

LET HISTORY REPEAT ITSELF: SOLVING ORIGINALISM’S HISTORY PROBLEM IN INTERPRETING THE ESTABLISHMENT CLAUSE

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INTRODUCTION

The Supreme Court’s Establishment Clause jurisprudence is “in shambles” and has “confounded the lower courts.”¹ The Court does not “employ [an] analytically sequenced, tiered framework for judicial review” as it does in other constitutional contexts.² The current justices on the Court have widely divergent views on the Establishment Clause’s meaning,³ and the lone test that the Court created has been panned by several justices.⁴ Originalist judges, however, have had a fairly consistent approach to interpreting the Establishment Clause.⁵

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1. *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 13 (2011) (Thomas, J., dissenting from denial of certiorari).

2. Richard H. Fallon, Jr., *Tiers for the Establishment Clause*, 166 U. PA. L. REV. 59, 60 (2017).

3. *Compare* *Dunn v. Ray*, 139 S. Ct. 661, 662 (2019) (Kagan, J., dissenting from denial of application to stay) (describing the Establishment Clause’s “core principle” as “denominational neutrality”) with Frank Ravitch, *Judge Kavanaugh on Law and Religion Issues*, SCOTUSBLOG (July 30, 2018), <https://www.scotusblog.com/2018/07/judge-kavanaugh-on-law-and-religion-issues/> (describing Judge Kavanaugh’s Establishment Clause approach as akin to Judge Rehnquist’s, who “rarely agreed” that government action violated the Establishment Clause) and *Zelman v. Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., concurring) (showing Justice Thomas’ view that Establishment Clause interpretation might depend on whether the actor is the state or federal government).

4. *See, e.g., Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (describing the Establishment Clause test from *Lemon v. Kurtzman*, 403 U.S. 602, 614–615 (1971), as a “ghoul in a late night horror movie”); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 346 (1987) (O’Connor, J., concurring) (noting the difficulties with the *Lemon* test); *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 400 (1985) (White, J., dissenting) (expressing consternation with the *Lemon* test).

5. *See infra* Part I (describing Scalia and Rehnquist’s approaches).

This largely stems from the judges' reliance on history. From Rehnquist to Scalia to Thomas, originalist judges' views have emphasized that history is key in determining the meaning of the Establishment Clause.⁶

I argue that the originalist use of history in analyzing the Establishment Clause's limits on government is flawed. For the sake of simplicity, I assume—as does current Establishment Clause jurisprudence—that the Establishment Clause is incorporated against the states. I make no judgment on whether that position is correct, and it may not be. Rather, I argue that the use of history in determining the *scope* of the Establishment Clause has been faulty. The *object* of the Establishment Clause is a different question, and my conclusion very well may have an impact on that analysis.

Originalist Establishment Clause jurisprudence, deployed in the opinions of Justices Rehnquist and Scalia, is criticized for being an unprincipled interpretation of the Establishment Clause. Originalists encounter such criticism because the justices struggle to reconcile historical practice with the strict command of the Establishment Clause. In other contexts, particularly in interpreting the Free Speech Clause, the Confrontation Clause, and the Eighth Amendment, history is used more consistently in conducting originalist analysis. Given the intent and public meaning of the Bill of Rights, historical evidence should have the same place in Establishment Clause interpretation as it does in Free Speech Clause interpretation.

I. ORIGINALIST ESTABLISHMENT CLAUSE JURISPRUDENCE

The Court's 1947 decision in *Everson v. Board of Education*⁷ “gave birth to the modern Establishment Clause. . . .”⁸ Accordingly, only relatively recent opinions are useful in outlining any Establishment Clause theory. Furthermore, scholars identify Justices Rehnquist, Scalia, and Thomas as the leading originalist justices on the Establishment Clause.⁹ To avoid Justice Thomas's focus on

6. See Steven K. Green, *Bad History: The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. REV. 1717, 1736–37 (2006) (describing the originalist justices' reliance on history in interpreting the Establishment Clause).

7. 330 U.S. 1 (1947).

8. Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 675 (2002).

9. See, e.g., Andrew M. Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. L. REV. 727, 731–43 (2009) (describing the jurisprudence of Justices Thomas, Rehnquist, and Scalia).

incorporation,¹⁰ I will focus on the opinions of Justices Rehnquist and Scalia.

A. *Chief Justice William Rehnquist and the Establishment Clause*

Justice William Rehnquist had a “massive and enduring impact” on the Court’s Establishment Clause jurisprudence.¹¹ Before Rehnquist’s influence, the Court had taken a “wall of separation”¹² approach to the Establishment Clause and struck down most laws that breached that wall.¹³ Rehnquist, however, firmly rejected the wall of separation approach.¹⁴ His views changed the Court’s Establishment Clause jurisprudence and are the touchstone when examining modern originalist views on the subject.

Justice Rehnquist’s dissent in *Wallace v. Jaffree* was the first indication of his disapproval of the “wall of separation” theory. In *Jaffree*, the plaintiff challenged a set of Alabama statutes that authorized Christian prayer in all public schools.¹⁵ The Court held that the statutes were “intended to convey a message of state approval of prayer activities” and therefore violated the Establishment Clause.¹⁶ Rehnquist vigorously disagreed. He claimed that the *Everson* command of a wall of separation between church and state was historically inaccurate.¹⁷ After recounting the founding-era history surrounding the Establishment Clause, Rehnquist concluded that the Establishment Clause neither required neutrality nor prohibited nondiscriminatory aid to religion.¹⁸ Additionally, like many after him, he lamented the difficulties of the *Lemon* test.¹⁹ Rehnquist suggested

10. Justice Thomas argues that the Establishment Clause was only meant to constrain the federal government and should not be incorporated against the states. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 677–80 (2002) (Thomas, J., concurring).

11. Brett M. Kavanaugh, “From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist” (2017 Walter Berns Constitution Day Lecture) (available at <https://perma.cc/7243-K7E9>).

12. *Everson*, 330 U.S. at 16 (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1879)).

13. *See, e.g., Epperson v. Arkansas*, 393 U.S. 97 (1968) (striking down a law that forbid the teaching of evolution); *Engel v. Vitale*, 370 U.S. 421 (1962) (ruling that encouraged school prayer is unconstitutional). *Cf. Zellers v. Huff*, 236 P.2d 949 (N.M. 1951) (showing the influence of the “wall of separation” theory on state courts).

14. *See Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting) (“There is simply no historical foundation for the proposition that the Framers intended to build the ‘wall of separation’ that was constitutionalized in *Everson*.”).

15. *See id.* at 40.

16. *Id.* at 61.

17. *Id.* at 92 (Rehnquist, J., dissenting).

18. *Id.* at 106.

19. *Id.* at 108–13 (discussing *Lemon v. Kurtzman*, 403 U.S. 602, 614–15 (1971)). *See also*

that the intent of the Establishment Clause was only to “prohibit the designation of any church as a ‘national’ one.”²⁰ He was convinced that it did not demand neutrality.²¹

Rehnquist’s majority opinion three years later in *Bowen v. Kendrick*²² elucidated his approach to interpreting the Establishment Clause. At issue in *Bowen* was a federal grant program related to adolescent sexuality that funded, among other organizations, institutions tied to religion.²³ While nominally applying the *Lemon* test, Justice Rehnquist primarily focused on the secular aspects of the grant program.²⁴ He found no issue with the program because its actual purpose was secular and it did not have the primary effect of advancing religion.²⁵ He theorized that such funding programs could only violate the Establishment Clause if Congress’s “‘actual purpose’ in passing [the statute] was one of ‘endorsing religion’” or if “the aid flow[ed] to institutions that [were] ‘pervasively sectarian.’”²⁶ The fact that the government was funding religious institutions was of little import to Rehnquist—there needed to be something more for an Establishment Clause challenge to succeed.

