wall of separation between church and state and return to the Framers' understanding that the Establishment Clause merely prohibits the designation of a "national" church or the preferential treatment of one religious denomination or sect over others.¹⁰⁵

Given Rehnquist's assault on the Court's Establishment Clause jurisprudence, it is interesting that no Justice responded to his arguments until *County of Allegheny v. ACLU*.¹⁰⁶ In his majority opinion upholding one religious display on public land and striking down another, Justice Blackmun acknowledged that the Founders may not have found such displays to be problematic.¹⁰⁷ Indeed, he noted that

[p]erhaps in the early days of the Republic [the words of the Religion Clause] were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to "the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism."¹⁰⁸

Blackmun's strategy, apparently, was to paint the Founders' understanding of religious liberty as being so limited as to be unpalatable. Accordingly, he rejected Rehnquist's interpretation that they desired neutrality with respect to the support of religion and pointed out that

[t]he history of this Nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically. . . . Some of these examples date back to the

¹⁰³ *Wallace*, 472 U.S. at 95-104 (Rehnquist, J., dissenting).

¹⁰⁴ *Id.* at 99.

¹⁰⁵ *Id.* at 113.

¹⁰⁶ 492 U.S. 573 (1989).

¹⁰⁷ *Id.* at 590, 604-05.

¹⁰⁸ *Id.* at 590 (quoting *Wallace*, 472 U.S. at 52 (majority opinion)).

Founding of the Republic, but this heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause.¹⁰⁹

Thus, Blackmun concluded, in spite of the Founders' views, "the bedrock Establishment Clause principle [is] that, regardless of history, government may not demonstrate a preference for a particular faith."¹¹⁰

Blackmun, following Brennan's lead, largely abandoned the use of history in Religion Clause cases. Justice O'Connor, in her concurring opinion, suggested something similar.¹¹¹ However, Justice Stevens, in his dissenting opinion, made several general appeals to the Founders to support his separationist conclusion.¹¹² Kennedy, in a dissent joined by Rehnquist, White, and Scalia, reiterated Rehnquist's argument that the Religion Clause should be informed by the Founders' intent.¹¹³ He argued that when one looks at a broad range of Founders it becomes evident that their chief concern was prohibiting coercion or favoritism in matters of religion.¹¹⁴ In his view,

the principles of the Establishment Clause and our Nation's historic traditions of diversity and pluralism allow communities to make reasonable judgments respecting the accommodation or acknowledgement of holidays with both cultural and religious aspects. No constitutional violation occurs when they do so by displaying a symbol of the holiday's religious origins.¹¹⁵

In *Allegheny*, Kennedy appealed to history to support religious displays on public land, but in *Lee v. Weisman*¹¹⁶ he did the same to prohibit prayer at public school graduation exercises. The critical distinction for Kennedy was an element of coercion that was

¹⁰⁹ *Id.* at 604-05 (citations & footnotes omitted).

¹¹⁰ *Id.* at 605.

¹¹¹ O'Connor wrote that "[h]istorical acceptance of a practice does not in itself validate that practice under the Establishment Clause if the practice violates the values protected by that Clause." *Id.* at 630 (O'Connor, J., concurring in part and concurring in the judgment).

¹¹² *Id.* at 646 (Stevens, J., concurring in part and dissenting in part).

¹¹³ *Id.* at 669-73 (Kennedy, J., concurring in the judgment in part and dissenting in part).

¹¹⁴ *Id.* at 659-61. In his opinion, Kennedy made it clear that it is the principles embraced by the Founders that are significant, not specific practices. Hence, it is irrelevant that "displays commemorating religious holidays were not commonplace in 1791." *Id.* at 669.

¹¹⁵ *Id.* at 679.

¹¹⁶ 505 U.S. 577 (1992).

present in *Lee* but absent in *Allegheny*.¹¹⁷ Justice Blackmun, apparently regretting his retreat from history in *Allegheny*, offered a substantial defense of *Everson*'s logic and history.¹¹⁸ Not surprisingly, in doing so he emphasized, in practice if not by argument, the priority of Thomas Jefferson, James Madison, and Roger Williams, to whom he appealed a total of six times out of a total of nine historical appeals.¹¹⁹

Lee is most notable for Justice Souter's remarkable effort to restate *Everson*'s argument on a wider evidentiary base. His concurring opinion is also significant as the first explicit reply to Rehnquist's dissent in *Wallace*.¹²⁰ In it, he conceded that Rehnquist and others have made a case for the nonpreferentialist position but contended that "it is not so convincing as to warrant reconsideration of our settled law; indeed, I find in the history of the Clause's textual development a more powerful argument supporting the Court's jurisprudence following *Everson*."¹²¹

Souter's concurrence provides a detailed discussion of the legislative history of the First Amendment, and he concluded, contrary to Rehnquist, that it requires the separation of church and state.¹²² Throughout his opinion, Souter made numerous broad appeals to the Framers in general. But when he turned to specific Founders to support his position, he appealed to Madison seventeen times, Jefferson seven times, and all other Founders twice. To his credit, Souter acknowledged that some of Madison's and Jefferson's actions work against his argument, such as the latter's treaty with the Kaskaskia Indians.¹²³ His response to such actions, following Brennan's earlier lead, is that they "prove only that public officials, no matter when they serve, can turn a blind eye to constitutional principle."¹²⁴

Souter contended that history supports a separationist reading of the First Amendment's Establishment Clause, but he was clearly aware that the argument was weaker than it was portrayed in *Everson*. Central to his conclusion, as suggested by the passage quoted above and as articulated elsewhere in the opin-

¹¹⁷ *See id.* at 587-93.

