NOTES

Forgetting to Weight: The Use of History in the Supreme Court’s Establishment Clause

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INTRODUCTION

History matters. It especially matters in the context of interpreting the First Amendment’s Establishment Clause. Since nearly the founding of the republic, jurists and commentators have recognized that the historical understanding\(^1\) of the Establishment Clause should guide contemporary interpretation. James Madison, in one of his final statements on church-state relations, acknowledged that debate on the topic was properly illuminated by history.\(^2\) “[O]n this question,” he wrote in an 1833 letter, “experience will be an admitted umpire.”\(^3\)

Madison’s reliance on history is instructive not merely because of his influ-

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1. Terms such as “original understanding,” “original intent,” and “original meaning” are laden with commentary that disputes both the definition of these terms and the propriety of using the interpretive methods embodied by them. See generally ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007); ANTONIN SCALIA, A MATTER OF INTERPRETATION (Amy Gutmann ed., 1997). For reasons that will become clear in Part I, this Note uses the term “historical understanding” in order to avoid the need to discuss these disputes at length. Historical understanding is intended to mean loosely the construction that pertinent persons who were alive at or near the time that the First Amendment was adopted would have given to it.

2. See Letter from James Madison to Jasper Adams (Sept. 1833), in THE SACRED RIGHTS OF CONSCIENCE: SELECTED READINGS ON RELIGIOUS LIBERTY AND CHURCH-STATE RELATIONS IN THE AMERICAN FOUNDING 612, 613 (David L. Dreisbach & Mark David Hall eds., 2009) [hereinafter SACRED RIGHTS] (describing the history and status of the states with respect to legally established churches).

3. Id. at 612.
ence on constitutional matters, but also because he wrote in an era that bears marked similarities to the modern debate on the Establishment Clause’s meaning. Madison’s letter was addressed to Reverend Jasper Adams, an Episcopal minister. Adams had recently delivered a sermon to his fellow clergymen arguing that religion, particularly Christianity, was a fundamental pillar of civil society and government and that religion could not flourish without government support. The sermon was largely a foray into a decade-old debate between Thomas Jefferson and Justice Joseph Story. Jefferson had attempted to dismantle the then widely held assumption that Christianity was a part of the received common law; Justice Story offered the main rebuttal. Relying on Story’s Commentaries, Adams argued that “establishment,” as used in the common law of England and the colonies, meant “the preference and establishment given by law to one sect of Christians over every other.” Consequently, the reference to “establishment” in the First Amendment also had a non-preferential meaning. In Adams’s estimation, the disestablishment language in many states’ constitutions only intended to “disclaim all preference of one sect of Christians over another,” and the First Amendment “leaves the entire subject [of religion] in the same situation in which it found it.”

It was in this context that Adams solicited responses to his sermon from the prominent scholars and statesmen of the day. In his letter to Adams, Madison first recounted that five colonies had disclaimed any religious establishment and argued that those southern states that had renounced their former establishments.

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5. Thomas Jefferson, Whether Christianity is Part of the Common Law? (1764), in Sacred Rights, supra note 2, at 539; see also Letter from Thomas Jefferson to Major John Cartwright (June 5, 1824), in Sacred Rights, supra note 2, at 547–50 (outlining chain of commentator errors leading to the assumed inclusion of Christianity in common law).


7. 3 Joseph Story, Commentaries on the Constitution of the United States; with a Preliminary Review of the Constitutional History of the Colonies and States, Before the Adoption of the Constitution (1833). Story recounted the history of England and the colonies in “foster[ing] and encourag[ing] the Christian religion” and concluded that when the First Amendment was adopted “the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state.” Id. §§ 1867–1868. As for the Federal government, the “real object of the [First] Amendment was . . . to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.” Id. § 1871. With the federal government proscribed from preferring a given sect, “the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions.” Id. § 1873.

8. Adams, supra note 4, at 13 n.†.


10. Adams, supra note 4, at 13.
had suffered no harm to the social order.\textsuperscript{11} After summarizing this history, Madison rejected Adams’s views on establishment. He believed that the tendency of each institution to corrupt the other was “best guarded against by an entire abstinence of the Government from interference, in any way whatever” in religion.\textsuperscript{12}

This early interpretive debate foreshadowed the contest now waged by modern antagonists. On one side, Adams and Justice Story claimed the Establishment Clause permits federal support of religion generally, so long as it offers no sect an exclusive preference.\textsuperscript{13} Madison and, presumably, Jefferson occupied an opposing position: The separation called for by the Establishment Clause requires the government to eschew the support of religion, regardless of whether one sect is preferred over others.\textsuperscript{14} These positions mirror those held by participants in the modern debate.\textsuperscript{15} Non-preferentialists, in general, contend that government may support religion, providing no one religious group is preferred; separationists maintain that government support of religion at all violates the Establishment Clause.\textsuperscript{16} Remarkably, the lines of argument espoused today were already drawn by the time Adams preached his sermon. Even more remarkable is that as early as the 1830s, both sides of the debate agreed—implicitly or (in Madison’s case) explicitly—that historical understanding was an indispensible guide to interpreting the Establishment Clause.

Despite the importance that has long been placed on historical understanding, the methods that commentators and the Supreme Court have used to interpret it have been unacceptably poor. This Note does \textit{not} offer a revision of Framing-era history, nor does it attempt to develop an overarching Establishment Clause standard. Instead, the focus of this Note is to identify the cause of the turn to “bad history” and then to suggest one method for improving the current state of

\textsuperscript{11} Letter from James Madison to Jasper Adams \textit{in Sacred Rights}, \textit{supra} note 2, at 613.

\textsuperscript{12} \textit{Id.} at 614.

\textsuperscript{13} In his letter responding to the sermon, Justice Story affirmed Adams’s analysis: “Christianity is indispensible to the true interests & solid foundations of all free governments. I distinguish, as you do, between the establishment of a particular sect, as the Religion of the State, & the Establishment of Christianity itself, without any preference of any particular form of it.” Letter from Joseph Story to Jasper Adams (May 14, 1833), \textit{in Sacred Rights}, \textit{supra} note 2, at 611.

\textsuperscript{14} \textit{See Religion and Politics, supra} note 4, at 20 (finding that Madison adopted a “separationist stance” in the letter). \textit{But see Rodney K. Smith, Public Prayer and the Constitution} 112–14 (1987) (suggesting that Madison may have allowed for non-preferential support of all religion and may have opposed Adams on the non-preferential support of all Christian denominations, to the exclusion of other religions).

\textsuperscript{15} \textit{Religion and Politics, supra} note 4, at 22, 152.

historical analysis in Establishment jurisprudence. To do so, the Note first
reexamines the importance of the use of historical understanding to Estab-
ishment Clause interpretation from a modern perspective in Part I. Then, it
summarizes both the Supreme Court’s use of historical evidence and the
criticism that has followed, describing the deleterious result of engaging in
bad history in Part II. Part III pinpoints the root cause of the Court’s bad history
as the failure to properly weight historical evidence and proposes a method to
address this shortfall. Finally, the Note turns to the concept of the rhetorical
presidency as an example of the proposed method in Part IV.

I. THE IMPORTANCE OF HISTORY IN ESTABLISHMENT CLAUSE INTERPRETATION

The interpretative significance of historical understanding, acknowledged in
the nation’s early days, remains potent even in modern contexts, including the
Supreme Court’s Establishment Clause jurisprudence. Both normative and
descriptive reasons exist for the Court to analyze history accurately. This Part will
discuss these reasons in turn: (A) as a normative matter, many justices and
commentators have argued that the Court should rely on a historical understand-
ing because it can be a helpful guide to interpretation; and (B) as a descriptive
matter, regardless of whether reliance on historical understanding is proper, the
Court has observed, and continues to observe, the historical understanding in
interpreting and applying the Establishment Clause.

A. NORMATIVE REASONS WHY HISTORY MATTERS

The historical understanding of the Establishment Clause matters because it
can help guide the decisional processes of the Court. This is true both for jurists
who adhere to an originalist approach and, less intuitively, for those who do not.17 In fact, justices of both stripes have often used history to shape current Establishment case law.

Originalists. For originalists, the appeal of historical understanding is obvi-
ous. The great object of originalism is to find some detached standard of
interpretation against which to measure a court’s decision—all as a method to
prevent judicial willfulness.18 Historical analysis is inextricably related to the
very task that originalists set for themselves: defining the constitutional provi-
sion at issue in terms of its original design. Often, delineating the historical
understanding of any constitutional provision is seen as a prerequisite to rightly
determining its legal meaning.19 Further, for originalists, historical understand-

17. Like viewpoints concerning separationism and non-preferentialism, see supra note 16, the
categorization of interpretive methods into opposing originalist and non-originalist camps is an
oversimplification. Many forms of originalism exist, and non-originalist positions are equally varied.
SMITH, supra note 14, at 1. However, for this Note, the oversimplified categorization is sufficient.
18. See SCALIA, supra note 1, at 44–47 (criticizing the standard-less approach of the “Living Con-
stitution” interpretation).
ing may be the means to obtain the holy grail of the religion clauses: a sound principle for “solving” the apparent contradiction found in the Free Exercise and Establishment Clauses. Most importantly for this Note, originalists see their “solution” as the result of applying a more-or-less objective standard—original intent or understanding as derived from historical analysis—and not the product of judicial willfulness.