Twelve years later, Justice Rehnquist again found himself in the dissent in *Santa Fe Independent School District v. Doe*.²⁷ In *Santa Fe*, the plaintiffs alleged that the Sante Fe School District engaged in various “proselytizing practices.”²⁸ The primary issue was a school-wide election to determine whether an invocation would be delivered at football games.²⁹ The Court held that the school’s policy violated the Establishment Clause because it “establishe[d] an improper majoritarian election on religion” and had “the purpose and create[ed]

Thomas C. Marks Jr. & Michael Bertolini, *Lemon is a Lemon: Toward a Rational Interpretation of the Establishment Clause*, 12 *BYU J. PUB. L.* 1, 2–13 (1997) (describing the difficulties with the *Lemon* test); Michael Stokes Paulsen, *Lemon is Dead*, 43 *CASE W. RES. L. REV.* 795, 800–13 (1993) (lamenting the difficulties of the *Lemon* test).

20. *Jaffree*, 472 U.S. at 113.

21. *See id.* (“[N]othing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means.”).

22. 487 U.S. 589 (1988).

23. *Id.* at 593–98.

24. *Id.* at 602–15.

25. *Id.* at 604, 605–12.

26. *Id.* at 604, 610.

27. 530 U.S. 290 (2000).

28. *See id.* at 295 (describing plaintiffs’ issues with the school district encouraging membership in religious clubs, distributing Bibles, and allowing students to read Christian invocations).

29. *Id.* at 297–98.

the perception of encouraging the delivery of prayer at . . . important school events.”³⁰ Justice Rehnquist dissented, joined by Justices Scalia and Thomas. He took issue with the majority “[bristling] with hostility to all things religious in public life.”³¹ He believed that an election would sufficiently dissociate the prayer from the government, and deferred to the school’s stated secular purpose.³² Finally, Justice Rehnquist rejected the idea that the Establishment Clause required content neutrality.³³

Justice Rehnquist’s opinions in *Jaffree*, *Bowers*, and *Santa Fe Indep. Sch. Dist.* help to broadly outline his views on the Establishment Clause. He believed that, considering the the practices of the Founders, the mere interaction of church and state was not nearly enough to raise Establishment Clause issues.³⁴ Moreover, he did not think that the Establishment Clause required neutrality or government dissociation from religion.³⁵ A valid secular purpose would be enough to save a challenged policy.³⁶ In his view, a policy would have an Establishment Clause problem only if the federal (or state) government designated an official religion, endorsed religion, or funded pervasively sectarian institutions.³⁷

B. Justice Antonin Scalia and the Establishment Clause

Unsurprisingly, Justice Scalia’s Establishment Clause jurisprudence was guided by his views on interpreting the Constitution.³⁸ Rehnquist, as shown above, started the originalist pushback against the *Everson* “wall of separation” approach. Scalia carried that mantle forward, as the “field general of the Rehnquist Court’s moderate-to-conservative bloc . . . [with] his troops ready to ‘storm the next walled city of separation.’”³⁹

30. *Id.* at 317.

31. *Id.* at 318 (Rehnquist, J., dissenting).

32. *Id.* at 321–22.

33. *Id.* at 325.

34. *See id.* at 318; *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985).

35. *See Jaffree*, 472 U.S. at 113.

36. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 322; *Bowers v. Hardwick*, 487 U.S. 589, 604 (1988).

37. *See Jaffree*, 472 U.S. at 113; *Bowers*, 487 U.S. at 604, 610.

38. *See generally* ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997) (providing insight into Scalia’s interpretive methods).

39. Eric R. Claeys, *Justice Scalia and the Religion Clauses: A Comment on Professor Epps*, 21 WASH. U. J. L. & POL’Y 349, 349 (2006) (quoting Garrett Epps, *Some Animals Are More Equal than Others: The Rehnquist Court and “Majority Religion,”* 21 WASH. U. J. L. & POL’Y 323, 326 (2006)).

Scalia's first opinion regarding the Establishment Clause appeared as a dissent in *Edwards v. Aguillard*.⁴⁰ There, parents of Louisiana children challenged the Creationism Act, which forbade the teaching of evolution unless it was taught alongside creationism.⁴¹ The Court held that the Act "advance[d] a religious doctrine by requiring either the banishment of the theory of evolution from public school classrooms or the presentation of a religious viewpoint that rejects evolution in its entirety," and thus violated the Establishment Clause.⁴² Justice Scalia dissented and was joined by Chief Justice Rehnquist. Skeptically applying the *Lemon* test, Scalia argued that because the act's *sole* purpose was not to advance religion, it did not violate the Establishment Clause as the First Amendment does not "forbid legislators merely to act upon their religious convictions."⁴³ He disregarded the fact that creation science aligned with the beliefs of some religions.⁴⁴ In fact, he argued that the Establishment Clause sometimes requires government action—such as the statute at issue—to prevent the inhibition of religion.⁴⁵

Justice Scalia again dissented in *Lee v. Weisman*.⁴⁶ In *Weisman*, the plaintiff challenged a public school's policy of having nonsectarian prayers before its graduation.⁴⁷ The Court held that the prayer practice persuaded students "to participate in a religious exercise" and was thus unconstitutional.⁴⁸ Justice Scalia, meanwhile, focused on the history of prayer during public ceremonies.⁴⁹ He described the frequent use of public prayer over time, up until the time the case was filed.⁵⁰ He also vehemently rejected the Court's idea of psychological coercion, believing that coercion could only be backed by threat of penalty.⁵¹ He believed that the Establishment Clause only prohibited establishment "coerced by the force of law."⁵²

40. 482 U.S. 578 (1987).

41. *Id.* at 596.

42. *Id.* at 596–97.

43. *Id.* at 612–15 (Scalia, J., dissenting).

44. *Id.* at 616.

45. *See id.* at 616–18 (also noting that similarly, the Free Exercise Clause sometimes required government action).

46. 505 U.S. 577 (1992).

47. *See id.* at 581–84.

48. *Id.* at 599.

49. *Id.* at 633 (Scalia, J., dissenting).

50. *Id.* at 633–35.

51. *See id.* at 637–39, 642.

52. *Id.* at 641 (emphasis omitted).

Justice Scalia found himself in both the majority and the dissent in the two “Ten Commandments cases”—*Van Orden v. Perry*⁵³ and *McCreary County v. ACLU*.⁵⁴ The two cases both turned on the vote of Justice Breyer.⁵⁵ Both cases involved a state display of the Ten Commandments: one on the grounds of the Texas State Capitol, and the other in two Kentucky county courthouses.⁵⁶ Justice Souter wrote the majority opinion in *McCreary County*. He used “neutrality as an interpretive guide” and held that the display had a “predominantly religious purpose.”⁵⁷ Justice Rehnquist wrote the majority opinion in *Van Orden* and held that displays had “dual significance, partaking of both religion and government.”⁵⁸ He concluded they did not violate the Establishment Clause.

Justice Scalia explained his views on the displays in his dissent in *McCreary County*. He rejected the idea that religion in public life had to be nondenominational.⁵⁹ He argued that the nation’s historical practices “demonstrate[d] that there is a distance between the acknowledgement of a single Creator and the establishment of religion.”⁶⁰ Because most Americans were monotheists (Christians, Jews, and Muslims), he reasoned that honoring the Ten Commandments was “indistinguishable . . . from publicly honoring God.”⁶¹ Scalia found his support in the official actions of the Founders and the First Congress, which he believed were the best evidence of how the Founders meant the Establishment Clause to be read.⁶²

Scalia’s Establishment Clause jurisprudence mirrored Rehnquist’s. He believed that as long as the sole purpose of a government action was not religious, it would not run into Establishment Clause problems.⁶³ Neither the fact that a policy was aligned with a religion nor the fact that it promoted monotheism was problematic.⁶⁴ He believed that the government did not need to act neutrally toward religion; it

53. 545 U.S. 677 (2005).