¹¹⁸ *See id.* at 599-609 (Blackmun, J., concurring).

¹¹⁹ *Id.* at 600 n.1, 608 & n.11.

¹²⁰ *Id.* at 612 (Souter, J., concurring).

¹²¹ *Id.*

¹²² *Id.* 612-16.

¹²³ *Id.* at 616 n.3.

¹²⁴ *Id.*

ion, is that the accomodationists' arguments are not so powerful as to require the Court to rethink its precedents.¹²⁵

Justice Scalia, in a dissent joined by Rehnquist, White, and Thomas, offered a response to Souter. He began by forcefully reminding his fellow Justices that they have time and time again agreed that "our interpretation of the Establishment Clause should 'comport with what history reveals was the contemporaneous understanding of its guarantees.'" ¹²⁶ He proceeded to document from a variety of sources that "[t]he history and tradition of our Nation are replete with public ceremonies featuring prayers of thanksgiving and petition."¹²⁷ Even Jefferson and Madison, he highlighted, invoked God in their inaugural addresses.¹²⁸ Like Kennedy in both *Allegheny* and *Lee*, Scalia contended that the Establishment Clause is intended merely to prohibit coercion in religion, and he argued that there is no coercion in having a prayer at a voluntary high school graduation.¹²⁹

Having reinvigorated historical debates about the Establishment Clause, Justice Souter also helped ignite a similar debate with respect to the Free Exercise Clause. As we have seen, Justices have appealed to history to shine light on this Clause, but they have done so with significantly less regularity than they have in Establishment Clause cases. In *Employment Division, Department of Human Resources of Oregon v. Smith*,¹³⁰ Scalia's majority opinion significantly reduced the degree to which the Free Exercise Clause protects actions based on religious conviction (at least according to many jurists and scholars).¹³¹ In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,¹³² Justice Souter, in his concurring opinion, pointed out that Scalia had reduced the vitality of the Free Exercise Clause without considering "the original meaning of the Free Exercise Clause."¹³³ He then suggested that "when the opportunity to reexamine *Smith* presents

¹²⁵ See *id.* at 612, 622.

¹²⁶ *Id.* at 632 (Scalia, J., dissenting) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984)). Scalia went on to quote similar passages from *Schempp*, *Marsh*, and *Walz*. *Id.* at 632-33.

¹²⁷ *Id.* at 633.

¹²⁸ *Id.* at 633-34.

¹²⁹ See *id.* at 640-44.

¹³⁰ 494 U.S. 872 (1990).

¹³¹ See, e.g., *id.* at 891 (O'Connor, J., concurring in the judgment); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1.

¹³² 508 U.S. 520 (1993).

¹³³ *Id.* at 574 (Souter, J., concurring in part and in the judgment).

itself, we may consider recent scholarship raising serious questions about the *Smith* rule's consonance with the original understanding and purpose of the Free Exercise Clause."¹³⁴ He made it clear that if *Smith* departs from the original understanding of the Clause, this would be a "powerful reason" to overturn the case.¹³⁵

Justice O'Connor accepted Souter's invitation to examine the "original understanding" of the Free Exercise Clause in her dissenting opinion in *City of Boerne v. Flores*.¹³⁶ Specifically, she announced, "I examine here the early American tradition of religious free exercise to gain insight into the original understanding of the Free Exercise Clause."¹³⁷ In one of the richest historical opinions to date, and the richest ever with respect to a Free Exercise Clause case, O'Connor offered a sweeping examination of Founding era history to support her thesis that the "drafters and ratifiers more likely viewed the Free Exercise Clause as a guarantee that government may not unnecessarily hinder believers from freely practicing their religion."¹³⁸ To support her claim, she quoted at some length numerous colonial and Founding era laws and constitutions.¹³⁹ Although they figure less prominently than in many Establishment Clause cases, Jefferson and Madison play significant roles in her argument, particularly Madison's contributions to the Virginia Declaration of Rights, Madison's authorship of *Memorial and Remonstrance*, and Jefferson's *Bill for Establishing Religious Liberty*.¹⁴⁰

In his concurring opinion, Justice Scalia rejected O'Connor's contention "that historical materials support a result contrary to the one reached in [*Smith*]."¹⁴¹ Scalia questioned neither the relevance of history nor the texts to which O'Connor appealed. Rather, he challenged her interpretation of these documents, arguing that the Founders' support of religious liberty did not include the right to refuse to obey generally applicable laws unless

¹³⁴ *Id.* at 575.

¹³⁵ *Id.* at 576.

¹³⁶ 521 U.S. 507 (1997). The majority decided the case on separation of powers grounds, but four Justices considered the case to involve substantial Religion Clause issues. Justice Souter dissented in this case because he thought the Court should not have granted certiorari. *Id.* at 565-66 (Souter, J., dissenting).

¹³⁷ *Id.* at 548 (O'Connor, J., dissenting).

¹³⁸ *Id.* at 549.

¹³⁹ *Id.* at 550-60.

¹⁴⁰ *Id.* at 555-57, 560-62.