Members of the Supreme Court have espoused roughly this view in Establishment cases since the early 1980s. In Marsh v. Chambers, the majority found the First Congress’s appointment of a chaplain revealed “what the draftsmen intended” the Establishment Clause to mean and that this intent was “contemporaneous and weighty evidence of its true meaning.” In his Wallace v. Jaffree dissent, Justice William Rehnquist warned the Court that “[a]ny deviation from [the Framers’] intentions frustrates the permanence of [the Establishment Clause] and will only lead to . . . unprincipled decisionmaking.” Justice Anthony Kennedy’s opinion in County of Allegheny v. ACLU, relying on Marsh, argued that the modern meaning of the Establishment Clause could not contradict how it was originally understood, as determined by historical practices. Justice Antonin Scalia, having joined with Justice Kennedy in Allegheny, dissented from the Kennedy-led majority in Lee v. Weisman, believing the majority’s application of the Establishment Clause did not square with historical practice. Justice Scalia affirmed his allegiance to originalist principles in later cases, finding that disregard for history had resulted in unprincipled and inconsistent decisions. Throughout these opinions beats a constant theme: failure to rely on

20. See id. at 7 (“Historical exegesis . . . yield[s] . . . a viable and just means of reconciling the purposes or values of the Free Exercise and Establishment clauses.”). Both commentators and courts have noted that the religion clauses, at least on the surface, seem paradoxical. See, e.g., Sch. Dist. v. Schempp, 374 U.S. 203, 309 (1963) (Stewart, J., dissenting) (“There are areas in which a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause.”). Justice Potter Stewart offered one example where the purposes of the clauses might conflict:

Spending federal funds to employ chaplains for the armed forces might be said to violate the Establishment Clause. Yet a lonely soldier stationed in some far-away outpost could surely complain that a government which did not provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion.

Id.

21. See Smith, supra note 14, at 131 (claiming that “principled historical exegesis” both solves the religion clauses’ contradiction and “lend[s] support to the general notion that the judiciary should judge rather than legislate”); see also Steven K. Green, “Bad History”: The Lure of History in Establishment Clause Adjudication, 81 Notre Dame L. Rev. 1717, 1736 (2006) (“Originalism leads to consistency, predictability, and, most important for originalists, judicial fidelity to the text rather than to a judge’s own ideological predilections.”); H. Jefferson Powell, Rules for Originalists, 73 Va. L. Rev. 659, 660 (1987) (“The originalist insists that judges must refrain from imposing their personal preferences in a democratic society.”).

26. See Van Orden v. Perry, 545 U.S. 677, 692 (2005) (Scalia, J., concurring) (describing preference for jurisprudence in accord with historical practices, which can be consistently applied); Bd. of Educ. v.
original understanding or intent, as demarcated by historical understanding, leaves Establishment Clause interpretation at the mercy of judicial predilection.

Non-Originalists. Though the draw of it is less obvious for non-originalists, a historical understanding retains important interpretive value outside originalist methodology. This suggests normative reasons for its use even by ardent non-originalists. One might reasonably assume that rejecting originalist models of interpretation implicitly includes a rejection of reliance on the historical understanding. That is not the case. Even for non-originalists, the historical understanding of the Establishment Clause merits study for at least two reasons.

First, historical understanding may have a legitimizing function. One reason that originalism is so alluring is because it offers “an aura of authority and objectivity.” Yet, this impression of authority need not flow from the originalist notion of an objective, unchanging meaning in the text; instead, it can flow from appeal to history itself, a practice that may be employed by non-originalists with equal results. A non-originalist court may thus look to history not to determine the correct interpretation of a provision but rather to assure the public that the interpretation it espouses is not inconsistent with the American experience. Furthermore, history acts as a commonly-agreed-upon “independent and apolitical source of information.” Courts can confidently appeal to Founding-era history because, deserved or not, it is deemed “conclusive and sacred,” untinged by skewed accounts. A court, by relying on historical under-

Grumet, 512 U.S. 687, 732 (1994) (Scalia, J., dissenting) (cautioning that the abandonment of history would allow the Court to name religious toleration an Establishment violation).

27. But see infra notes 44–46 and accompanying text.
28. Green, supra note 21, at 1728.
29. See Jack N. Rakove, Fidelity Through History (or to It), 65 FORDHAM L. REV. 1587, 1591 (1997) (“[T]he role that appeals to history play . . . [is] not as the reasons driving decisions, but as an attractive rhetorical method of reassuring citizens that courts are acting consistently with deeply held values.”).
30. Id.; see also Mark DeWolfe Howe, The Garden and the Wilderness: Religion and Government in American Constitutional History 167–68 (1965) (“[T]he Court has promulgated interpretations of history, not in order to tell accurately the story of the past, but in order to legitimate its own judgment of policy.”). The distinction between using history as objectively authoritative and using it as a non-authoritative legitimating device is a subtle one. See Smith, supra note 14, at 6 (acknowledging that some differences between originalists and non-originalists are merely a matter of emphasis). It often invites a charge that the Court is dissembling—feigning allegiance to an objective standard in order to curry favor with the public. Id.; see Erwin Chemerinsky, History, Tradition, the Supreme Court, and the First Amendment, 44 HASTINGS L.J. 901, 908 (1997) (“[J]udges want very much to make it appear that their decisions are not based on their personal opinions, but instead are derived from an external source.”). But this need not be the case. A judge can disclaim the authority of history and still recognize that history happens to agree with his interpretation. Mere recognition of the fact is not necessarily dishonest. See Ronald Dworkin, Law’s Empire 227–28 (1986) (“Law as integrity . . . does not aim to recapture, even for present law, the ideals or practical purposes of the politicians who first created it. It aims rather to justify what they did . . . in an overall story worth telling now, a story with a complex claim: that present practice can be organized by and justified in principles sufficiently attractive to provide an honorable future.”).
31. Green, supra note 21, at 1728.
32. Id. (quoting The Federalist No. 20, at 138 (James Madison & Alexander Hamilton) (Clinton Rossiter ed., 1961)).
standing, thus avoids the criticism associated with using purportedly biased sources.

Second, using a historical understanding may perform a “distilling” function. Even if history holds no independent interpretive value under a “Living Constitution” theory, history can yet aid interpretation by distilling a set of principles that have been useful guideposts in the past.\(^3^3\) Once the authority of original intent or meaning is rejected, a court has still to determine what rule of law a constitutional provision requires, given the evolving standards of modern society. Importantly, modern standards are related to the past.\(^3^4\) Historical understanding, then, at a minimum, can inform courts concerning what standards modern society has adopted by demonstrating the social choices that have been made in the past to arrive at society’s current standards. Furthermore, the principles that have been distilled from society’s past experiences may still bear application in modern contexts.\(^3^5\) Though the Framers’ generation lived in a different era, they were participants in a similar endeavor.\(^3^6\) Their responses to thorny church-state issues were shaped by years of experience and may “shed light” on how modern society might respond.\(^3^7\) Professor Rodney Smith has argued that only an imprudent non-originalist would ignore evidence that helps to describe the content of current social thought on church-state relations.\(^3^8\)

Several Supreme Court justices have promoted these functional uses of historical understanding. Throughout his tenure on the Court, Justice William Brennan consistently and strongly embraced this position. In \textit{School District v. Schempp}, he criticized a “too literal quest” for the Framer’s thoughts because of the “dramatic evolution of the religious diversity among the population” since their time; thus, “awareness of history” could not always solve modern problems.\(^3^9\) Historical practices, such as religious tax exemptions at issue in \textit{Walz v. Tax Commission}, he argued, did not conclusively render the practice constitutional, though it did aid the “interpretation of abstract constitutional language.”\(^4^0\) Historical practice was not dispositive because “the Constitution is not a static document . . . fixed for all time by the life experiences of the Framers”; it was intended to have “inherent adaptability” to face an ever-

\(^{33}\) \textit{SMITH}, supra note 14, at 7.
\(^{34}\) See Barry Friedman & Scott B. Smith, \textit{The Sedimentary Constitution}, 147 U. Pa. L. Rev. 1, 51–52 (1998) (“[L]iving constitutionalists . . . cannot . . . escape the fact that today’s deeply held constitutional commitments have been shaped by history.”).
\(^{35}\) \textit{SMITH}, supra note 14, at 7; see also \textit{LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE} 175–76 (1986).
\(^{37}\) \textit{Id.; see SMITH, supra note 14, at 7} (arguing that non-originalists should analyze historical principles “in terms of their contemporary utility”).
\(^{38}\) \textit{See SMITH, supra note 14, at 8 & n.10} (“[D]ispensing with the historical record in such a flippant manner . . . at best disregards, without justification, that which may be of value in the historical record, and is at worst an invitation to have history repeat itself in a less than pleasant manner.”).
changing society.\footnote{41 Marsh v. Chambers, 463 U.S. 783, 816–17 (1983) (Brennan, J., dissenting); accord Lynch v. Donnelly, 465 U.S. 668, 718–19 (1984) (Brennan, J., dissenting) (arguing that “historical practice often can provide a useful guide” but that “details of history should not blind us to the cardinal purposes of the Establishment Clause”).} Justice Sandra Day O’Connor’s opinions have suggested some support for this view, contending in both \textit{Allegheny} and \textit{Jaffree} that historical practice alone does not make government action constitutionally valid but not denying that it has some value.\footnote{42 Cnty. of Allegheny v. ACLU, 492 U.S. 573, 630 (1989) (O’Connor, J., concurring in part and concurring in the judgment); Wallace v. Jaffree, 472 U.S. 38, 80–81 (1985) (O’Connor, J., concurring in the judgment).} Justice John Paul Stevens as well found that a historical understanding’s usefulness comes not by determining authoritative original meaning, but rather by “deriving from the [Establishment] Clause’s text and history the broad principles that remain valid today.”\footnote{43 Van Orden v. Perry, 545 U.S. 677, 731 (2005) (Stevens, J., dissenting).}

Whether for originalists or non-originalists, good reasons exist to believe a historical understanding holds significant value in guiding the Court’s interpretation and application of the Establishment Clause. If so, an important corollary is that the Court must be able to accurately analyze history. Even if one is unconvinced by the normative argument that the Court should use history to guide interpretation, a descriptive reason remains.