54. 545 U.S. 844 (2005) (Scalia, J., dissenting).

55. Thomas Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U. L. REV. 1097, 1097 (2006).

56. *McCreary Cty.*, 545 U.S. at 851; *Van Orden*, 545 U.S. at 681.

57. *McCreary Cty.*, 545 U.S. at 874, 881.

58. *Van Orden*, 545 U.S. at 691.

59. *McCreary Cty.*, 545 U.S. at 893.

60. *Id.* at 894.

61. *Id.*

62. *Id.* at 895–97.

63. See *Edwards v. Aguillard*, 482 U.S. 578, 612–15 (1987) (Scalia, J., dissenting).

64. *Id.* at 616; *McCreary Cty.*, 545 U.S. at 894.

merely could not establish a national religion by the force of law.⁶⁵

II. A CRITICISM OF ORIGINALIST ESTABLISHMENT CLAUSE JURISPRUDENCE

Scalia's and Rehnquist's views on the Establishment Clause have been heavily criticized. Justice Scalia has been accused of veiling his value choices under a cloak of unbiased judicial interpretation.⁶⁶ Both Scalia and Rehnquist have been criticized for historical inaccuracies.⁶⁷ Because their views are substantially the same, the criticisms are alike. Most focus on their methods of determining the original intent of the Founders. Specifically, critics allege that determining the intent of the Establishment Clause is uniquely difficult due to the conflicting and incomplete sources available to interpreters.

Interpreters of the Establishment Clause have a unique problem when attempting to determine its meaning. While Rehnquist and Scalia believed that the historical evidence strongly favored their jurisprudential approach, some scholars have shown that the historical evidence does not clearly support any one interpretation.⁶⁸ Because of this, critics of originalist Establishment Clause jurisprudence believe that "there is no single, objective original meaning that can be discerned from the incomplete and often contradictory historical record"⁶⁹ Thus, they see Scalia's and Rehnquist's "historical analysis" as nothing more than a mere choice between many equally persuasive authorities.

Professor Leonard Levy recounts the history of religion in the United States, specifically up until the time of the passage of the Bill of Rights.⁷⁰ Most colonies had an established religion and discriminated against non-believers.⁷¹ Following the Revolution, however, some New

65. See *Lee v. Weisman*, 505 U.S. 577, 641 (1992).

66. Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 385 (2000).

67. See Koppelman, *supra* note 9, at 731–41 (pointing out the holes in both Justices' historical examination).

68. See Frank Guliuzza III, *The Practical Perils of an Original Intent-Based Judicial Philosophy: Originalism and the Church-State Test Case*, 42 DRAKE L. REV. 343, 382 (1993) ("The conclusions of the separationists and the accommodationists, though they are looking at exactly the same historical evidence, are often 180 degrees apart.")

69. Colby, *supra* note 55, at 1138.

70. See generally LEONARD LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (1994).

71. *Id.* at 1.

England states pushed for greater separation of church and state.⁷² During the framing of the Constitution, there was a “widespread understanding . . . that the new central government would have no power whatever to legislate on the subject of religion.”⁷³ Finally, in ratifying the Establishment Clause itself, there is some indication that the state ratifiers understood that it would not be interpreted narrowly.⁷⁴

Whatever that broad history of religion in the early Republic might have indicated, Rehnquist and Scalia particularly focused on the views and actions of James Madison and some of his contemporaries during and after the framing of the Bill of Rights. For example, after describing those views in his *Jaffree* dissent, Rehnquist characterized Madison as believing that the Establishment Clause was “designed to prohibit the establishment of a national religion . . . not . . . as requiring neutrality on the part of government between religion and irreligion.”⁷⁵ Similarly, in *McCreary County*, Scalia described the various actions of the Framers and took them to be highly probative of the meaning of the Establishment Clause.⁷⁶ The views and actions of the Framers came to be the sources that the two justices primarily relied on in determining the original meaning of the Establishment Clause.

The use of those sources of evidence has drawn significant criticism. Take the example of nonpreferential aid. As shown above, Justice Rehnquist believed that the Establishment Clause did not forbid such aid,⁷⁷ relying in part on historical practice at the time.⁷⁸ Professor Doug Laycock disagrees. He argues that the Framers’ actions are not by themselves a good indicator of what is constitutional.⁷⁹ To effectively use their actions as evidence, an interpreter must “identify some principled distinction between the practices the Framers accepted and those they rejected,” and determine whether that implicit principle should be followed.⁸⁰ After examining the Framers’ actions, Laycock

72. *See id.* at 28–51 (describing actions that some New England states took to separate church and state). Levy describes some of the actions that Southern states took as well, *see id.* at 52–78.

73. *Id.* at 93.

74. *See id.* at 111 (describing how Virginia ratifiers understood the Establishment Clause).

75. *Wallace v. Jaffree*, 472 U.S. 38, 98 (1985).

76. *See* 545 U.S. 844, 893–94 (2005).

77. *See infra* Part II.A.

78. *See* Douglas Laycock, “Nonpreferential” Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 913 (1986).

79. *Id.*

80. *Id.* at 914.

determines that the distinction to be drawn was not between preferential and nonpreferential aid, but between financial and nonfinancial aid.⁸¹ Essentially, he believes that Rehnquist needed to inquire more subtly into the historical record to determine what the Framers' actions said about their views of the Establishment Clause.

Critics have also attacked originalist justices' reliance on Madison and his contemporaries to justify their positions. Once again, the example of nonpreferential aid is apt. Levy argues that nonpreferentialists are "wrong in thinking that they have a prop in Madison."⁸² He analyzes Madison's actions both as a Framer and as President⁸³ and concludes that the Madisonian view is that "religion will exist in greater purity without the aid of government."⁸⁴ This view not only rejects nonpreferentialism, but also requires the *Everson* wall of separation.⁸⁵ Similarly, Professor Frank Guliuzza thoroughly examines the writing of scholars who attempt to interpret the intentions of the First Congress in enacting the Establishment Clause.⁸⁶ He concludes that in looking at the same evidence, proponents and opponents of original intention interpretation can come to opposite conclusions.⁸⁷ He posits that this may be because the originalists have "simply propos[ed] a different interpretation of the historical evidence."⁸⁸ The evidence is the same, but the nonpreferentialists claim that their interpretation is superior, without offering reasons for why this is so.

Historical evidence can support both the nonpreferentialist and the strict separationist, rendering it unhelpful in determining the original intent of the Framers. In *Van Orden* and *McCreary County*, for example, Scalia and Rehnquist deferred to the statements of George Washington and John Adams to support their idea that such an intertwining of religion and government was not unconstitutional.⁸⁹

81. *Id.* at 914–19.

82. Levy, *supra* note 70, at 114.

83. *See id.* at 115–34.

84. *Id.* at 144.

85. *See id.* at 145 n.91 (noting that Madison in his "Memorial and Remonstrance" talked about the wall of separation).

86. *See generally* Guliuzza, *supra* note 68.

87. *Id.* at 382.

88. *Id.* at 383.