¹⁴¹ *Id.* at 537 (Scalia J., concurring in part).

a legislature explicitly sanctioned an exemption.¹⁴²

Although Justice O'Connor is no longer on the Court, history suggests that debates over the original intentions of the Founders regarding the Free Exercise Clause will continue and expand. As we have seen, Justices have spilled a great deal of ink debating the Founders' views of the Establishment Clause, and these disagreements show little sign of abating. Indeed, recent Justices have evidenced an inclination to expand these debates. For instance, Justice Thomas, in his concurring opinion in *Rosenberger v. Rector & Visitors of the University of Virginia*,¹⁴³ criticized the tendency of some Justices to rely on the views of James Madison—noting poignantly that “the views of one man do not establish the original understanding of the First Amendment.”¹⁴⁴ As well, he aggressively challenged the view that Madison favored the strict separation of church and state.¹⁴⁵

The significance of history for contemporary Religion Clause jurisprudence is perhaps best demonstrated by the recent Ten Commandment cases *Van Orden v. Perry*,¹⁴⁶ and *McCreary County v. ACLU of Kentucky*.¹⁴⁷ Authors of seven of the ten opinions in these cases collectively appealed to history sixty-two times.¹⁴⁸ Four of these seven opinions opposed displays of the Ten Commandments on public property, and the Justices authoring them made thirty-three appeals to history, sixteen of which (almost fifty percent) were to Jefferson and Madison.¹⁴⁹ On the other hand, the three Justices appealing to history who favored allowing such displays made twenty-nine historical references, of which only four were to Jefferson and Madison (about seven percent of the total).¹⁵⁰

Justice Stevens, in a dissenting opinion in *Van Orden* joined by Justice Ginsburg (one of the two Justices in the last half-century

¹⁴² *Id.* at 537-44.

¹⁴³ 515 U.S. 819 (1995).

¹⁴⁴ *Id.* at 856 (Thomas, J., concurring).

¹⁴⁵ *Id.* at 852-63.

¹⁴⁶ 125 S. Ct. 2854 (2005).

¹⁴⁷ 125 S. Ct. 2722 (2005).

¹⁴⁸ The Justices appealing to history were O'Connor, Rehnquist, Scalia, Souter, and Stevens.

¹⁴⁹ See *Van Orden*, 125 S. Ct. at 2883-86 & nn.23-26 (Stevens, J., dissenting); *id.* at 2892 (Souter, J., dissenting); *McCreary*, 125 S. Ct. at 2746-47 (O'Connor, J., concurring).

¹⁵⁰ See *Van Orden*, 125 S. Ct. at 2858-62 (Rehnquist, C.J., plurality opinion); *id.* at 2865 (Thomas, J., concurring); *McCreary*, 125 S. Ct. at 2748-50 (Scalia, J., dissenting).

who has never appealed to history in a Religion Clause opinion),¹⁵¹ criticized the majority's use of history. Throughout his opinion, he reiterated traditional separationist arguments, including the idea that "the widely divergent views espoused by the leaders of our Founding era plainly reveal [that] the historical record of the preincorporation Establishment Clause is too indeterminate to serve as an interpretive North Star."¹⁵² Implicitly acknowledging that accommodationists can marshal a large amount of evidence, he contended that such "early religious statements and proclamations made by the Founders is also problematic because those views were not espoused at the Constitutional Convention of 1787 nor enshrined in the Constitution's text."¹⁵³ As well, he took the accommodationists to task for neglecting the views of important Founders, notably Madison and Jefferson, to whom he appeals eight times to shine light on the meaning of the Establishment Clause.¹⁵⁴

Like Justice Blackmun in *Allegheny*, Stevens conceded that "the requirement that government must remain neutral between religion and irreligion would have seemed foreign to some of the Framers; so too would a requirement of neutrality between Jews and Christians."¹⁵⁵ The word "some" in this passage could be taken to imply that he thinks only a few Founders believed this, but his claim a few sentences later that "we are not bound by the Framers' expectations—we are bound by the legal principles they enshrined in our Constitution"¹⁵⁶ suggests otherwise. Although Stevens's opinion still has an element of an appeal to the "legal principle" embraced by the Founders, it is clear that in his mind these principles are only to be understood in light of Jefferson's and Madison's vision of how church and state should be related. In her concurring opinion in *McCreary*, Justice O'Connor emphasized this point, noting that the Court's "guiding principle has been James Madison's—that '[t]he Religion . . . of every man must be left to the conviction and conscience of every man.'"¹⁵⁷

Justice Scalia's dissent in *McCreary* challenges Stevens's claim

¹⁵¹ The other is Justice Arthur Goldberg.

¹⁵² *Van Orden*, 125 S. Ct. at 2888 (Stevens, J. dissenting).

¹⁵³ *Id.* at 2883 (footnote omitted).

¹⁵⁴ *Id.* at 2883-85 & n.27.

¹⁵⁵ *Id.* at 2889-90.

¹⁵⁶ *Id.* at 2890.

¹⁵⁷ *McCreary*, 125 S. Ct. at 2746 (O'Connor, J., concurring) (alteration and omission in original) (citing *Memorial and Remonstrance*).

that accomodationist sentiment and actions were “idiosyncratic,” arguing instead that “they reflected the beliefs of the period.”¹⁵⁸ Appealing to a range of Founders, documents, and actions, he added a twist to the accomodationist argument by pointing out that his opinion primarily relies on

official acts and official proclamations of the United States or of the component branches of its Government, including the First Congress’s beginning of the tradition of legislative prayer to God, its appointment of congressional chaplains, its legislative proposal of a Thanksgiving Proclamation, and its reenactment of the Northwest Territory Ordinance; our first President’s issuance of a Thanksgiving Proclamation; and invocation of God at the opening of sessions of the Supreme Court.¹⁵⁹

Notably, Scalia appeals to the actions and addresses of President Washington seven times—a record number of appeals in a single opinion to any Founder other than Jefferson or Madison.