\section*{B. DESCRIPTIVE REASON WHY HISTORY MATTERS}

In addition to the normative reasons to consider history, a descriptive reason also stresses attention to the use of historical understanding. History matters because the Court has used and continues to use historical understanding in its Establishment jurisprudence.

Despite the normative reasons above that history should matter in the interpretive endeavor, a few commentators, not swayed by these arguments, have argued that history, for the purpose of interpretation, is irrelevant.\footnote{44 See Paul G. Kauper, \textit{Religion and the Constitution} 47 (1964) (“The search for original meaning and historical purpose underlying this language has yielded inconclusive results, and it would not be profitable to explore this matter in detail. In the end the Supreme Court is free to give the meaning it chooses . . . .”). Michael J. Perry, \textit{The Constitution, the Courts, and Human Rights} 75 (1982) (“[I]n the end the answers the Court gives are (most often) its own, and not the framers’. And that is as it should be . . . .”).} Justices have also made similar arguments. Justice Stevens, for instance, in \textit{Van Orden v. Perry}, deemed a narrow interpretation of the Establishment Clause, even if faithful to the Founders’ views, “plainly not worthy of a society” that had “continued its expansion of religious pluralism and tolerance” for over two centuries.\footnote{45 Van Orden, 545 U.S. at 730 (Stevens, J., dissenting).} A reasonable inference from Justice Stevens’s opinion might not only be that history is not controlling for modern courts, but also that it does not
matter. One strand of the argument is that the historical record is simply too contradictory to offer firm guidance. Justice David Souter, writing for the majority in *McCreary County v. ACLU of Kentucky*, relied on this argument to reject the dissent’s turn to history. As a purely practical matter, whatever the strength of these criticisms may be, they are simply unavailing. Whether the Court *should* rely on historical understanding is ultimately beside the point. Of more import is that the Court, descriptively, *does* use historical understanding.

Commentators have universally recognized that history matters to the Supreme Court. Though historical understanding holds great weight in the Court’s interpretation of other constitutional provisions, it seems to be of particular importance in the Establishment context. In its seminal modern Establishment case, the Court affirmed “no provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment.” Moreover, of the two religion clauses, the Establishment Clause’s commentary and cases are replete with extensive historical analysis far beyond that found in the reviews of the Free Exercise Clause. Professor Mark Hall’s research identified seventy-one Supreme Court cases up to 2006 in which Establishment Clause issues were considered. These generated a total of 636 appeals to history. Clearly, history matters to the Court, and this fact alone is a sufficient reason to find historical understanding important.

History matters. It particularly matters in the Establishment Clause context, as it has since the 1830s. History matters because, for both originalists and non-originalists, it offers valuable guidance for the interpretive process. More

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47. This Note’s outlining of arguments in favor of the Court’s utilizing history (as in section I.A) is not intended to judge the merits of those arguments; it is intended merely to highlight the importance that many scholars and members of the Court place on the use of history.
48. See Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 239 (1982) (“The U.S. Supreme Court has appealed almost solely to U.S. history to legitimize its Establishment Clause decisions.”); Davis, *supra* note 16, at 42, 62 (“The Supreme Court has historically considered the original intent of the framers of the religion clauses a salient matter.”); Religion and Politics, *supra* note 4, at xi (“The U.S. Supreme Court has long relied on history . . . to guide its interpretation of the First Amendment provisions concerning religion.”); Smith, *supra* note 14, at 7 (pointing out that historical data are significant because “the Court relies on and uses historical data in its decision making”); Green, *supra* note 21, at 1717 (“[I]n no area has such reliance [on historical authority] been more noticeable (and notable) than in Establishment Clause cases.”).
49. The Court’s intense focus on Framing-era history in its Establishment cases allows for a fuller examination of its methods of historical analysis in the church-state context than in any other context. However, much of this Note’s critique of the Court’s use of history and the suggested remedies to problems caused by it can be applied to other provisions of the Constitution in which historical understanding has been a point of contention.
53. *Id.* at 568–69 tbl.1.
importantly, history matters because the Supreme Court considers it to be significant. Because history does matter, it is imperative that the Court analyzes history well.

II. THE COURT’S USE OF BAD HISTORY

Though the apparent importance assigned to the role of history by the Court calls for the use of attentive and competent historical analysis, the Court has consistently used “bad history” in its Establishment Clause jurisprudence. This Part briefly describes the Court’s use of history in two strands of cases, both of which have been roundly criticized for relying on lackluster historical examination: (A) the Everson v. Board of Education line of cases, espousing a more-or-less strict separationist version of Establishment; and (B) the revisionist line of cases, proffering non-preferentialist or non-coercion theories of Establishment. This Part concludes by identifying the consequences of utilizing bad history—charges of eisegesis that, true or not, weaken the public’s faith in the Court’s objectivity, legitimacy, and sense of justice.

A. BAD HISTORY IN THE EVERSON LINE OF CASES

1. The Everson Opinions

The Court’s treatment of the Establishment Clause in Everson marks its first in the modern era. Ostensibly, the standard it set in the majority opinion is that no government “can pass laws which aid one religion, aid all religions, or prefer one religion over another.” Further, “[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions.” With this language, the Court endorsed a standard closely aligned with a strict separationism viewpoint. But for the purpose of this Note, Everson’s import derives from the historical analysis in the opinions of Justices Hugo Black and Wiley Rutledge to which all members of the Court apparently subscribed.

The Court, especially in Justice Rutledge’s dissent, supported its separationist standard by relying on two points of historical evidence. First, the Court virtually equated the purpose of the Establishment Clause exclusively with the

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54. The term “bad history” seems first to have been used in the Establishment context by John Courtney Murray. John Courtney Murray, Law or Prepossessions?, 14 LAW & CONTEMP. PROBS. 23, 25 (1949). Justice Rehnquist later used the term to describe the near-forty-year hegemony of the “wall of separation” metaphor in his Wallace v. Jaffree dissent, which heralded a turning point in the Court’s Establishment case law. 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting).

55. Everson, 330 U.S. at 15.

56. Id. at 16.

57. See LEVY, supra note 35, at 127 (describing Everson as “the original strict-separationist or impregnable-wall test”); SMITH, supra note 14, at 126 (stating that both the Everson majority and Justice Rutledge’s dissent argued for “strict or absolute separation of church and state”); see also sources cited supra note 16.

58. See CORD, supra note 48, at 113 (equating the historical analyses of the Everson majority and dissenters).
circumstances surrounding the Virginia assessment controversy. For Justice Rutledge, the First Amendment, principally authored by the representative from Virginia, James Madison, was the “direct culmination” of Virginia’s struggle for religious freedom. Madison’s *Memorial and Remonstrance*, composed during this time, was “the most accurate statement of the views of the First Amendment’s author concerning what is ‘an establishment of religion.’” Consequently, the experience in Virginia’s struggle, as embodied particularly in the *Remonstrance*, “became warp and woof of our constitutional tradition . . . by the common unifying force of Madison’s life, thought and sponsorship.” In Madison, Justice Rutledge perceived a friend to strict separationism because Madison was “unrelentingly absolute” in opposing state aid such as Virginia’s assessment bill.

Second, both Justice Rutledge and the majority in *Everson* adopted Thomas Jefferson’s metaphor of a “wall of separation between church and state” as the standard of the Establishment Clause. The metaphor was originally used in a letter from President Jefferson in response to a congratulatory missive from the Danbury Baptist Association of Connecticut. According to the Court, Jefferson, also intimately involved in the Virginia assessment controversy, had in this one, concise phrase encapsulated what the Establishment Clause was intended to do: Erect a wall between religion and government. Moreover, both the majority and dissenters agreed that the wall must be kept “high and impregnable”; not “the slightest breach” could be approved.

2. Perpetuation of *Everson’s* History

Since *Everson*, the Supreme Court has continually perpetuated the analysis of history used in that case to support a separationist interpretation of the Establishment Clause. For nearly forty years, the Court’s Establishment cases propagated near-exclusive reliance on Madison’s Virginia experience and Jefferson’s meta-

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62. *Everson*, 330 U.S. at 37 (Rutledge, J., dissenting). Justice Rutledge so devoutly held to this Madisonian reading of the First Amendment that he appended the *Remonstrance* in its entirety to his *Everson* dissent. *Id.* at 63–72; see *SMITH*, supra note 14, at 50 (calling the *Remonstrance* the Court’s “guiding light” in resolving church-state issues since the *Everson* decision).
64. *Id.* at 40.
65. See *CORD*, supra note 48, at 114 (noting that the *Everson* majority “sums up” the interpretation of the Establishment Clause with Jefferson’s metaphor); *LEVY*, supra note 35, at 124 (noting agreement between majority and dissenters on the “wall of separation” standard).
68. See *id.* at 18; *id.* at 29 (Rutledge, J., dissenting).
phor without serious challenge. Justices continued to deliver expositions with heavy or even exclusive reliance on Madison’s struggle in Virginia, going so far as discerning in the Virginia experience an authoritative “gloss on the signification of the [First] Amendment” and finding that the views of Jefferson and Madison “came to be incorporated... in the Federal Constitution.” Justice William O. Douglas even mimicked Justice Rutledge’s homage to Madison by affixing the Remonstrance as an addendum to his Walz dissent. The members of the Court also continued to define the Establishment standard in terms of Jefferson’s “wall of separation,” even as the metaphorical wall began to lose its rigidity in various opinions.

Even after the legitimacy of this historical account had finally been challenged, some members of the Court continued to espouse the Everson version of events. Justice Harry Blackmun in Lee v. Weisman cited with approval the Court’s use of history in Everson and in Reynolds v. United States. Justice Souter, as well, confessed his faith in Everson’s history, maintaining that

69. See Cord, supra note 48, at 147–63 (describing the cases following Everson). Cord concludes that the post-Everson cases are twenty years of decisions perpetuating the same faulty history used in Everson. Id. at 163–64 & n.76.