89. *See Van Orden v. Perry*, 545 U.S. 677, 687 (2005) (recounting George Washington's Thanksgiving Proclamation, which continuously mentioned God); *McCreary Cty. v. ACLU*, 545 U.S. 844, 887–88 (2005) (Scalia, J., dissenting) (using John Adams' letter to the Massachusetts Militia saying that "[o]ur Constitution was made only for a moral and religious people." (quoting 9 Works of John Adams 229 (C. Adams ed. 1971))).

Justice Stevens took issue with that deference in his *Van Orden* dissent. He noted that Thomas Jefferson—another Framer—had refused to issue a statement similar to Washington’s for fear of violating the Establishment Clause.⁹⁰ He also quoted James Madison—who Rehnquist and Scalia cited frequently—to argue that Government should be entirely divested from religion.⁹¹ Opponents of Scalia and Rehnquist continually cite the Framers’ actions and views in their condemnation of the originalist interpretation.⁹²

In sum, critics of Scalia and Rehnquist believe that the justices’ determination of the original intent is incomplete and arbitrary. While they do point to historical facts, the critics disagree with the characterization of such evidence as dispositive. Some historical practices, views, and writings may point toward nonpreferentialism, but a closer or different examination may indicate otherwise. Finally, the fact that both strict separationists and nonpreferentialists can both point to historical evidence for support undercuts the originalists’ argument that their interpretation is required by the original intent.

III. ORIGINALISM’S ESTABLISHMENT CLAUSE PROBLEM

So what is the issue? Why do originalists have such a problem with the Establishment Clause? Why do people consistently claim that in interpreting the Establishment Clause, originalists fail to follow the principles that guide their interpretation in other settings?⁹³ In interpreting the Establishment Clause, originalists have trouble with history. There is “bad history.”⁹⁴ And there is good history.⁹⁵ But the main trouble that permeates originalist Establishment Clause

90. *Van Orden*, 545 U.S. at 724.

91. *Id.* at 725. See, e.g., *McCreary Cty.*, 545 U.S. at 888 (Scalia, J., dissenting) (citing Madison’s First Inaugural Address); *Wallace v. Jaffree*, 472 U.S. 38, 93 (1984) (Rehnquist, J., dissenting) (citing Madison’s remarks in the House of Representatives).

92. See, e.g., Caroline Mala Corbin, *Justice Scalia, the Establishment Clause, and Christian Privilege*, 15 FIRST AM. L. REV. 185, 214 (2016) (using Madison’s *Memorial and Remonstrance Against Religious Assessments* to criticize Scalia); Koppelman, *supra* note 9, at 746–48 (using the same to criticize Scalia, Thomas, and Rehnquist); *Lee v. Weisman*, 505 U.S. 577, 612–16 (1992) (Souter, J., concurring) (using the debates in the First Congress to argue that the Establishment Clause prohibited both preferential and nonpreferential aid).

93. See Koppelman, *supra* note 9, at 728 (outlining the “proper originalist way” to interpret the Establishment Clause and then asserting that originalist judges do not use that method); John C. Jeffries Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 281 (2001) (“Whatever the modern [Establishment Clause] decisions may be thought to represent . . . they cannot persuasively be attributed to original understanding.”).

94. See Green, *supra* note 6, at 1717.

95. See *infra*, part II (describing Scalia and Rehnquist’s use of history).

jurisprudence is squaring the historical practices of the Founders with the command of the Establishment Clause itself.

Establishment Clause jurisprudence has generally relied on history to some extent. Take, for example, *Town of Greece v. Galloway*.⁹⁶ In *Town of Greece*, the plaintiffs challenged a town board’s policy of having volunteers conduct prayers before the start of each town hall meeting.⁹⁷ Relying on the Court’s opinion in *Marsh v. Chambers*,⁹⁸ Justice Kennedy found the practice to be constitutional. He focused on the “unambiguous and unbroken history” of legislative prayer, which helped guide his Establishment Clause interpretation.⁹⁹ Justice Alito also emphasized that historical practice in his concurrence.¹⁰⁰ Even Justice Kagan in her dissent acknowledged that the Founders’ tradition gave legislative prayer a “distinctive constitutional warrant.”¹⁰¹

So history does have a role in interpreting the Establishment Clause, for both non-originalists and originalists. But originalist interpreters have erred in two ways. First, they have failed to offer a principled approach as to *what* Founding-era evidence should be determinative rather than informative. Second, and relatedly, they have inconsistently determined *how much weight* they should put on specific evidence from history. And these errors engender the criticisms discussed above.¹⁰²

Compare *Town of Greece*—where all of the justices agreed that the practices of the Founders were highly probative of how to interpret the Establishment Clause—to Rehnquist’s dissent in *Jaffree*. There, Rehnquist quickly discounted the “wall of separation” from Thomas Jefferson—a Framers in his own right.¹⁰³ He discussed the advantages someone like James Madison might have had over Jefferson.¹⁰⁴ He then recounted the founding debates over the Bill of Rights and the Religion Clauses.¹⁰⁵ This included statements from Madison, resolutions from representatives, and indicative actions from the

96. 572 U.S. 565 (2014).

97. *Id.* at 570–71.

98. 463 U.S. 783 (1983).

99. *Town of Greece*, 572 U.S. at 576 (quoting *Marsh*, 463 U.S. at 792).

100. *See id.* at 600–03 (Alito, J., concurring).

101. *Id.* at 622 (Kagan, J., dissenting).

102. *See supra* Part II.A.

103. *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985).

104. *Id.*

105. *See id.* at 92–103 (recounting, among other things, James Madison’s statements in the House of Representatives as well as other Representative’s thoughts).

Framers themselves.¹⁰⁶ Rehnquist concluded that this evidence meant that the Establishment Clause had the “well-accepted meaning” of forbidding the establishment of a national religion and the preference between religions, but nothing more.¹⁰⁷

In deploying history in such a way, Rehnquist runs squarely into the criticisms outlined above. For example, he does not determine *why* the First Congress decided not to limit land grants for schools in the Northwest Territory to public schools (a limitation which Professor Laycock’s proposed approach would require).¹⁰⁸ He merely says that “it seems highly unlikely that the House of Representatives would simultaneously consider proposed amendments to the Constitution and enact an important piece of territorial legislation which conflicted with the intent of these proposals.”¹⁰⁹ But that is not an effective guiding principle, as it is well established that the Founders did act in unconstitutional ways.¹¹⁰ Furthermore, in her *Jaffree* concurrence, Justice O’Connor criticized Rehnquist’s use of history. She argued that Rehnquist’s dissent did not show that the Founders specifically encouraged prayer in public schools.¹¹¹ The history Rehnquist used is in stark contrast to the use of history in *Town of Greece*. While the majority in *Town of Greece* identified a specific practice that had persisted since the time of the Founders, Rehnquist used founding-era debates, actions, and pronouncements to determine the original intent behind the Establishment Clause and apply it definitively.

Justice Scalia similarly relied on history in his *McCreary County* dissent.¹¹² And as shown above, the majority also relied on history in disagreeing with him.¹¹³ Their only disagreement was about how to weigh the historical evidence. In addressing Justice Stevens’s concerns, Scalia claimed that because he relied on “official acts and official proclamations of the United States” and “statements of Founders who occupied federal office, and spoke in at least a quasi-official capacity,” his evidence was more compelling than Stevens’s.¹¹⁴ He analyzed Stevens’s evidence, which included the Memorial and Remonstrance,

106. *Id.* at 97–106.

107. *Id.* at 106.

108. *See id.* at 100.

109. *Id.*

110. *See, e.g.,* *Marbury v. Madison*, 1 Cranch 137 (1803) (overturning the Judiciary Act of 1789, which was passed by the Founders).

111. *Jaffree*, 472 U.S. at 80 (O’Connor, J., concurring).

112. *See* Part I.B.

113. *See* Part II.A.