One implication of Scalia’s suggestion that “official acts and official proclamations” of federal officials are more important than the thoughts and deeds of private or state officials is that *Everson*’s reliance on documents penned by Jefferson and Madison before the creation of the Bill of Rights (e.g., *Memorial and Remonstrance* (1785) and *Bill for Religious Liberty* (1786)) or afterward when Madison was a private citizen (e.g., his *Detached Memoranda* (c. 1817)) is problematic. That Scalia had *Everson* in mind is evident when, early in his opinion, he quoted Edward S. Corwin’s famous observation that the Court had been “sold . . . a bill of goods” in *Everson*.¹⁶⁰

Cutter v. Wilkinson,¹⁶¹ the last Religion Clause opinion considered in this study, contains a historical argument by Justice Thomas that could have even more profound implications than that made by Scalia in *McCreary*. In his concurring opinion, Thomas reiterated and explained his controversial claim that “a proper historical understanding” of the Establishment Clause should lead the Court to understand it as a “federalism provision.”¹⁶² In concurring opinions in *Elk Grove Unified School District v. Newdow*¹⁶³ and *Zelman v. Simmons-Harris*,¹⁶⁴ he had

¹⁵⁸ *Id.* at 2749 (Scalia, J., dissenting).

¹⁵⁹ *Id.* at 2754.

¹⁶⁰ *Id.* at 2751 n.2 (omission in original) (quoting Corwin, *supra* note 4, at 16).

¹⁶¹ 544 U.S. 709 (2005).

¹⁶² *Id.* at 726-27 (Thomas, J., concurring).

¹⁶³ 542 U.S. 1 (2004).

earlier contended the primary purpose of the Establishment Clause was to protect “state establishments from federal interference” and as such “it makes little sense to incorporate the Establishment Clause.”¹⁶⁵ In *Cutter*, he was forced to clarify his argument, rejecting Ohio’s contention that it prohibited “Congress from legislating on religion generally.”¹⁶⁶ Instead, he concluded that it merely prohibited “legislation respecting coercive state establishments.”¹⁶⁷

Justices have hesitated to accept Thomas’s 2004 invitation in *Newdow* to “begin the process of rethinking the Establishment Clause” based on a more accurate account of the history of the Founding era.¹⁶⁸ At least one Justice has refused, not because he thinks it is wrong as a matter of history, but because of its consequences. In his dissenting opinion in *Van Orden*, Justice Stevens conceded that constricting “the reach of the Establishment Clause to the views of the Founders” would “leave us with an unincorporated constitutional provision,” but he rejected this outcome as “unpalatable.”¹⁶⁹

Justice Stevens’s opinions in recent Religion Clause cases often, but not always, have the virtue of clearly rejecting the relevance of history for interpreting the Establishment Clause. Few Justices, notably Blackmun, Douglas, and, to a lesser extent, Brennan, have joined him in doing this. Others, including Justices Ginsburg, Marshall, and White, have perhaps implicitly endorsed this approach through their neglect of history. However, as shown above, most Justices have regularly used history to help them interpret the Religion Clause.

¹⁶⁴ 536 U.S. 639 (2002).

¹⁶⁵ *Newdow*, 542 U.S. at 49-50 (Thomas, J., concurring); see also *Zelman*, 536 U.S. at 677-80 (Thomas J., concurring). *Newdow* is not included in this study because only three Justices thought the case should be decided on Religion Clause grounds.

Other Justices have raised Thomas’s point about federalism, but none have advocated it as vigorously as Thomas. See, e.g., *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 309-10 (Stewart, J., dissenting) (“[T]he Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments.”); see also *Lee v. Weisman*, 505 U.S. 577, 641 (Scalia, J., dissenting) (“The Establishment Clause was adopted to prohibit such an establishment of religion at the federal level (and to protect state establishments of religion from federal interference).”).

¹⁶⁶ *Cutter*, 544 U.S. at 729 (Thomas, J., concurring).

¹⁶⁷ *Id.*

¹⁶⁸ *Newdow*, 542 U.S. at 45 (Thomas, J., concurring).

¹⁶⁹ *Van Orden v. Perry*, 125 S. Ct. 2854, 2887 (2005) (Stevens, J., dissenting).

CONCLUSION

The current Court contains an interesting mix of views on the propriety of using history to interpret the Religion Clause and, where applicable, the requirements of this history. On balance, Justices Stevens and Ginsburg fairly consistently reject the use of history and support liberal outcomes; Justices Souter and Breyer often use history to support liberal outcomes; Justices Scalia, Thomas, and Kennedy regularly use history to support conservative outcomes; and Justices Roberts and Alito have yet to vote on a Religion Clause case. Moreover, Scalia and Thomas have made historical arguments that could radically change the Court's Establishment Clause jurisprudence. It is perhaps therefore an opportune time for Justices and scholars to reconsider the relevance or irrelevance of history for Religion Clause jurisprudence. Understanding how Justices have used history in previous cases may help answer the question of how they should use it in the future—or if they should use it at all.