71. McGowan, 366 U.S. at 494 (Frankfurter, J., writing separately).


74. See Larkin v. Grendel’s Den, Inc., 459 U.S. 116, 122–23 (1982) (calling the metaphor a “useful signpost”); Nyquist, 413 U.S. at 761 (affirming that Jefferson’s metaphor is “firmly rooted”); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (relying still on the concept of a wall, but recognizing that it had become a “blurred, indistinct, and variable barrier”); Zorach v. Clauson, 343 U.S. 306, 314 (1952) (stating flatly that “[t]he constitutional standard is the separation of Church and State”); id. at 316–17 (Black, J., dissenting) (acknowledging implicitly that violation depends on whether the government action is “not separation of Church and State” (quoting McCollum, 333 U.S. at 212)); McCollum, 333 U.S. at 211 (“[T]he First Amendment’s language, properly interpreted, ... erected a wall of separation between Church and State.” (citing Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947))); id. at 213 (Frankfurter, J., writing separately) (agreeing with the majority that “the First Amendment was designed to erect a ‘wall of separation between Church and State’”)

75. See Lee v. Weisman, 505 U.S. 577, 599–600 & n.1 (1992) (Blackmun, J., concurring) (mentioning with seeming agreement the acceptance by the Court of the Danbury Letter as “almost as an authoritative declaration of the scope and effect of the First Amendment” (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878))).
Madison’s “authority on questions about the meaning of the Establishment Clause is well settled.” As recently as 2005, three Supreme Court justices confirmed adherence to at least portions of the history received from the *Everson* line of cases, including the continued validity of Jefferson’s “wall.”

3. Criticism

The Court’s historical analysis in *Everson* and its progeny provoked heavy criticism from commentators. Not until *Wallace v. Jaffree* in 1985, however, did any serious challenge appear to *Everson*’s historical hegemony in the form of a Supreme Court opinion. There, Justice Rehnquist, for the first time, questioned the veneration the Court had shown to Jefferson’s metaphor and the beliefs it had ascribed to Madison in authoring the Establishment Clause.

Following *Jaffree*, critics of the *Everson* line of cases have used the three following forms of attack. First, the very evidence used by the *Everson* Court—mostly the *Remonstrance*—shows that Madison and, perhaps, Jefferson did not hold to the separationist views that the Court attributed to them. Second, the *Everson* analysis of its highly circumscribed evidence of Madison’s and Jefferson’s views may be correct, but the Court wholly ignored other historical evidence concerning their views—evidence that contradicts the separationist impulse the Court ascribed to Madison and Jefferson. Third, though the


77. *See McCready Cnty. v. ACLU of Ky.*, 545 U.S. 844, 882 (2005) (O’Connor, J., concurring) (naming a statement in Madison’s *Remonstrance* as the Court’s “guiding principle”); *Van Orden v. Perry*, 545 U.S. 677, 708–09, 709 n.4, 724, 730 (2005) (Stevens, J., dissenting) (reflecting that the Court has never questioned the “separation of church and state” concept embodied in Jefferson’s metaphor); *id.* at 737 (Souter, J., dissenting) (supporting *Everson*’s neutrality principle by citing Madison’s *Remonstrance*).


79. *See Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) (noting Jefferson’s absence from the country when the Bill of Rights were under consideration by Congress and the states and describing the Danbury Letter as a “short note of courtesy”).

80. *See id.* at 92–99 (concluding that the *Everson* Court was “totally incorrect” to assume Madison’s views of proper church-state relations in Virginia during the assessment controversy were the same he held when applied to the Federal government).

81. *See*, e.g., Rosenberger, 515 U.S. at 852–56 (Thomas, J., concurring) (commending the view that the assessment controversy is consistent with non-preferentialism); Cord, *supra* note 48, at 20–23 (noting the view that the *Remonstrance* opposed the assessment bill because it discriminated between religions, rather than because it opposed any aid to religion (citing LEO PFEFFER, CHURCH, STATE, AND FREEDOM 171–72 (rev. ed. 1967))); Smith, *supra* note 14, at 50–59, 128 (“When read closely, even Madison’s *Memorial and Remonstrance* did not preclude aid to all religions . . . .”).

82. *See*, e.g., McCreary Cnty., 545 U.S. at 896 (Scalia, J., dissenting) (finding the *Remonstrance* “irrelevant” compared to Madison’s official acts as President); Cord, *supra* note 48, at 125
Everson interpretation of Madison’s and Jefferson’s views may be correct, the Court ignored any evidence of historical understanding aside from that of Madison’s and Jefferson’s views. Such evidence, in the aggregate, contradicts Everson’s historical thesis and dislocates the separationist standard for Establishment that rests upon it. This third attack itself comes in three interrelated forms: (a) Madison’s and Jefferson’s views on establishment are largely irrelevant when compared to the views of the drafters as a group83 or compared to the views of the ratifiers at the state conventions;84 (b) their views are less relevant than those of other Founders and Framers because Madison and Jefferson represented minority views on the subject;85 and (c) their views do not merit the special reverence bestowed on them by Everson because they stood on equal ground with the conflicting views of other Founders and Framers.86

The strength of these criticisms, and the vehemence with which critics have made them, might lead to the hope that the Court’s later turns to history would be rigorous enough to at least forestall some of this ridicule. Sadly, those hopes have gone unfulfilled. For critics of the Court’s historical analysis, the “bad history” did not end with the Everson line of cases.

83. See Rosenberger, 515 U.S. at 856 (Thomas, J., concurring) (finding the House debates to be a “more relevant context” than the Virginia assessment controversy); Smith, supra note 14, at 128–30 (describing the House debates as “[t]he best indication of legislative intent” and criticizing Everson for almost completely ignoring them).

84. See McCreary Cnty., 545 U.S. at 886–89, 895–96 (Scalia, J., dissenting) (cataloguing official actions of other Founders and preferring these to the Remonstrance); Bradley, supra note 78, at 12, 87 (“Ratification, not either congressional proposal or authorship, is the operative fact, and thus the meaning apprehended by the ratifiers—the state legislators—is what matters.”); Howe, supra note 30, at 10 (claiming the basic error of Everson was in assuming the state ratifiers “spoke in a wholly Jeffersonian dialect”); Smith, supra note 14, at 15 (“[I]n interpreting a constitution, the intent of the ratifiers is critical . . . .”).

85. See Cutter v. Wilkinson, 544 U.S. 709, 730 (2005) (Thomas, J., concurring) (arguing the final version of the First Amendment embodied a principle more narrow than Madison personally preferred (citing Philip Hamburger, Separation of Church and State 106 (2002))); Bradley, supra note 78, at 87–88 (arguing that Madison intentionally eschewed instilling his own “personal philosophy” in the Establishment Clause because “his ideas were far more exotic than those of his contemporaries”); Daniel L. Dreisbach, Thomas Jefferson and the Wall of Separation Between Church and State 5 (2002) (claiming that Jefferson’s metaphor did not attain “great currency” until the mid-1900s); Smith, supra note 14, at 103 (describing the positions held by Washington and Adams as “constituting the prevailing public view” compared to the “Madisonian and more extreme Jeffersonian positions”).

86. See Cutter, 544 U.S. at 729–30 (Thomas, J., concurring) (finding a quotation from Madison during the Virginia Ratifying Convention proved “only that some of the Framers may have believed” the proposition); Rosenberger, 515 U.S. at 856 (referring to Madison and stating “the views of one man do not establish the original understanding of the First Amendment”); Howe, supra note 30, at 1–31 (arguing that the Founding generation was more influenced by Roger Williams’s understanding of separation than by Thomas Jefferson’s).
B. BAD HISTORY IN THE REVISIONIST LINE OF CASES

1. Revisionist Jurisprudence

In response to the multitude of “blistering critiques” leveled at the *Everson* strand of cases, a new, revisionist jurisprudence cropped up, espousing a different version of historical understanding. In a broad sense, the revisionist viewpoint simply reflects a rejection of the brand of separationism found in *Everson* and the cases that followed it; however, revisionist understanding of Establishment does not present a unified front. Two major stripes of revisionism that have found their way into the casebooks are non-preferentialism and non-coercion. A non-preferentialist standard for the Establishment Clause holds that government may aid religion so long as no particular religion is preferred. A non-coercion standard, on the other hand, would make state action to compel religious observance the touchstone of an Establishment violation. The distinction is not integral here; what is important is that judges espousing both these standards have chosen to depart from the Court’s prior historical narrative.