114. *McCreary Cty. v. ACLU*, 545 U.S. 844, 895–96 (2005).

Thomas Jefferson’s refusal to issue a Thanksgiving Proclamation, and letters from Madison, discounting it as non-official.¹¹⁵ But in *Van Orden*, Stevens turned the tables: he criticized Scalia for “fail[ing] to account for the acts and publicly espoused views of other influential leaders.”¹¹⁶ Stevens was right to note that Scalia merely ignored and minimized the historical evidence that contradicted him. His reasoning—the unofficial nature of Stevens’s evidence—falls flat, as it seems to be nothing but an argument that furthers Scalia’s reasoning. And so again it seems that the interpretation is a choice of historical evidence more than anything else.

At bottom, using history is valid. Even non-originalists have accepted that history has a powerful and sometimes dispositive effect on the Establishment Clause. But not in every instance. A single action of the Founders is not determinative of its constitutionality. Nor should some historical evidence be more persuasive than others because it is “official.” There must be a better way to use history in interpreting the Establishment Clause.

IV. USING HISTORY IN OTHER CONTEXTS

An originalist understanding of any part of the Constitution requires historical inquiry. Because, as shown above, the originalist use of history in the Establishment Clause context has been unpersuasive, examining history’s use in originalist interpretation in other contexts is helpful in determining its proper role. History is prevalent in the originalist jurisprudence in the Free Speech, Confrontation Clause, and Eighth Amendment contexts.

A. *History’s Role in Interpreting the Free Speech Clause*

History has played an important part in outlining Free Speech jurisprudence. Specifically, it helps to decide what the First Amendment *does not* protect. For example, in *United States v. Stevens*,¹¹⁷ the government argued that a restriction on certain depictions of animal cruelty, “crush videos,”¹¹⁸ was not protected by the First Amendment. The Supreme Court disagreed. Justice Roberts—joined by all except Justice Alito—explained that “[f]rom 1791 to the present’ . . . the First Amendment has ‘permitted restrictions upon the

115. *Id.*

116. *Van Orden v. Perry*, 545 U.S. 677, 724 (2005) (Stevens, J., dissenting).

117. 559 U.S. 460 (2010).

118. For an explanation of crush videos, see *Stevens*, 559 U.S. at 464–66.

content of speech in a few limited areas,' and has never 'included a freedom to disregard these traditional limitations.'"¹¹⁹ While the government argued that the United States had a long history of prohibiting animal cruelty, Roberts was more concerned about whether *depictions* of animal cruelty were historically prohibited.¹²⁰ Roberts was explicit: for something to be outside of the protection of the First Amendment, it had to be within a "previously recognized, long-established category of unprotected speech."¹²¹

Although the Court had not been so explicit about the importance of history in the years before, its explanation was consistent with its prior rulings. For example, in *Roth v. United States*, the Court considered a challenge to a federal obscenity statute.¹²² In explaining why the obscenity statute was not unconstitutional, the Court noted that not only had it always assumed that obscenity was not protected by the First Amendment, but the history of the United States bolstered that assumption as well.¹²³ The Court noted that many states criminalized profanity and that it had been criminalized as early as 1712.¹²⁴ It cited "contemporaneous evidence to show that obscenity . . . was outside the protection [of the First Amendment]."¹²⁵

In the Free Speech context, history defines the scope of the Clause's protection. History is important because of the language of the First Amendment. The command is extreme: "Congress shall make no law . . . abridging the freedom of speech."¹²⁶ But no court thought that the Amendment protected all speech, as there were "historic and traditional categories [of limitations] long familiar to the bar."¹²⁷ And to find those limitations, one had to conduct a detailed historical inquiry into the precise depictions and speech that the United States community has consistently held to be not protected by the First Amendment. That does include obscenity, defamation, fraud, and

119. *Id.* at 468 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992)).

120. *Id.* at 469.

121. *Id.* at 471.

122. 354 U.S. 476, 479 (1957).

123. *Id.* at 481–82.

124. *Id.* at 482.

125. *Id.* at n.13 (citing various founding-era laws that criminalized obscenity).

126. U.S. CONST. amend. I.

127. *United States v. Stevens*, 559 U.S. 460, 468 (2010) (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring)).

incitement.¹²⁸ But that does not include depictions of animal cruelty, hate speech, and pornography.¹²⁹

B. *History's Role in Interpreting the Confrontation Clause*

History has also played an important role in determining the policies that the Confrontation Clause furthers and the rights it protects. Any interpretation of the Clause requires an examination of history. The motivations underlying the Confrontation Clause can be traced to the Roman and British common law times, long before the United States was founded.¹³⁰ History is vital for the Confrontation Clause to be fully understood and applied.

Justice Scalia used history to understand and apply the Confrontation Clause in *Crawford v. Washington*.¹³¹ *Crawford* involved a defendant's challenge to the state's use of a police tape-recording of his wife's testimony when she would not testify due to marital privilege.¹³² To determine whether this violated the Confrontation Clause, Justice Scalia looked beyond the ambiguous text.¹³³ He turned to history, focusing on the Clause's English common-law roots.¹³⁴ He then turned to its use in the colonies, noting that many of their declarations of rights "guaranteed a right of confrontation."¹³⁵ He finally examined early state-court decisions about the right of confrontation.¹³⁶

After examining the text, Scalia drew two conclusions about the Confrontation Clause: first, the "principal evil" at which the Confrontation Clause was directed,¹³⁷ and second, a specific policy that the Framers would have supported.¹³⁸ Specifically, Scalia said that "the

128. See *id.* at 468 (citing *Roth*, 354 U.S. at 483 (obscenity); *Beauharnais v. Illinois*, 343 U.S. 250, 254–55 (1952) (defamation); *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (fraud); *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (*per curiam*) (incitement)).

129. See *Stevens*, 559 U.S. at 482 (finding unconstitutional the statute prohibiting crush videos), *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 258 (2002) (protecting virtual child pornography), *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992) (protecting racist cross burning).

130. Frank T. Read, *The New Confrontation-Hearsay Dilemma*, 45 S. CAL. L. REV. 1, 5–6 (1972).

131. 541 U.S. 36, 43 (2004).

132. *Id.* at 40.

133. *Id.* at 42–43.

134. *Id.* at 43–47.

135. *Id.* at 47–48.

136. *Id.* at 49–50.

137. *Id.* at 50.

138. *Id.* at 53–54.

Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”¹³⁹ What is critical is the fact that history, not reason or policy, led Scalia to two conclusions. First, a conclusion about the general intent of the clause. And second, an actual policy that the clause itself commanded. The historical understanding of both the general purposes behind the Clause and the specific policies the Clause pursued determined how the Clause itself applied.

C. *History’s Role in Interpreting the Eighth Amendment*

History also plays a central role for originalists in interpreting the Eighth Amendment. Justice Scalia approached the Cruel and Unusual Punishments Clause as “intend[ing] to prohibit only certain inherently cruel forms of punishment . . . that were already unacceptable by the end of the eighteenth century.”¹⁴⁰ This interpretation would mean that the Cruel and Unusual Punishment Clause would not outlaw sentences that might today be considered unfair, such as disproportionate sentencing or capital punishment.¹⁴¹

Professor John Stinneford has extensively explored the role of history in Eighth Amendment jurisprudence. He starts with the term “unusual” and argues that understanding the term requires deciphering what early Americans understood the term to mean.¹⁴² He claims that they understood it as addressing actions that were “contrary to ‘long usage.’”¹⁴³ After recounting the history during colonial times, the Revolution, the Founding, and early case law,¹⁴⁴ he concludes that an unusual punishment is one that is “contrary to our longstanding traditions.”¹⁴⁵ His analysis is similar for the word “cruel,”¹⁴⁶ and he

139. *Id.*

140. John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1742 (2008) (citing *Harmelin v. Michigan*, 501 U.S. 957, 966–85 (1991)). Scalia did note that he could be considered a “faint-hearted originalist” with respect to the Eighth Amendment, see *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989). But the very fact that he called himself *faint-hearted* means he acknowledged what originalism required in the Eighth Amendment context.