In this Article, I have shown that the vast majority of Justices who have written Religion Clause opinions have used history to shine light upon its meaning. This has been particularly true with respect to Establishment Clause jurisprudence, and appeals to history in this area of law have been steady throughout the Court's cases. The Court has been far less likely to appeal to history to illuminate the Free Exercise Clause, but recent opinions suggest that history may become increasingly important for understanding this Clause. As well, the data show that liberal Justices are slightly more likely to appeal to history than conservative Justices, although these Justices do not necessarily appeal to the same history.

I have not attempted to resolve broader theoretical questions about the appropriateness of Justices appealing to history, and I have not evaluated the accuracy of their use of history. Cynics might reply that such questions are meaningless because Justices simply reach conclusions they desire and then use history to justify them. A slightly less cynical observer might suggest that the policy preferences of Justices color their understanding of history so that they give greater weight to evidence that supports their desired outcomes. It is true that there is no such thing as historical objectivity, but as Bernard Bailyn has written, "the fact that there is no such thing as perfect antisepsis does not mean that

one might as well do brain surgery in a sewer.”¹⁷⁰ Some historical arguments are better than others, and if is appropriate to interpret the First Amendment in light of its “generating history,” it is reasonable to expect Justices to make an effort to get that history right.

This is not the place to evaluate the Court’s use of history throughout the entirety of its Religion Clause jurisprudence, but I will suggest that the syllogism developed by Black and Rutledge in *Everson* is flawed. Simply put, relying on the views of Jefferson and Madison to represent the Founders’ intent is bad history.¹⁷¹ Both were, to be sure, important Founders, and if Jefferson was not involved in writing or ratifying the First Amendment, arguably no single American played a more significant role in drafting it than Madison. Yet the First Amendment did not spring fully clothed from Madison’s mind like Athena from Zeus’s head. Madison’s proposals were revised significantly in the House of Representatives, changed by the Senate and Conference Committee, agreed to by Congress, and ratified (initially) by nine state legislatures. Surely any attempt to delineate the meaning of this critical Amendment must go beyond the views of two Founders—no matter how prominent.

When Justices have looked beyond the drafting and ratification of the First Amendment to cast light on its meaning, many have still found it difficult to escape the gravitational attraction of Madison and Jefferson. When they consider pre-amendment history, they often appeal to Madison’s *Memorial and Remonstrance* (1785) and Jefferson’s *Bill for Religious Liberty* (1786), and when they turn to post-amendment history, they appeal to Jefferson’s letter to the Danbury Baptist (1802) and Madison’s *Detached Memoranda* (c. 1817). Although these documents are undoubtedly important, it is not self-evident that they reflect the views of the men who wrote and ratified the First Amendment.

An accurate account of the “generating history” of the First Amendment necessarily involves careful consideration of the debates over it in Congress and the state ratifying conventions. Records of these debates are notoriously scanty, but many of the

¹⁷⁰ BERNARD BAILYN, *ON THE TEACHING AND WRITING OF HISTORY* 73 (1994).

¹⁷¹ See DAVID HACKETT FISCHER, *HISTORIANS’ FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT* 109-16 (1970). Of course some scholars deny that it is possible to distinguish between good and bad history. I presume these scholars do not believe that history is relevant for constitutional interpretation (except perhaps for rhetorical purposes), and I invite them to skip the remaining paragraphs.

men involved in them reveal their views of the proper relation between church and state elsewhere. An obvious place to begin this investigation is with actions of the first Congress, but a thorough study would go beyond this to subsequent Congresses, the other branches of the federal government, and the state legislatures.¹⁷² In looking at the latter, Justices should move beyond their almost singular focus on Virginia to consider similar debates in other states. And if Justices conclude that they should focus only on the thoughts and deeds of prominent Americans, surely they should consider the views of men such as George Washington, John Adams, James Wilson, Roger Sherman, John Witherspoon, and John Jay, in addition to Thomas Jefferson and James Madison.¹⁷³

As indicated by the above paragraph, carefully exploring the history of the First Amendment is hard work, and perhaps Justices simply do not have the time to do it well. But as Michael Flaherty says with respect to legal theorists, this is no excuse for “habits of poorly supported generalization—which at times fall below even the standards of undergraduate history writing.”¹⁷⁴ At a minimum, he contends that legal theorists should take advantage of “the often tedious work that keeps historians employed.”¹⁷⁵ Justice Souter makes a similar claim with respect to Justices in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.¹⁷⁶ Of course Justices cannot be expected to keep abreast with every minor development in the literature on religious liberty and church–state relations in the Founding era, but they

¹⁷² Of course when looking at the actions of state legislatures, scholars must take into account the possibility that some political leaders believed that the state governments could do things that the federal government could not.

¹⁷³ Good overviews of a broader range of Founders’ views of church–state relations may be found in DANIEL L. DREISBACH, MARK D. HALL & JEFFRY H. MORRISON, *THE FOUNDERS ON GOD AND GOVERNMENT* (2004) (containing essays about Washington, John Adams, Jefferson, Madison, Witherspoon, Franklin, Wilson, Mason, and the Carrolls); DANIEL L. DREISBACH, MARK D. HALL & JEFFRY H. MORRISON, *THE FORGOTTEN FOUNDERS ON CHURCH AND STATE* (forthcoming) (containing essays about Abigail Adams, Samuel Adams, Oliver Ellsworth, Alexander Hamilton, Patrick Henry, John Jay, Richard Henry Lee, Nathaniel Niles, Edmund Randolph, Benjamin Rush, Roger Sherman, and Mercy Otis Warren).