To support their views, revisionists have attempted to present evidence to fill the holes in *Everson*’s historical analysis. Thus, revisionist arguments contain the mirror opposite of the criticisms aimed at *Everson*. They reinterpret the meaning of the Virginia disestablishment experience, the main *Everson* evidence; assert that other evidence substantiates a contra-*Everson* understanding of the views of Jefferson and Madison; and appeal to historical data aside from those relating to Jefferson and Madison. Following Justice Rehnquist’s broadside attack on the Court’s use of history up to *Jaffree*, revisionists began to focus more intently on the historical data ignored in *Everson*, especially the

88. The term “revisionist” in describing an anti-*Everson* view of historical understanding is not original to this work. See, e.g., *id.* at 1718. It is used in this Note merely as a shorthand and is not intended to be pejorative in any way.
90. *See* Lee v. Weisman, 505 U.S. 577, 587 (1992) (“[A]t a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . . .”); *id.* at 640–42 (Scalia, J., dissenting) (recognizing that the Establishment Clause was adopted to prohibit coercion); Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 660 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (explaining that a ban on coercion “goes far” in attaining the “great object” of the religion clauses).
93. *See supra* notes 81–86 and accompanying text.
94. *See* sources cited *supra* notes 81–86.
legislative history of the First Congress, the debates during ratification, and the historical practices of the Framers. 95

2. Criticism

Like the Court’s use of history in Everson, revisionist historical analysis has also been roundly criticized. Attacks on the reinterpretation of the Establishment Clause came quickly following Justice Rehnquist’s Jaffree dissent. 96 The anti-revisionist criticisms follow four interrelated themes, mentioned here briefly. First, contrary to revisionist claims, the meaning that the Everson Court attached to the evidence it reviewed was essentially correct; moreover, that evidence was the most relevant to interpreting the Establishment Clause. 97 Second, and in an opposite vein, is that revisionist history is simply irrelevant for a society that has evolved past eighteenth-century religious bigotry. 98 Third and relatedly, revisionist reliance on the historical practice of the Framers, even if relevant, does not yield reliable information. This is so because the Framers, like many politicians, were apt to disregard constitutional prohibitions 99 and because the discourse prevalent in the early republic was so flooded with religious rhetoric and practice that isolated statements and conduct supporting religion are almost meaningless. 100 Fourth and most importantly, revisionists, while cataloguing evidence that supports their views, completely ignore conflicting evidence, especially evidence from the debates in the First Congress 101 and


96. See generally THOMAS J. CURRY, THE FIRST FREEDOMS (1986); DAVIS, supra note 16; LEVY, supra note 35.

97. See supra notes 75–77 and accompanying text; see also Carl H. Esbeck, Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation, 2011 UTAH. L. REV. 489, 492, 623 (concluding that the Court properly looked to state experiences to discover the foundational principles of disestablishment); Douglas Laycock, “Nonpreferential” Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 895–97 (1986) (describing the disestablishment experience in Virginia as “most important”).

98. See Green, supra note 21, at 1738–39 (“[Eighteenth-century views of religious liberty, equality, and church-state interactions are simply ill suited for twenty-first-century America.”). This criticism simply repeats the criticism of using history in constitutional interpretation at all. See supra notes 44–46 and accompanying text. Its importance here is its connection to the argument that an analysis of historical practice is useless. See infra note 99.

99. See Lee v. Weisman, 505 U.S. 577, 626 (1992) (Souter, J., concurring) (“[The Framers’] practices prove . . . that they, like other politicians, could raise constitutional ideals one day and turn their backs on them the next.”); Green, supra note 21, at 1745–46 (cautioning against placing “stock in isolated statements of early political figures” because they may have had “mixed motives”).

100. See Green, supra note 21, at 1738 (“The more common [religious] language was during the Founding period, the less significance we can attach to any particular statements . . . . “); cf. Laycock, supra note 97, at 878–79, 913–14 (arguing that a given Framer’s conduct is only relevant if that person was thinking about establishment at the time).

101. See Laycock, supra note 97, at 879–83 (finding that non-preferentialists ignore or pass over inconvenient drafts of the First Amendment).
the historical practices at the time the Establishment Clause was adopted.102

Revisionists sought to replace Everson’s standard of strict separation with their own varied Establishment standards. To do so, they were compelled to renounce the bad history relied upon by the Everson Court. But revisionists were themselves not immune to using equally bad historical analysis. The bad history in both the Everson and revisionist lines of cases is not without consequences.

C. EXEGESIS OR CONSEQUENCES

The result of the Court’s turn to bad history and the ensuing criticisms in both of the above lines of cases has been continual charges of eisegesis.103 Especially in the context of historical practice, what commentators (and perhaps the public) perceive is an undignified squabble: an interminable back and forth104 with as much a chance at resolution as a schoolyard battle over “whose dad is tougher.” One side proffers a quote by Madison; the other responds with one by Washington. A revisionist reminds the Court that Adams issued religiously themed Thanksgiving proclamations, but the separationist replies that Jefferson refused to do so.105 From this perspective, an observer has no choice but to conclude that each Justice is arbitrarily picking the version of history he or she prefers. In short, the Court’s history seems to be pure eisegesis. Further, when the Court repeatedly indulges in such bad history as outlined above, observers

102. See McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 877 (2005) (arguing the dissent’s revisionist opinion “is flawed from the outset by its failure to consider the full range of evidence showing what the Framers believed”); Van Orden v. Perry, 545 U.S. 677, 724 (2005) (Stevens, J., dissenting) (arguing that the historical narrative drawn by the revisionist opinions “paint[s] a misleading picture” because it “fail[s] to account” for the practice of other leaders and “disregard[s] the substantial debates that took place” concerning the constitutionality of the conduct that the narrative does recite); Esbeck, supra note 97, at 612–22 (describing the behavior of government officials in the period after ratification as “mixed and inconsistent”); Green, supra note 21, at 1745 (referring to revisionist historical analysis as “merely engag[ing] in a selective listing of data”).

103. The terms “eisegesis” and “exegesis” are closely associated with Christian theology and biblical hermeneutics. The terms are better understood when they are contrasted with each other. Exegesis (from the Greek ἔξηγεῖσθαι, “to draw or lead out”) is the process of interpreting a portion of the biblical text to educe only the meaning that the author intended to convey, no more and no less. See generally D. A. Carson, Exegetical Fallacies (2d ed. 1996); 2 The Anchor Yale Bible Dictionary 682–88 (David Noel Freedman ed., 1992). Eisegesis (from the Greek εἰσίς, “in or into,” later combined with the stem of ἔξηγεῖσθαι, to produce “to draw or lead in”), on the other hand, is a process of interpretation that reflects the predetermined viewpoint of the interpreter by reading that viewpoint into the biblical text. Eisegesis is often considered a form of confirmation bias: the interpreter comes to the text expecting to find proof of an already-held opinion and finds that the text does indeed support that opinion. In theology, as in law, the act of superimposing one’s own views into a text or record is much maligned; thus the label “eisegete” can be pejorative. See generally D.A. CARSON, EXEGETICAL FALLACIES (2d. ed. 1996); 2 THE ANCHOR YALE BIBLE DICTIONARY, 682–88 (David Noel Freedman ed., 1992). Applying the term “eisegesis” to the observer’s perception of the Court’s use of the historical record in the Establishment Clause context seems appropriate.

104. See Green, supra note 21, at 1747 (describing the dissenting opinions in Van Orden and McCreary Cnty. as “a tit-for-tat over who has the better historical evidence at his disposal”).

105. Esbeck, supra note 97, at 616.
have little reason to believe its eisegetical approach is unintentional.\footnote{Commentators have not spared the Court their disapprobation. \textit{See Cord}, supra note 48, at 124 (calling Justice Rutledge’s history in \textit{Everson} “virtually reckless in its disregard of the indisputable facts of American history”); \textit{Howe}, supra note 30, at 4 (“[T]he Court has too often pretended that the dictates of the nation’s history, rather than the mandates of its own will, compelled a particular decision. By superficial and purposive interpretations of the past, the Court has dishonored the arts of the historian . . . .”); \textit{Levy}, supra note 35, at 163 (“The Court has reaped the scorn of a confused and aroused public because it . . . sometimes heeds history; oftentimes it ignores history or distorts it.”); \textit{Smith}, supra note 14, at 55 (describing the Court’s use of “‘law office history,’ selectively using historical data to build a case for [a] position rather than viewing the history itself to determine what was actually intended”); Green, supra note 21, at 1745 (chiding revisionists who “merely engage in a selective listing of data”).}

Eisegesis has consequences. Whether the Court has actually engaged in intentional “cherry picking” to arrive at preferred interpretations of the Establishment Clause is beside the point. Here, perception is just as important as reality. The mere semblance of eisegesis not only destroys the normative benefits of relying on historical understanding, but also turns that reliance into a liability for the Court from both originalist and non-originalist perspectives.

For originalists, the benefit of history is as a tool to maintain faithful adherence to the original meaning of the text, and thereby thwart judicial activism.\footnote{See supra notes 18–26 and accompanying text.} Eisegesis, however, transforms historical analysis into a tool for judicial willfulness because it seems to observers that history is used merely as a thin pretext for activism.\footnote{See \textit{Rakove}, supra note 29, at 1588 (“Far from providing the constraints for which advocates of originalism yearn, . . . an ambiguous historical record may simply give judges new paths for their interpretive meanderings.”). If this is true, then the fact is doubly hard on originalists because this is exactly the accusation that is often leveled at originalism (and sometimes at the use of history in general). Non-originalists maintain that originalism itself is activism under the guise of modesty. \textit{See Chemerinsky}, supra note 30, at 918 (“History cannot serve the Court’s goal of constraining decision-making. At most, it provides an objective-sounding basis for the Justices’ subjective choices.”); Green, supra note 21, at 1737 (“[O]riginalism makes a false claim of judicial objectivity and passivity when, in reality, the methodology is as subjective and activist as the approaches originalists disclaim.”).}

For non-originalists, the perception of eisegesis turns the normative legitimizing and distilling functions of history into a millstone slung around the proverbial neck of the Court. First, instead of legitimizing the Court’s decisions by connecting them to the American experience,\footnote{See supra notes 28–31 and accompanying text.} historical analysis gives the impression that the Court is ignorant of history and unable to avoid unwinnable squabbles. Second, instead of distilling from history the choices that have informed modern principles of justice,\footnote{See supra notes 33–43 and accompanying text.} historical analysis focuses the Court’s attention on the minutiae of antiquated practices rather than on the broad principles that can be derived from them. It also raises the specter of a Court that has no interest or competence in taking the pulse of contemporary society but rather constitutionalizes its own preferences.

The turn to bad history results in observers discerning eisegetical bias in the Court’s analysis. Instead of yielding the benefits that accompany historical
analysis, charges of eisegesis produce the opposite: a basis for questioning the objectivity, legitimacy, and fairness of the Court’s decisions.