141. *Id.*

142. *Id.* at 1770.

143. *Id.*

144. *See id.* at 1771–1815.

145. *Id.* at 1815.

146. *See* John F. Stinneford, *The Original Meaning of “Cruel,”* 105 GEO. L.J. 441, 473–93 (recounting the historical understanding of the word “cruel”).

concludes that the term means “unjustly harsh” and does not require cruel intent.¹⁴⁷

Although the use of history in the Eighth Amendment jurisprudence is slightly different than in the Free Speech and Confrontation Clause contexts, an originalist approach still requires a detailed inquiry into history. Because the words of the Eighth Amendment are ambiguous, history determines its meaning. Originalist Eighth Amendment jurisprudence uses historical inquiry in the same manner as the Free Speech Clause and Confrontation Clause contexts, as history defines what the words mean.

V. THE SOLUTION

As shown in the previous Part, history is an essential tool for originalists in interpreting the Constitution. Constitutional interpretation generally deploys historical analysis in order to determine the meaning and scope of specific clauses. Nevertheless, the originalist use of history in Establishment Clause jurisprudence is flawed. Critics of this approach make valid arguments.

Like the Confrontation Clause and Eighth Amendment, the Establishment Clause requires the use of history to discover the meaning of its particular words. Originalist Establishment Clause jurisprudence needs to reorient itself to become more consistent with originalist principles. This requires aligning Establishment Clause use of history with the originalists’ use of history in interpreting the Free Speech Clause (as shown above).¹⁴⁸ In doing so, I first examine originalist Free Speech doctrine as a whole and conclude that its use of history is actually originalist. I then argue that the text of the two clauses and the original intent and public meaning of the Bill of Rights indicate that they should be interpreted similarly. Finally, I identify what this means: the Establishment Clause should reject government intervention in all cases except where there is a clearly identified, principled, widespread, and long-standing historical practice of government involvement.

147. *Id.* at 494.

148. *See supra* section IV.A.

A. *The Originalist Use of History in Current Free Speech Doctrine*

Modern free speech jurisprudence may not, on the whole, be originalist.¹⁴⁹ But that is an undertaking for a different piece. Here, I merely seek to establish that the Court's *use of history* in the free speech context is originalist. To do that, I will mainly study Justice Scalia's free speech jurisprudence and his use of history. In doing so, I will show that his use of history was quite similar to Roberts's use of history in defining the scope of the Free Speech Clause in *Stevens*.

Justice Scalia anticipated Roberts's characterization of the free speech clause in *Stevens* in his majority opinion in *R.A.V. v. City of St. Paul, Minnesota*.¹⁵⁰ He recognized what Justice Roberts would lay out nineteen years later in *Stevens*: the scope of First Amendment protection was determined by history. He wrote that "[f]rom 1791 to the present . . . our society . . . has permitted restrictions upon the content of speech in a few limited areas," calling this a "limited categorical approach."¹⁵¹ This was not because those topics were not speech; rather, it was because of "*their constitutionally proscribable content*."¹⁵² The proscribability of such content was wholly determined by history.

His acceptance of this line of thinking was affirmed in *Brown v. Entertainment Merchants Association*.¹⁵³ In *Brown*, video game companies filed a challenge to a California law that restricted the sale or rental of violent video games to minors.¹⁵⁴ Justice Scalia held that the law was unconstitutional and violated the First Amendment.¹⁵⁵ What is important, however, was Scalia's adherence to and approval of the Court's reasoning in *Stevens*.¹⁵⁶ He first generally characterized the basic command of the First Amendment: that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."¹⁵⁷ He then listed the matters outside of First Amendment protection, explaining that punishment of such speech

149. See David Lat, *Justice Scalia, Originalism, Free Speech And The First Amendment*, ABOVE THE LAW (November 22, 2016), <https://abovethelaw.com/2016/11/justice-scalia-originalism-free-speech-and-the-first-amendment/> (relating Michael McConnell's comment that "free speech has been kind of a desert when it comes to originalism").

150. 505 U.S. 377 (1992).

151. *Id.* at 383.

152. *Id.*

153. 564 U.S. 786 (2011).

154. *Id.* at 789.

155. *Id.* at 805.

156. See *supra* Part IV.A.

157. *Brown*, 564 U.S. at 790–91 (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)).

“[has] never been thought to raise any Constitutional problem.”¹⁵⁸ In rejecting California’s claim that history did not matter in *Stevens*,¹⁵⁹ Scalia clung to Justice Roberts’s language. He held that content was not outside of First Amendment protection “without persuasive evidence that [such] a novel restriction on content [was] part of a long . . . tradition of proscription.”¹⁶⁰ Because violence was consistently held to not be obscene, there had to be a “longstanding tradition in [the United States] of specially restricting children’s access to depictions of violence” for the California law to be constitutional.¹⁶¹ After recounting the history of violence in youth entertainment over time, he concluded that there was never a clearly held and longstanding tradition of the country restricting it.¹⁶²

Other Scalia opinions confirm that this was how he viewed history in interpreting the Free Speech Clause. For example, in *Republican Party of Minnesota v. White*, he considered a Minnesota Supreme Court rule that prohibited judicial candidates from “announcing their views on disputed legal and political issues.”¹⁶³ The Eighth Circuit sustained the rule, relying “on the fact that a pervasive practice of prohibiting judicial candidates from discussing disputed legal and political issues developed during the last half of the 20th century.”¹⁶⁴ Scalia acknowledged that a “‘universal and long-established’ tradition of prohibiting certain conduct creates ‘a strong presumption’ that the prohibition is constitutional.”¹⁶⁵ But he disputed the Eighth Circuit’s holding that this specific practice was longstanding or universal.¹⁶⁶ He dove deep into the history of judicial elections at the time of the founding and found no evidence of the same restrictions.¹⁶⁷ While there were some restrictions on judicial conduct, by no means were they deeply held as traditions or widespread.¹⁶⁸

158. *Id.* at 791 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

159. *Id.* at 792.

160. *Id.*

161. *Id.* at 795.

162. *See id.* at 795–98.

163. 536 U.S. 765, 768 (2002).

164. *Id.* at 785.

165. *Id.* (quoting *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 375–77 (1995) (Scalia, J., dissenting)).

166. *Id.*

167. *Id.* at 785–86.

168. *Id.* at 786.

Finally, Justice Scalia’s concurring opinion in *Citizens United v. Federal Election Commission*¹⁶⁹ used history in the same way. While the dissent attempted to explain the Framers’ views about the role of corporations in society,¹⁷⁰ Scalia specifically examined early speech restrictions as they pertained to corporations. He noted that there was no “textual exception for speech by corporations” even though corporations existed and “actively petitioned” the early Government.¹⁷¹ He also pointed out that the dissent offered no evidence—save for “postratification practice”¹⁷²—that “the First Amendment’s unqualified text was originally understood to exclude . . . associational speech from its protection.”¹⁷³ Finally, he concluded that the historical evidence “provide[d] no support for the proposition that the First Amendment excludes conduct of artificial legal entities from the scope of its protection.”¹⁷⁴ Essentially, Scalia argued in *Citizens United* that there was a historical burden. The burden was on the dissenters—who argued that corporations were *outside* of the scope of First Amendment protection—to prove that history showed their argument was consistent with a longstanding historical practice.