¹⁷⁴ Flaherty, *supra* note 5, at 526.

¹⁷⁵ *Id.* at 590.

¹⁷⁶ See 508 U.S. 520, 575 (1993) (Souter, J., concurring in part) (suggesting that the Court consider scholarship on the Free Exercise Clause’s original purpose and understanding).

clearly should do more than simply rely on *Everson*'s account of this history.

A cursory reading of Religion Clause cases reveals that Justices do in fact use academic scholarship to support their Religion Clause opinions. Selected examples include works by James M. O'Neill,¹⁷⁷ Leo Pfeffer,¹⁷⁸ Robert Cord,¹⁷⁹ Leonard Levy,¹⁸⁰ Michael McConnell,¹⁸¹ and Akhil Amar.¹⁸² It goes without saying that influence is not always reflected in the number of cita-

¹⁷⁷ JAMES M. O'NEILL, *RELIGION AND EDUCATION UNDER THE CONSTITUTION* (1949). Written in response to *Everson*, this book has only been cited in three Religion Clause opinions, but "it is still widely regarded as a leading manifesto for the nonpreferentialist position." Dreisbach, *supra* note 4, at 35.

¹⁷⁸ LEO PFEFFER, *CHURCH, STATE, AND FREEDOM* (1953). Pfeffer authored, coauthored, or edited numerous books supporting the strict separation of church and state. This volume is cited in six different Religion Clause cases: *McGowan v. Maryland*, 366 U.S. 420, 578 n.9 (1961) (Douglas, J., dissenting); *Abington School District v. Schempp*, 374 U.S. 203, 227 (1963); *McDaniel v. Paty*, 435 U.S. 618, 622 n.3 (1978); *Larson v. Valente*, 456 U.S. 228, 244 n.17 (1982); *Marsh v. Chambers*, 463 U.S. 783, 791 n.12 (1983); and *Lynch v. Donnelly*, 465 U.S. 668, 716 n.23 (1984) (Brennan, J., dissenting).

¹⁷⁹ CORD, *supra* note 5. The book helped lay the groundwork for Rehnquist's dissent in *Wallace*. See *Wallace v. Jaffree*, 472 U.S. 38, 104 (1985) (Rehnquist, J., dissenting). It has also been referenced in four other Religion Clause cases: *Lee v. Weisman*, 505 U.S. 577, 612 (1992) (Souter, J., concurring); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring); *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 855 (1995) (Thomas, J., concurring); and *McCreary County v. ACLU of Kentucky*, 125 S. Ct. 2722, 2745 (2005).

¹⁸⁰ LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (1986). Levy's attack on the nonpreferentialist interpretation of the Establishment Clause was written at least in part as a response to Rehnquist's opinion in *Wallace*. See LEVY, *supra*, at xvii-xviii. It has been cited by the Court in five Religion Clause opinions: *County of Allegheny v. ACLU*, 492 U.S. 573, 646 (1989) (Stevens, J., concurring in part and dissenting in part), *Lee*, 505 U.S. at 613 (Souter, J., concurring); *Rosenberger*, 515 U.S. at 869 (Souter, J., dissenting); *Agostini v. Felton*, 521 U.S. 203, 214 (1997); and *Cutter v. Wilkinson*, 544 U.S. 709, 729 (2005) (Thomas, J., concurring).

¹⁸¹ Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990). McConnell's article played a particularly prominent role in Justice O'Connor's opinion in *Boerne*. See *City of Boerne v. Flores*, 521 U.S. 507, 551, 553, 557-59 (1997) (O'Connor, J., dissenting). As well, it is cited in two other Religion Clause cases: *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 574 (1993) (Souter, J., concurring in part and concurring in the judgment); and *Board of Education v. Grumet*, 512 U.S. 687, 723 (1994) (Kennedy, J., concurring).

¹⁸² Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991). Amar's article, along with other scholarship, seems to have encouraged Justice Thomas to embrace a jurisdictional understanding of the Establishment Clause. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 679 n.4 (2002) (Thomas, J., concurring).

tions a work receives in Supreme Court opinions (for instance, Corwin's famous and influential response to *Everson* has been cited in only one Religion Clause case—and this more than a half a century after it was written).¹⁸³

Proposals that Justices seriously consider academic scholarship raise questions about how they have used such scholarship in the past. Do Justices use the best scholarship available? Do they consider a range of scholarship, or do separationist Justices simply cite separationist works and accommodationist Justices accommodationist works? Undoubtedly Justices appeal to books and essays simply because they support their desired outcomes—and of course citations may only be padding added by law clerks. Yet it is not unreasonable to assume that some articles and books have changed the way Justices view the First Amendment. Studying these issues in the context of the information provided in this Article could help resolve questions about the impact of academic scholarship on the Supreme Court's Religion Clause jurisprudence.

More broadly, this Article suggests lessons for how scholars might evaluate the use of history by Supreme Court Justices. Most literature on this subject relies on broad, unsupported generalizations about Justices' use of history or careful consideration of only a handful of cases. If studies such as this one are replicated for other areas of law, students of the Court will be able to better answer questions about whether Justices should use history to help them interpret the Constitution and the degree to which they are good historians.