The Court’s emphasis on history called for well-reasoned and well-researched analysis, but, in practice, the Court’s history—from both sides of the current church-state debate—has been shoddy. Its bad history has placed it in a muddy predicament: what was supposed to alleviate the interpretive burden on the Court’s back has only weighed it down more. Missing have been the tools to extract the Court out of this miry clay.

III. FINDING THE ANALYTICAL TOOLS TO INTERPRET HISTORICAL PRACTICE

Though an accurate interpretation of the Establishment Clause requires a command of the history surrounding its adoption, the Court’s effort has been inadequate. The purpose of this Part is to show that this inadequacy is a result of the Court not using the tools of historical analysis. To do so, I narrow the focus to a slightly more specific type of evidence: historical practice.111 With a narrower scope of historical evidence, it becomes easier to spot the missing analytical tools. This Part asserts (A) that interpreting historical practice involves, in simplified form, at least two critical steps—determining the meaning of evidence and assigning it weight; (B) that the three methods of historical analysis employed by the Court and commentators have largely abandoned one of these two critical steps—weighting the evidence; and (C) that the importance of assigning proper weight should impel scholars to provide the Court with the proper analytical tools to do so.

A. THE (SIMPLIFIED) FORM OF INTERPRETING HISTORICAL PRACTICE

From the discussion in Parts I and II above, two facts are readily apparent. First, exactly how historical practice informs the Court’s Establishment jurisprudence is not always clear—especially to the members of the Court.112 Most likely, disagreement on the uses of historical practice derives from the justices’ conflicting philosophies of constitutional interpretation that control how each understands the proper role of history.113 But the Court’s difficulty in applying history to constitutional interpretation does not obviate the duty of scholars to provide the correct tools of historical interpretation. Commentators must provide the interpreter, in this case the Court, with a framework for using history

111. The term here is meant to describe the conduct or behavior of historical figures near the time the Establishment Clause was drafted and adopted that indirectly speaks to its meaning, as opposed to statements by these persons that directly address the meaning of the Clause.
112. See Esbeck, supra note 97, at 493 (“[T]he divide is over which side has the better grasp of the history, as well as which historical events matter the most.”); cf. Levy, supra note 35, at 163 (noting that the one thing separationists and non-preferentialists are likely to agree on is that “the Supreme Court would not recognize an establishment of religion if it took life and bit the Justices”).
113. See Powell, supra note 21, at 662 (“History cannot answer or even address the question of whether modern Americans ought to obey the intentions of the Constitution’s founders. That question belongs to political theory (or philosophy) . . . .”).
correctly; it is then the Court’s responsibility to apply accurate historical analysis to the First Amendment according to the Justices’ philosophies of constitutional interpretation.\(^\text{114}\)

Second, what is clear is that, regardless of which constitutional philosophy governs, the historical interpretive process in its simplest form involves, at a minimum, two steps. In step one, the Court must determine what a given piece of historical evidence means\(^\text{115}\)—what idea is conveyed by it.\(^\text{116}\) An example will be useful: when considering President Jefferson’s refusal to issue Thanksgiving proclamations,\(^\text{117}\) the Court needed to determine what that piece of evidence meant or what idea it conveyed. Did it mean that Jefferson eschewed aiding religion in any form, that he thought refusal was necessary to avoid coercing people into giving thanks to a deity, that only Congress could issue such proclamations, that only states could issue them, or something else?

This first step represents the bulk of the work done by courts and scholars in their analyses. The step involves a whole host of possible factors for the interpreter to consider, but attention to what these factors should be, or the substeps the Court should use to determine the correct meaning (if that is possible), is not considered here. Precisely because this has been the subject occupying the vast majority of scholarship on the Establishment Clause’s historical understanding, this Note takes a different direction. It is enough to recognize that this is only one step, albeit an important one, in at least a two-step process.

In step two, the Court must determine what weight or interpretive value to assign the given piece of historical evidence. In the first step, the meaning of evidence can be ascertained without affecting the meaning to be assigned other pieces of evidence, at least in theory. The second step, however, is inherently relative: what matters is the importance one piece of evidence has when compared to all the others. For example, regardless of what Jefferson’s refusal to issue Thanksgiving proclamations meant, the Court must also determine what weight it should be given, relative to all other pertinent evidence. Both the

\(^{114}\) See id. at 661 (“[T]he task of the constitutional historian is to make the lawyers’ use of history as intellectually responsible (and therefore as hermeneutically useful) as possible.”); Rakove, supra note 29, at 1589 (describing the task of the historian as “narrowing and ranking the available range of meanings” that can be plausibly ascribed to the constitutional text).

\(^{115}\) Whether “meaning,” in an objective sense, can be found in history is a subject of no small debate. See Powell, supra note 21, at 698–99 (A Note on ‘Truth’ and ‘History’). Like Powell’s article, this Note assumes that the search for meaning is not an invalid use of history.

\(^{116}\) The term “meaning” is used only to distinguish the first step of analysis—determining the idea conveyed by a piece of evidence—from the second step of analysis—determining the magnitude of that piece of evidence relative to all other pieces of evidence—for which the term “weighting” is used.

\(^{117}\) See Letter from Thomas Jefferson to Levi Lincoln (Jan. 1, 1802), in SACRED RIGHTS, supra note 2, at 527 (writing that his response to the Danbury Baptists would provide Jefferson an opportunity to explain why he did “not proclaim fastings & thanksgivings, as [his] predecessors did”); see also Daniel L. Dreisbach, Thomas Jefferson and Bills Number 82–86 of the Revision of the Laws of Virginia, 1776–1786: New Light on the Jeffersonian Model of Church-State Relations, 69 N.C. L. REV. 159, 193–99 (1990) (arguing Jefferson’s refusal was based on principles of Federalism, not Establishment).
weight of that evidence and the scope of what other evidence remains pertinent can change depending on the precise issue being analyzed. Thus, the weight of President Jefferson’s refusal to issue Thanksgiving proclamations varies according to whether the Court is attempting to determine the views of Jefferson himself, the views of Virginians, the views of the Founders as a group, or the overall historical understanding of the Establishment Clause.

What has been said about this two-step process above is rather pedestrian. However, the point merits some emphasis: interpretation involves at least a two-step process. The Court must determine both the meaning and the weight of any given piece of evidence; these are two distinct analytical steps. Unfortunately, the methods of analysis used by the Court and scholars often overlook the second step.

B. THE FAILURE OF THE CURRENT METHODS OF HISTORICAL ANALYSIS

1. The Methods Used by the Court and Commentators

The Court’s cases, along with much of the scholarly commentary, on the Establishment Clause have utilized three basic methods of historical analysis.\(^{118}\) The first method is the digestion of the entire historical record in order to produce one overarching Establishment standard to be applied to all church-state issues. Examining the complete history is, of course, an endeavor more suited to the academy than the bench. Accordingly, a number of commentators have used this method,\(^{119}\) and the Court has rarely employed it.\(^{120}\)

A second method, more commonly used by commentators and sometimes by the Court, is to digest the entirety of some subpart of the historical record in order to elicit a likewise overarching Establishment standard. Works of this type include analysis of the evidence from one era,\(^{121}\) about one person or

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118. Any categorization of the Court’s methods of analysis is, of course, arbitrary and not an exact fit, but categorization is useful here.

119. E.g., CORD, supra note 48; CURRY, supra note 96; LEVY, supra note 35; PFEFFER, supra note 81; SMITH, supra note 14.

120. Many judges have opined that thoroughly researching the complete historical record is beyond the ability of the courts, simply because it takes too long. Among them have been Justice Robert Jackson, Justice Scalia, and Judge Jeffrey Sutton. See Robert H. Jackson, Full Faith and Credit—the Lawyer’s Clause of the Constitution, 45 COLUM. L. REV. 1, 6 (1945) (“Judges often are not thorough or objective historians.”); Antonin Scalia, Originalism: The Lesser Evil, 57 U. CIN. L. REV. 849, 860–61 (1989) (asking rhetorically after explaining the relatively short time in which the Supreme Court has to render a decision whether there is “any doubt that this system does not present the ideal environment for entirely accurate historical inquiry”); Jeffrey S. Sutton, The Role of History in Judging Disputes about the Meaning of the Constitution, 41 TEX. TECH L. REV. 1173, 1184 (2009) (“Responsible historical research is difficult, and . . . judges often lack the expertise, let alone the time, to do it right.”); see also SMITH, supra note 14, at 209 (noting the brevity of Justice Rehnquist’s historical analysis was necessary “given the time constraints facing a justice”); Rakove, supra note 29, at 1587–88 (describing historians as “lonely long-distance runners of the human sciences” because of the time commitment inherent in their work).

group, or even from one particular area.

The third method is to directly apply the historical record, or some part of it, to a specific modern practice at issue. The Court seems much more keen on using this method where it is applicable. Commentators also have focused their efforts on addressing what historical analysis has to say about particular issues, such as conscientious objection, official public prayer, and tax exemptions for religious institutions.

2. Failure to Account for Weight

The three methods described above, as they have been used by the Court and in the scholarly literature, often fail to address the second critical step in historical analysis—determining the relative weight to assign pertinent evidence. To be more specific, these methods tend to draw the analyst’s attention toward defining the meaning of the evidence and away from any substantial discussion concerning weight. Importantly, the contention of this Note is not that weight is never discussed. Instead it argues that: (1) the current methods incline the analyst away from weighting and (2) most of the weighting that does occur falls short of what responsible historical analysis requires.
a. Tendency Against Weighting. The methods currently used tend to focus analysis away from weighting relative evidence. Of course, weighting is possible in any of the three methods: any time analysis includes conflicting pieces of evidence, that conflict must be explained. However, some methods of analysis are less likely to uncover and evaluate conflicting evidence than are others. The first method—digesting the entire record of history to elicit an all-encompassing Establishment standard—is the likeliest to reveal and grapple with contradictory evidence. It is also the method the Court is least likely to employ. When commentators use this method, the purpose of developing a broad and often singular Establishment standard constrains them from a serious argument about weighting. Instead, the quest for a standard leads to in-depth examination of the meaning of evidence rather than its relative weight. After all, once one has determined that the record imparts a monolithic standard, grasping the content of that standard becomes far more important than addressing minor errata in the pages of history.