Justice Scalia’s vision of free speech jurisprudence was similar to Justice Roberts’s view in *Stevens*. He anticipated Roberts’s characterization of unprotected speech as being within a “previously recognized, long-established category of unprotected speech”¹⁷⁵ in *R.A.V.* and supported that sentiment in *Brown*. He also used history to determine whether speech was outside protection in *White* and demanded more historical evidence in order to establish the same in *Citizens United*.

B. The Establishment Clause and Free Speech Clause Jurisprudence Should Use History in Similar Ways

Having established that the Court’s use of history in free speech jurisprudence is originalist, I now turn to why that should inform originalist Establishment Clause jurisprudence. Although the two clauses do appear in the same Amendment of the Constitution,¹⁷⁶ that

169. 558 U.S. 310 (2010).

170. *See id.* at 425–32 (Breyer, J., dissenting).

171. *Id.* at 388–89 (Scalia, J., concurring).

172. *Id.* at 389 n.5.

173. *Id.* at 389.

174. *Id.* at 390.

175. *United States v. Stevens*, 559 U.S. 460, 471 (2010).

176. U.S. CONST. amend. I.

does not mean they should be interpreted similarly — and the Supreme Court has not done so. But an originalist interpretation should *use history* consistently. First, the text of the two clauses is similarly structured, making history useful in the same way for both. And second, an originalist reading of the Bill of Rights — intent or public meaning focused — shows that the ultimate goal of the Bill of Rights as a whole was to impose restrictions on the federal government.

The relevant parts of the First Amendment command that “Congress shall make no law respecting an establishment of religion . . . or abridging the freedom of speech.”¹⁷⁷ Both clauses are clear as to the substance that they are addressing: establishment of religion and the freedom of speech.¹⁷⁸ The verbs, however, that cause consternation. The Establishment Clause is vague because of its use of the word “respecting.”¹⁷⁹ And the Free Speech Clause is distinctly vague because of its use of the word “abridging.”¹⁸⁰

Philosophers of language and constitutional historians may argue that those two verbs have specific and ascertainable meanings. For example, constitutional historians have attempted to define the scope of the word “respecting” by examining the history surrounding the codification of the First Amendment in general and the Establishment Clause in particular.¹⁸¹ This logic should be flipped on its head. With such ambiguous words, an interpreter should first understand what the purpose of the substantive guarantee was (as I attempt to do below). Then, the interpreter should use history to determine what actions, in light of that purpose, are constitutional or not. This method of interpretation is what the Supreme Court’s approach to free speech interpretation has looked like, time and again.¹⁸²

177. *Id.*

178. I acknowledge that some may quibble with my assertion that those concepts are clear on their face. This point is well taken, but I merely wish to show that the *objects* of First Amendment protection are clear, while the *actions* that the government may not take with respect to that object are less clear.

179. See Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1834 (2009) (explaining that the establishment clause is ambiguous).

180. See Philip B. Kurland, *The Irrelevance of the Constitution: The First Amendment’s Freedom of Speech and Freedom of Press Clauses*, 29 DRAKE L. REV. 1, 2 (1980) (describing the “basic ambiguity” in the free speech clause).

181. See, e.g., Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489, 583–96 (2011).

182. See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 451–53 (2011) (describing the motivations behind the First Amendment and then holding that offensive speech about a matter of public concern was protected by the First Amendment); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (describing the “bedrock principle” of the First Amendment and then explaining that there was

To determine what the purpose of the substantive guarantee of the Establishment Clause was, we must look at the Bill of Rights as a whole. Originalists have attempted to understand text by looking at its author's original intent or at what the original public meaning of the text would have been.¹⁸³ One reaches the same conclusion about the purpose of codifying the Bill of Rights using either method. Determining the original intent and public meaning of the Bill of Rights is a massive undertaking that I cannot accomplish myself. In this section, however, I aim only to summarize some of the works that show that the Bill of Rights—and thus the Establishment Clause—was broadly targeted at furthering the idea of limited government.

The Framers intended the Bill of Rights to be a constraint on the federal government. Although the original drafting of the Constitution imposed some limits on the federal government, “the Bill of Rights contained explicit limitations on government.”¹⁸⁴ After the Constitution was ratified, influential individuals such as James Madison believed that “the American people expected the First Congress to deal immediately with amendments protecting personal liberty. . . .”¹⁸⁵ Many citizens were “concerned about the potentially sweeping powers that Congress would have under the Constitution. . . .”¹⁸⁶ As such, the “Bill of Rights serves primarily and fundamentally as a means of limiting government. . . . [It] simply provides an additional constitutional mandate for limited government.”¹⁸⁷ Those who opposed the Bill of Rights did so not out of support for bigger government but because they believed the Constitution already constrained the government enough.¹⁸⁸ Those who supported it did so because they did not trust that the Constitution as written would sufficiently limit

no historical exception allowing for regulation of flag burning); *Roth v. United States*, 354 U.S. 476, 484, 481 (1957) (describing the purpose of the freedom of speech and using history to determine that obscenity is outside of that freedom).

183. See Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 609 (2004) (distinguishing between types of originalism that focus on the “concrete intentions of individual drafters” rather than on “public meaning”).

184. Patrick M. Garry, *Liberty through Limits: The Bill of Rights as Limited Government Provisions*, 62 SMU L. REV. 1745, 1757 (2009).

185. RICHARD LABUNSKI, *JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS* 195 (2006).

186. *Id.* at 197.

187. Garry, *supra* note 184, at 1757.

188. See *id.* at 1758 (“According to the Federalists, the structural design of the Constitution would effectively protect individual’s rights and liberties by granting only limited powers to the new federal government.”). See, e.g., LABUNSKI, *supra* note 185, at 223 (describing how Roger Sherman thought an original draft of the Establishment Clause was unnecessary because he believed Congress already had no power to establish religion).

government.¹⁸⁹ The argument over the Bill of Rights was one over necessity; its opponents and proponents agreed that its effect was to constrain the government.

The public would have understood the Bill of Rights to be government-constraining as well.¹⁹⁰ Vasan Kesavan and Michael Paulsen have identified “second-best” sources of original public meaning.¹⁹¹ These sources are to be consulted if the “text of the Constitution does not conclusively answer a constitutional question” and include the public writings of the Federalists and Anti-Federalists, the public debates of the state ratifying conventions, early precedents of the Constitution, and works of early constitutional commentators.¹⁹² I will touch briefly on the public writings of the Federalists and Anti-Federalists and the ratification debates of the Bill of Rights, which also show that the Bill of Rights would have been understood as government-constraining.

The Antifederalists started campaigning for a Bill of Rights “immediately after the Constitutional Convention adjourned.”¹⁹³ Individuals such as Richard Henry Lee wrote that the great power that would be available to the federal government had the potential to corrupt and spurred the need for an explicit declaration of rights.¹⁹⁴ In response, Federalists such as James Wilson argued that a bill of rights was not needed “because it would imply that the federal government had ‘some degree of power’ in every area”¹⁹⁵ This idea became the “‘official’ Federalist explanation for the lack of a federal bill of rights” and was accepted by all Federalists, including James Madison.¹⁹⁶ The debate was one of consequences: neither the Federalists nor the Anti-

189. See Garry, *supra* note 184, at 1759 (“The Anti-Federalists did not trust that the structural provisions in the original Constitution would sufficiently limit the power of government . . .”).

190. Randy Barnett has pointed out that the Establishment Clause itself is written as a limitation on (admittedly federal) government power. See Randy E. Barnett, *Kurt Lash’s Majoritarian Difficulty*, 60 STAN. L. REV. 937, 949 (2008) (describing the Establishment Clause as a “limitation of federal power”).

191. Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1148 (2003).

192. *Id.*

193. John P. Kaminski, *Restoring the Grand Security: The Debate Over a Federal Bill of Rights, 1787-1792*, 33 SANTA CLARA L. REV. 887, 893 (1983).

194. *Id.* at 893–94 (quoting 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 323 (John P. Kaminski et al. eds., 1981)).

195. *Id.* at 895 (quoting JAMES WILSON, AN ADDRESS TO A MEETING OF THE CITIZENS OF PHILADELPHIA (1787), reprinted in 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 528–32 (1971)).

196. *Id.* at 895–96.

Federalists disagreed that the provisions in the Bill of Rights itself would be constraining on the government.

The ratification of the Bill of Rights in the states further shows that the public would have understood it as government-constraining. Not much is known about the debates over the Bill of Rights,¹⁹⁷ but what is known is that those who supported it focused on its effect on the government. John Hancock told Massachusetts ratifiers that the Bill of Rights “prevents government from verging towards despotism.”¹⁹⁸ Additionally, Virginia postponed voting on some of the amendments because they fell short of “effectually guarding against the apprehended mischief of the government” that the Virginia convention amendments proposed.¹⁹⁹

This examination of the original intent and public meaning of the Bill of Rights is not meant to be exhaustive. Many other more experienced and more knowledgeable authors have written on the debates over the Bill of Rights. What I have shown, however, is that both proponents and opponents of the Bill of Rights— Framers and the public alike—acknowledged that the new government needed to be constrained. Opponents believed that a bill of rights would actually *expand* the powers of the government by what it left out, while proponents believed that the Bill of Rights was necessary to *restrict* the powers of the government. Whatever their arguments, the Bill of Rights was passed. Regardless of what implications it had for federal power not within its scope, all agreed it limited government power in the areas it was directed.

C. *Using History in Interpreting the Establishment Clause*

Because the text of the First Amendment and the original understanding and public meaning of the Bill of Rights implicate a parallel between the Establishment Clause and free speech clause, history should serve the same purpose in both settings. Having outlined the originalist use of history in the free speech clause in Part V.A, this Part will show how a parallel use of history in the Establishment Clause would work.

The Supreme Court’s jurisprudence in the legislative prayer setting serves as an example.²⁰⁰ In *Town of Greece*, all of the writers—majority,

197. *Id.* at 921.

198. LABUNSKI, *supra* note 185, at 246 (internal quotation marks and citations omitted).

199. Kaminski, *supra* note 1933, at 928.

200. *See* Part III.

concurrence, and dissent—agreed that legislative prayer had a special place in Establishment Clause jurisprudence because of its historical roots.²⁰¹ That analysis is similar to the analysis in *Stevens*.²⁰² Both Justice Roberts in *Stevens* and Justice Kennedy in *Town of Greece* acknowledged that specific historical practices determined the scope of the First Amendment’s warrant. In *Stevens*, the historical practices helped to determine what speech was *not* protected by the First Amendment. And in *Town of Greece*, historical practice helped to determine what government actions would *not violate* the Establishment Clause.

This approach would presumably uphold other government actions with respect to religion (absent powerful historical research to the contrary). Specifically, government actions that might be considered “ceremonial deism”²⁰³ would not run afoul of such an interpretation. Justice Brennan, dissenting in *Lynch v. Donnelly*, admitted even then that government actions such as “the designation of ‘In God We Trust’ as our national motto, or the references to God contained in the Pledge of Allegiance” would not violate the Establishment Clause, in part because of their long use in America’s history.²⁰⁴ The majority in *Lynch* noted that “it has never been thought either possible or desirable to enforce a regime of total separation”²⁰⁵ just as the “prevention and punishment of [certain kinds of speech] have never been thought to raise any Constitutional problem.”²⁰⁶

Other kinds of government action related to religion might require more extensive historical research. Unlike legislative prayer—whose deep historical roots were widely acknowledged—many government actions have not been shown to be so deeply held. Religious symbols such as the Ten Commandments displays in *Van Orden* and *McCreary County* or the Christmas displays in *Lynch* are not the same as legislative prayer. There has not been a longstanding practice of the Ten Commandments being posted by the government in every forum.²⁰⁷

201. See sources cited, *supra* notes 99–101.

202. See Part IV.A.

203. *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting) (quoting Arthur E. Sutherland, *Book Review*, *IND. L. J.* 83, 86 (1964) (quoting Dean Rostow’s 1962 Meiklejohn Lecture delivered at Brown University)).

204. See *id.* at 716–17.

205. *Id.* at 673 (majority opinion) (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973)).

206. *United States v. Stevens*, 559 U.S. 460, 469 (2010) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)).

207. See, e.g., *Stone v. Graham*, 449 U.S. 39 (1980) (*per curiam*) (holding that a Kentucky

But the United States does have some tradition of posting the Ten Commandments in certain places.²⁰⁸ The historical inquiry would play a central role in determining what a longstanding historical practice is.

This historical inquiry would limit the scope of the “exceptions” to the Establishment Clause. In order for a governmental action to be constitutional, it would have to be longstanding and recognized in the same way obscenity, libel, slander, and the rest of the free speech exceptions are recognized. As evidenced in Parts II.A and III, this would not be easy for the Establishment Clause. The historical record is murky, and both the separationists and the accommodationists²⁰⁹ often have history on their side. In such situations, there would inherently not be a longstanding historical practice and thus no exception. While that may be drastic, that mirrors the approach that free speech takes. And, as shown above, that is in line with the intent of the Bill of Rights, which was designed to be government-constraining.

CONCLUSION

At the outset, I noted that I was assuming the fact that the Establishment Clause has been incorporated against the states, as doing so opens another door that has been explored extensively by other authors. But my approach does call into question that incorporation. If the Bill of Rights was intended as a restriction on the federal government and if we must utilize history in a certain way because of that, then incorporation becomes a dispositive question. If the Fourteenth Amendment was *not* specifically intended to transfer those limits on the federal government to state governments, this use of history would only be applicable to federal actions (where very few Establishment Clause cases arise). But that is another work for another time.

Is my proposed use of history originalist? Originalists such as Scalia and Rehnquist squarely rejected approaches such as this, as it seems to support the “wall of separation” that Scalia and Rehnquist were eager to tear down. But Justice Hugo Black was the one who “carried [the

statute requiring the posting of the Ten Commandments on the wall of each public classroom violated the Establishment Clause).

208. *See* Van Orden v. Perry, 545 U.S. 677, 689–90 (2005) (describing longstanding areas where the Ten Commandments have been posted, including in the Library of Congress, the National Archives, the Department of Justice, and the District of Columbia federal courthouse).

209. *See supra* note 68.

wall of separation] into the modern era,”²¹⁰ and some have called him the “inventor of originalism.”²¹¹

The Establishment Clause is unique. Because its historical record and text are ambiguous, we must look beyond those sources. And today we have the benefit of extensive historical analysis of the Bill of Rights. The Bill of Rights would have been understood and intended as a constraint on the federal government, and that is the approach we must follow. That is what free speech jurisprudence does. Having the benefit of years of free speech jurisprudence, we should use history similarly in the Establishment Clause context. History is vital in originalism, and rightly so. But it must be carefully and properly used.

210. Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 349 n.10 (1984).

211. NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR’S GREAT SUPREME COURT JUSTICES 145 (2010). *See also* D.A. Jeremy Telman, *Originalism: A Thing Worth Doing*, 42 OHIO N.U. L. REV. 529, 535 n.23 (describing examples of Black’s use of originalism).