In this Article, I have systematically investigated how Justices have used history in Religion Clause cases. I have shown that both liberal and conservative Justices often appeal to history to help them interpret the Religion Clauses, especially the Establishment Clause. I have not addressed the propriety of using history in this way, but I have suggested that *if* Justices are going to use history they should use good history. In the words of Edward S. Corwin, "the Court has the right to make history . . . but it has no right to *make it up*."¹⁸⁴

¹⁸³ Corwin, *supra* note 4. Corwin's article is cited by Scalia in *McCreary*, 125 S. Ct. at 2751 n.2 (Scalia, J., dissenting).

¹⁸⁴ EDWARD S. CORWIN, A CONSTITUTION OF POWERS IN A SECULAR STATE 116 (1951). This book is a slightly revised version of Corwin's *The Supreme Court as National School Board*, *supra* note 4.

APPENDIX 1

LIST OF RELIGION CLAUSE CASES CONSIDERED IN
THIS STUDY

The United States Supreme Court has decided 115 cases in which at least four Justices considered the Free Exercise or Establishment Clauses (or both) to raise substantial issues. This count does *not* include cases in which religion plays a significant role but were decided upon other constitutional or statutory grounds. Nor does it include cases where a Religion Clause claim is dismissed without serious consideration. Of these 115 cases, 60 primarily involved the Establishment Clause, 44 the Free Exercise Clause, and 11 concern both clauses:

1. *Reynolds v. United States*, 98 U.S. 145 (1878) (Free Exercise Clause).
2. *Davis v. Beason*, 133 U.S. 333 (1890) (Both Establishment and Free Exercise Clauses).
3. *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890) (Free Exercise Clause).
4. *Bradfield v. Roberts*, 175 U.S. 291 (1899) (Establishment Clause).
5. *Quick Bear v. Leupp*, 210 U.S. 50 (1908) (Establishment Clause).
6. *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (Free Exercise Clause).
7. *Minersville School District v. Gobitis*, 310 U.S. 586 (1940) (Free Exercise Clause).
8. *Cox v. New Hampshire*, 312 U.S. 569 (1941) (Free Exercise Clause).
9. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (Free Exercise Clause).
10. *Jones v. City of Opelika (I)*, 316 U.S. 584 (1942) (Free Exercise Clause).
11. *Jamison v. Texas*, 318 U.S. 413 (1943) (Free Exercise Clause).
12. *Largent v. Texas*, 318 U.S. 418 (1943) (Free Exercise Clause).
13. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (Free Exercise Clause).
14. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (Free Exercise Clause).

15. *Prince v. Massachusetts*, 321 U.S. 158 (1944) (Free Exercise Clause).
16. *Follett v. Town of McCormick*, 321 U.S. 573 (1944) (Free Exercise Clause).
17. *United States v. Ballard*, 322 U.S. 78 (1944) (Free Exercise Clause).
18. *In re Summers*, 325 U.S. 561 (1945) (Free Exercise Clause).
19. *Marsh v. Alabama*, 326 U.S. 501 (1946) (Free Exercise Clause).
20. *Tucker v. Texas*, 326 U.S. 517 (1946) (Free Exercise Clause).
21. *Cleveland v. United States*, 329 U.S. 14 (1946) (Free Exercise Clause).
22. *Everson v. Board of Education*, 330 U.S. 1 (1947) (Establishment Clause).
23. *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948) (Establishment Clause).
24. *Niemotko v. Maryland*, 340 U.S. 268 (1951) (Free Exercise Clause).
25. *Zorach v. Clauson*, 343 U.S. 306 (1952) (Establishment Clause).
26. *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952) (Free Exercise Clause).
27. *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (Free Exercise Clause).
28. *Poulos v. New Hampshire*, 345 U.S. 395 (1953) (Free Exercise Clause).
29. *McGowan v. Maryland*, 366 U.S. 420 (1961) (Establishment Clause).
30. *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961) (Establishment Clause).
31. *Braunfeld v. Brown*, 366 U.S. 599 (1961) (Free Exercise Clause).
32. *Gallagher v. Crown Kasher Super Market of Massachusetts, Inc.*, 366 U.S. 617 (1961) (Both Establishment and Free Exercise Clause).
33. *Torcaso v. Watkins*, 367 U.S. 488 (1961) (Establishment Clause).
34. *Engel v. Vitale*, 370 U.S. 421 (1962) (Establishment Clause).
35. *Abington School District v. Schempp*, 374 U.S. 203 (1963) (Establishment Clause).