The second method—digesting some subpart of history to produce an overarching standard—has the same problem as the first method. The search for a standard tends to focus attention on meaning, not on weight. The tendency to avoid weighting is compounded by the fact that whole swathes of evidence are intentionally ignored from the outset, often without explanation. A study of James Madison’s Establishment views contemplates a disregard for the views of Roger Sherman, for example. Perhaps this method is merely a type of ex ante conclusive weighting: the analyst presumes that the Virginia experience vastly outweighs all other evidence, so study of the Massachusetts experience would be pointless. 128 Even so, this type of analysis often presents no substantive reasons for why such heavy weight should be given to the evidence within its purview or why conflicting evidence should be excluded from the analysis ex ante.

The third method—direct application of history to a specific church-state topic—like the second, intentionally ignores a great deal of possibly contradictory evidence without explanation. This method, of course, neglects any evidence not on point. Can the federal government agree to pay for religious education in a treaty with Native American tribes? President Jefferson’s treaty with the Kaskaskia Indians indicates that he believed it could. 129 His treaty

128. Arguably, the Everson Court engaged in this type of weighting. See Everson v. Bd. of Educ., 330 U.S. 1, 11 (1947) (citing the Virginia experience as particularly important, though acknowledging no locality or group could “rightly be given entire credit” for the religious liberty provisions of the Bill of Rights). Conceivably, then, it did not “ignore” other evidence in the strictest sense. The Court simply conclusively found that examination of any other evidence was not worth its while. Still, a main point of this Note is that if conclusive weighting is used, the Court should at least present a defensible reason for that decision. This, Everson did not do.

129. Treaty with the Kaskaskia, U.S.–Kaskaskia Tribe, Aug. 13, 1803, 7 Stat. 78. The treaty was negotiated by William Henry Harrison, then the governor of the Indiana territory, and sent by President Jefferson to the Senate where it was ratified without opposition. See SACRED RIGHTS, supra note 2, at 476. The treaty provides the following:
informs the answer to a specific church-state question, but myopic analysis like this overlooks some obvious weighting issues. Other evidence might explain, for instance, whether this treaty represents only a small exception to an otherwise strictly separationist Jeffersonian viewpoint,130 or whether Jefferson viewed the treaty as posing an Establishment issue at all.131 Answers to these questions depend on weighting evidence that will likely go unaddressed using the third method. Moreover, directly applying history in this manner again focuses the analyst on finding a single conclusive answer to a discrete modern problem. The efforts of such a search will tend to concentrate on defining the content, the meaning, of the evidence, rather than assigning relative weight.

In sum, the three methods of analyzing the historical record used by the Court and church-state scholars are ill-suited to the task of weighting evidence. Indeed, the two methods practiced by the Court focus the Court’s attention only on determining the meaning of evidence; consequently, the Court rarely uncovers issues affecting weight, let alone grapples with them.

b. Bad Weighting. The Court and commentators have acquiesced to the tendency in these methods to ignore the weighting component of historical analysis. Ignoring weight is not a necessary result of these methods; it is merely a tendency. Nevertheless, commentators and especially the Court have frequently focused on the meaning of favorable evidence, ignored unfavorable evidence,132 and thereby prevented substantial discussion on weight.

When the Court does engage in weighting analysis, its performance leaves much to be desired. Instead of providing a satisfying explanation of a decision to favor some evidence over another, the Court’s weighting is often done in passing and in an ad hoc manner.133 Furthermore, the Court’s ad hoc weighting

And, whereas, [t]he greater part of the said tribe have been baptised [sic] and received into the Catholic church to which they are much attached, the United States will give annually for seven years one hundred dollars towards the support of a priest of that religion, who will engage to perform for the said tribe the duties of his office and also to instruct as many of their children as possible in the rudiments of literature. And the United States will further give the sum of three hundred dollars to assist the said tribe in the erection of a church.


130. See Lee v. Weisman, 505 U.S. 577, 615, 616 n.3 (Souter, J., concurring) (finding in Jefferson’s writings a “separationist response” to even non-preferential aid to religion and viewing the Kaskaskia treaty as proof only that any public official could “turn a blind eye to constitutional principle”); Esbeck, supra note 97, at 617–20, 618 n.559 (rejecting arguments that the treaty was consistent with Jefferson’s principles and arguing that this and likewise inconsistent actions were the result of “inattentiveness”).

131. See AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 248 (1998) (theorizing that the early Congress, when legislating for the territories, viewed itself as acting as one of the states, which retained the latent power to establish a religion); Laycock, supra note 97, at 915–16 (implying that the Framing generation would have viewed tax support of a church as an Establishment violation, but would have viewed the Kaskaskia treaty as merely “hiring churches to provide government services” rather than offering tax support to the Catholic church).

132. See supra notes 81–86, 101–02 and accompanying text.

is often accomplished by relying on implication; no rationale is expressly stated for weighting some evidence more heavily. Justice Rehnquist’s treatment of Jefferson’s “wall of separation” metaphor in Jaffree provides an excellent example. Part of his attack may be expressed as a syllogism:

Minor Premise: Jefferson was absent during the debates on the First Amendment.\(^{134}\)
Conclusion: Jefferson’s views should be given low weight.\(^{135}\)

Missing from Justice Rehnquist’s analysis, of course, is the major premise:

Major Premise: Views of a person absent during the debates on the First Amendment should be given low weight.

Probably, Justice Rehnquist skipped the missing premise because he believed that the point need not be made explicitly because it was implicit in his argument. However, this major premise is one example of a tool of historical interpretation of Madison’s Remonstrance, as opposed to the “no aid” interpretation assigned to it in Everson. \(\text{Id.}\) at 853–56. He then, in a single sentence, implies that the debates in the First Congress are a better guide to understanding both the Remonstrance and Madison’s establishment views as a whole. \(\text{Id.}\) at 856. Then, again in a single sentence, Justice Thomas declares that the views of Madison, only one Framers among many, do not conclusively establish original understanding. \(\text{Id.}\) These are arguments concerning weight, not meaning. Specifically, they are arguments about the relative weight to be given to different pieces of evidence concerning Madison’s views (the Remonstrance compared to the debates of the First Congress) and the weight to be given to different pieces of evidence concerning the original understanding of the Establishment Clause (Madison’s views compared to the views of others). Justice Thomas may be correct in his estimation that the interpretive value of the debates outweighs the value of the Remonstrance and that the views of other Framers outweigh the views of Madison alone. But he has provided little argument showing why they should be weightier. Justice Thomas’ analysis may have been truncated because he found other evidence—historical examples of non-preferential aid to religion—to be more pertinent. But this is an unsatisfactory excuse for giving evidence short shrift, especially when observers are quick to perceive eisegesis. Such cramped examination is better than completely ignoring unfavorable evidence, but only by a scant margin.

134. Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting). The full text of the attack is as follows:

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

\(\text{Id.}\) Thus, the rest of Justice Rehnquist’s attack may also be expressed as similar syllogisms. The conclusions of each would be that the weight of Jefferson’s view should be discounted. The minor premise of one would be that the letter came long after the passage of the First Amendment and the other that it was a response to constituents. The major premises are again missing. They would be that the views of a person expressed long after passage occurred should be discounted, as should views expressed in constituent response letters.

135. \(\text{Id.}\)
analysis that can be employed in order to weight the evidence correctly. It is precisely the type of analysis that this Note contends should not be left to inference.

Most importantly, the Court’s weighting of evidence is often done by “direct comparison.” Direct comparison here means the Court pits one discrete piece of evidence against another discrete piece of evidence.\textsuperscript{136} Direct, head-to-head comparison of discrete pieces of evidence creates two problems for the Court. First, it prevents the Court from attempting anything more than a cursory examination of the record. The Court generally does not have the luxury of compiling and assessing every minute piece of evidence from history.\textsuperscript{137} When it compares two discrete pieces of evidence, it engages in a level of specificity that naturally calls for analysis of all the evidence of similar specificity. This the Court cannot do, so it leaves the history short changed.

Second and relatedly, direct comparison is a chief cause for objections concerning eisegesis. Charges of eisegesis come from the perception that the Court ignores valuable evidence.\textsuperscript{138} This perception is inescapable when the Court has placed itself in a position to always choose between conflicting pieces of evidence that have roughly equal value. Direct comparison does just this: the Court accounts for some discrete pieces of evidence but ignores others. In short, the Court uses bad weighting. The Court neglects to explain its preference for some pieces of evidence over others, or it directly compares evidence at the micro level. In either case, an observer is left to believe the Court preselects advantageous evidence.

The current methods of historical analysis employed by the Court generate a perception of eisegesis. These methods do so because they concentrate the Court on the task of extracting meaning from the historical evidence but fail to place any importance on weighting that evidence. On the rare occasions when the Court does engage in weighting, it only compounds the problem of eisegesis. By leaving the reasons for its choice of evidence to inference, and by directly comparing discrete evidence, the Court seems to cherry pick evidence to suit its needs. A better method of analysis is sorely needed.

C. THE NEED FOR BETTER ANALYTICAL TOOLS

The Court needs better tools of historical analysis. In its simplest form, historical analysis requires assigning both meaning and weight to evidence from history. Thus, weighting evidence is a necessary component of accurate historical analysis. This fact alone ought to merit not only the scholarly study of analytical tools designed to effectively weight evidence but also the use of these

\textsuperscript{136} The definition given to “direct comparison” is meant to contrast direct comparison with the method of weighting described below that uses analytical tools to compare one “type” of evidence with another “type.”