36. *Sherbert v. Verner*, 374 U.S. 398 (1963) (Free Exercise Clause).
37. *Flast v. Cohen*, 392 U.S. 83 (1968) (Establishment Clause).
38. *Board of Education v. Allen*, 392 U.S. 236 (1968) (Establishment Clause).
39. *Epperson v. Arkansas*, 393 U.S. 97 (1968) (Establishment Clause).
40. *Presbyterian Church v. Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969) (Free Exercise Clause).
41. *Walz v. Tax Commission of New York City*, 397 U.S. 664 (1970) (Establishment Clause).
42. *Gillette v. United States*, 401 U.S. 437 (1971) (Establishment and Free Exercise Clause).
43. *Lemon v. Kurtzman (I)*, 403 U.S. 602 (1971) (Establishment Clause).
44. *Tilton v. Richardson*, 403 U.S. 672 (1971) (Establishment Clause).
45. *Cruz v. Beto*, 405 U.S. 319 (1972) (Free Exercise Clause).
46. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Free Exercise Clause).
47. *Lemon v. Kurtzman (II)*, 411 U.S. 192 (1973) (Establishment Clause).
48. *Norwood v. Harrison*, 413 U.S. 455 (1973) (Establishment and Free Exercise Clause).
49. *Levitt v. Committee for Public Education & Religious Liberty*, 413 U.S. 472 (1973) (Establishment Clause).
50. *Hunt v. McNair*, 413 U.S. 734 (1973) (Establishment Clause).
51. *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (Establishment Clause).
52. *Sloan v. Lemon*, 413 U.S. 825 (1973) (Establishment Clause).
53. *Johnson v. Robison*, 415 U.S. 361 (1974) (Free Exercise Clause).
54. *Meek v. Pittenger*, 421 U.S. 349 (1975) (Establishment Clause).
55. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) (Free Exercise Clause).
56. *Roemer v. Board of Public Works*, 426 U.S. 736 (1976) (Establishment Clause).

57. *Wolman v. Walter*, 433 U.S. 229 (1977) (Establishment Clause).
58. *New York v. Cathedral Academy*, 434 U.S. 125 (1977) (Establishment Clause).
59. *McDaniel v. Paty*, 435 U.S. 618 (1978) (Free Exercise Clause).
60. *Jones v. Wolf*, 443 U.S. 595 (1979) (Free Exercise Clause).
61. *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646 (1980) (Establishment Clause).
62. *Harris v. McRae*, 448 U.S. 297 (1980) (Establishment Clause).
63. *Stone v. Graham*, 449 U.S. 39 (1980) (Establishment Clause).
64. *Thomas v. Review Board*, 450 U.S. 707 (1981) (Establishment and Free Exercise Clause).
65. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (Free Exercise Clause).
66. *Widmar v. Vincent*, 454 U.S. 263 (1981) (Establishment and Free Exercise Clause).
67. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) (Establishment Clause).
68. *United States v. Lee*, 455 U.S. 252 (1982) (Free Exercise Clause).
69. *Larson v. Valente*, 456 U.S. 228 (1982) (Establishment Clause).
70. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (Establishment Clause).
71. *Bob Jones University v. United States*, 461 U.S. 574 (1983) (Establishment and Free Exercise Clause).
72. *Mueller v. Allen*, 463 U.S. 388 (1983) (Establishment Clause).
73. *Marsh v. Chambers*, 463 U.S. 783 (1983) (Establishment Clause).
74. *Lynch v. Donnelly*, 465 U.S. 668 (1984) (Establishment Clause).
75. *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985) (Establishment and Free Exercise Clause).
76. *Wallace v. Jaffree*, 472 U.S. 38 (1985) (Establishment Clause).

77. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (Establishment Clause).
78. *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985) (Establishment Clause).
79. *Aguilar v. Felton*, 473 U.S. 402 (1985) (Establishment Clause).
80. *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) (Establishment Clause).
81. *Bender v. Williamsport Area School District*, 475 U.S. 534 (1986) (Establishment Clause).
82. *Goldman v. Weinberger*, 475 U.S. 503 (1986) (Free Exercise Clause).
83. *Bowen v. Roy*, 476 U.S. 693 (1986) (Free Exercise Clause).
84. *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986) (Establishment and Free Exercise Clause).
85. *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987) (Free Exercise Clause).
86. *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (Free Exercise Clause).
87. *Edwards v. Aguillard*, 482 U.S. 578 (1987) (Establishment Clause).
88. *Corporation of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) (Establishment Clause).
89. *Lyng v. Northwest Indian Cemetery Protection Ass'n*, 485 U.S. 439 (1988) (Free Exercise Clause).
90. *Bowen v. Kendrick*, 487 U.S. 589 (1988) (Establishment Clause).
91. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (Establishment Clause).
92. *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989) (Free Exercise Clause).
93. *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680 (1989) (Establishment and Free Exercise Clause).
94. *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (Establishment Clause).
95. *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378 (1990) (Establishment and Free Exercise Clause).
96. *Employment Division, Department of Human Resources of*

- Oregon v. Smith*, 494 U.S. 872 (1990) (Free Exercise Clause).
97. *Board of Education v. Mergens*, 496 U.S. 226 (1990) (Establishment Clause).
98. *Lee v. Weisman*, 505 U.S. 577 (1992) (Establishment Clause).
99. *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) (Establishment Clause).
100. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (Free Exercise Clause).
101. *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993) (Establishment Clause).
102. *Board of Education v. Grumet*, 512 U.S. 687 (1994) (Establishment Clause).
103. *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995) (Establishment Clause).
104. *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995) (Establishment Clause).
105. *Agostini v. Felton*, 521 U.S. 203 (1997) (Establishment Clause).
106. *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Free Exercise Clause).
107. *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) (Establishment Clause).
108. *Mitchell v. Helms*, 530 U.S. 793 (2000) (Establishment Clause).
109. *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (Establishment Clause).
110. *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002) (Free Exercise Clause).
111. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Establishment Clause).
112. *Locke v. Davey*, 540 U.S. 712 (2004) (Free Exercise Clause).
113. *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (Establishment Clause).
114. *Van Orden v. Perry*, 545 U.S. 677 (2005) (Establishment Clause).
115. *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005) (Establishment Clause).