\textsuperscript{137} \textit{See supra} note 120 and accompanying text.

\textsuperscript{138} \textit{See supra} section II.C.
tools by the Court. Additionally, better analytical tools provide routes around at least two of the problems caused by the Court’s current methods: (1) they can avoid the problem of interpretational stalemate and (2) the problem of charges of eisegesis caused by direct comparison.

1. Avoiding Stalemate

First, a renewed emphasis on tools that analyze weight can extricate the Court from its current stalemate. The methods the Court has used so far have devolved into what Professor Thomas Curry, writing shortly after Jaffree was decided, described as “trench warfare,” that is, both sides asserting the superiority of their version of historical understanding without any objective means of resolving the dispute.139 Not much seems to have changed in the intervening years. The conflict appears futile because the Court’s methods continually attempt to provide conclusive answers to problems that are simply insoluble. The problem is not that the Court has not yet discovered the “definitive” historical account that provides the long-sought answer to the whole interpretive disagreement. That account does not exist.140 Neither is the problem that the Court has not yet discovered what the Framers thought about some modern church-state issue. Evidence like that does not exist either.141

The problem is that the Court has not convincingly used the tools of historical analysis that focus on weight—tools that can sift out the relevant historical facts from so much chaff and thereby provide better, albeit not final, answers. Those tools do exist. If the Court can use them convincingly, it might just break the stalemate and move the battle lines in the right direction. For instance, if a more rigorous historical analysis revealed that the probable concern of the Establishment Clause was government coercion of religion, then the Court could turn to addressing what constitutes coercion,142 what constitutes religious coercion,143 and even whether a non-coercion standard should apply to modern society at

139. CURRY, supra note 96, at vii.
140. Virtually all commentators agree that history provides no definitive answers. See, e.g., SMITH, supra note 14, at 5 (“Examining the history rarely, if ever, yields clear-cut answers.”); Green, supra note 21, at 1753 (“[H]istory can never provide ‘answers’ any more than it can provide ‘truths.’”); Powell, supra note 21, at 678 (“Complex historical assertions are always probabilistic in character. They involve greater and lesser likelihoods that they are correctly describing past reality.”). However, this fact has not stopped commentators from continually offering their own overarching theories of historical understanding.
141. See Powell, supra note 21, at 673–74, 678–79 (explaining that the temporal, linguistic, and cultural distance between the Framing and modernity inevitably renders the meaning of any useful evidence contestable).
142. In one case that relied on a coercion test, the Court did exactly this. Justice Kennedy found state coercion to exist in the social compulsion students feel to participate in a prayer offered during a public school’s graduation ceremony. See Lee v. Weisman, 505 U.S. 577, 592–95 (1992). Justice Scalia, on the other hand, would define coercion only as forced support of or participation in religion “by force of law and threat of penalty.” Id. at 640–41 (Scalia, J., dissenting).
all. The Court will remain impotent to move on to such issues if its members continue to insist that the entire historical record, which they are unable to analyze fully, and which, in any case, cannot speak on the process of constitutional interpretation, nonetheless conclusively supports each member’s particular standard.

2. Avoiding Direct Comparison

Second, analytical tools that focus on weight can also avoid the problems caused by direct comparison of discrete evidence. Specifically, analytical tools that categorize historical evidence by type will, by definition, avoid direct comparison, which in turn can protect the Court’s legitimacy by avoiding charges of eisegesis. First, comparing and weighting evidence at a more general level allows the inclusion of more evidence without the hassle of comparing each discrete piece in detail. Thus, the Court can sufficiently analyze a great amount of evidence by category, rather than examining each discrete piece of evidence in turn or (as is more likely) examining only a few discrete pieces and ignoring the rest.

Second, categorizing the evidence by type allows the Court to avoid the perception that it selects favorable and ignores unfavorable evidence to analyze. In effect, the Justices are able to avert the charge of being eisegetes and thereby safeguard the Court’s legitimacy. Comparison by type also protects the legitimacy of the Court in another way. Analytical tools that categorize by type have the side benefit of insulating the Court from directly handling what the American public sees as its inviolate heritage. For instance, finding that the relative weight of statements made in presidential inaugural addresses are fairly low allows the Court to escape the less palatable option of declaring that George Washington’s ideas found in his inaugural addresses are irrelevant. The tools contemplated by this Note permit the Court to continue handling history but at a level that is further removed from the historical narrative that the American people know and revere. Tools that refocus the Court’s analysis on weight, therefore, can address many of the problems caused by its previous turn to bad history. They can free the Court from its current tit-for-tat style of argument and avoid the perception of bias caused by direct comparison.

Proper analytical tools emphasize both the meaning and weighting components of historical analysis. Until now, the Court’s methods have mostly failed to weight evidence from history, and this has been the root cause for complaints

144. See supra notes 35–38 and accompanying text; see also Steven G. Gey, Reconciling the Supreme Court’s Four Establishment Clauses, 8 U. Pa. J. CONST. L. 725, 746 (2006) (arguing that Justice Scalia mitigates application of his coercion analysis for fear that it would not fit the public’s perception of religious liberty); Green, supra note 21, at 1737–38 (describing Justice Thomas’s desire to return to an originalist coercion-based standard for Establishment as “ill suited for twenty-first-century America”).

145. See supra notes 31–32 and accompanying text.
of eisegesis. If the Court is to overcome the perception of eisegesis, it must use analytical tools that bring weighting to the foreground.

IV. A SHORT EXAMPLE OF AN ANALYTICAL TOOL: THE RHETORICAL PRESIDENCY

This Note, especially Part III, has been a call for further research. The main purpose has been to point out that a disregard for the weighting component has been the chief flaw of the Court’s method of historical interpretation. This has caused the Court to either ignore obvious and relevant evidence altogether or to give it a stunted analysis. In both cases, the result is the same: charges of eisegesis that undermine the reasons for engaging in the analysis of history in the first place. A secondary purpose has been to propose an alternative method that would escape this result. That method would focus on weighting by employing analytical tools that categorize and compare evidence of historical understanding by generalized types, rather than directly comparing particularized pieces of evidence. Agenda setting like this seems appropriate, given the current deadlock in Establishment Clause jurisprudence, however, an example of what is meant by an “analytical tool” and how it may be applied might give more direction.

This Part uses the concept of the rhetorical presidency as an example of an analytical tool. To do so, it (A) offers a brief overview of the rhetorical presidency hypothesis, and then (B) categorizes evidence by type using the hypothesis.

A. THE RHETORICAL PRESIDENCY

The rhetorical presidency hypothesis is a well-known staple in the field of presidential studies and has been for over a quarter of a century. The theory was first developed by Jeffrey K. Tulis and his colleagues in 1981, but it gained more attention when Tulis published The Rhetorical Presidency in 1987.

The theory begins with the intuitive observation that modern presidents operate under a much different institutional construct than did their predeccessors. This fact has become almost a truisim in presidential studies. The modern presidency has been characterized as “plebiscitary”—increasingly dependent on

146. See supra note 96 and accompanying text.
147. See Terri Bimes, Understanding the Rhetorical Presidency, in The Oxford Handbook of the American Presidency 208, 209 (George C. Edwards III & William G. Howell eds., 2009) (noting the “substantial influence” the theory has had on political science in the presidential studies subfield); Mary E. Stuckey, Rethinking the Rhetorical Presidency and Presidential Rhetoric, 10 Rev. Comm. 38, 38 (2010) (describing the theory as a well-known concept over the last twenty-five years).
and seeking support from the general public. This dependence is self-reinforcing. As support increases, the expectations placed on the presidency also increase; as expectations increase, presidents seek further direct support from the public. Presidents appeal to the people by “going public,” directly petitioning for support on their policy positions by talking “‘over the heads’ of Congress.”

In contrast, early presidents eschewed appeals to the public altogether. The Framing generation feared the dangers that a powerful executive might pose to the fledgling republic. The model of the presidency, Tulis contends, was designed to prevent the office from devolving into a vehicle for demagoguery. Thus, the early presidents were constrained in their rhetoric by an “anti-demagoguery” principle embodied in the customs of the day. The anti-demagoguery principle of early presidential rhetoric contained two key limits on presidential speech. First, any speech on policy—such as recommending new law or describing the current state of public affairs—was made in writing and was addressed to Congress, not to the public. Second, any speech directed at the public was consistent with the notion of a presidency that eschewed popular leadership; public addresses instead were explications of constitutional principles. Even instruction in the Constitution tended to be hortatory rather than controversial; the early presidents espoused general patriotism, rather than staking out polemic constitutional interpretations. They “tended to present themselves in the manner of Supreme Court Justices, as nonpartisan exegetes of permanent constitutional principle, rather than propo-


151. See id. at 7–21 (describing the cyclical, escalating nature of plebiscitary politics); see also Stephen Skowronek, The Politics Presidents Make 30, 52–55 (1997) (describing the “secular” change in the presidency as new presidents must seek more and more political power from the public to remake the politics of the past).

152. See Tulis, supra note 149, at 4 (“Presidents regularly go ‘over the heads’ of Congress to the people at large in support of legislation and other initiatives.”). See generally Samuel Kernell, Going Public: New Strategies of Presidential Leadership 10–47 (4th ed. 2007) (describing the incentive for presidents to shun bargaining with Congress and instead force Congress by appealing directly to the public).

153. See Tulis, supra note 149, at 27 (finding the concept of popular leadership by the executive to be especially worrisome to the Framers).

154. See id. (equating executive popular leadership with demagoguery).

155. See id. at 30–32 (finding that the Founding generation “attempted both to narrow the range of acceptable demagogic appeals . . . and to mitigate the effects of such appeals in the day-to-day conduct of governance” partly by teaching acceptable rhetoric to “the principal actors in the government . . . through institutional mores, incentives, and rewards”). See generally id. at 61–93 (concluding that all nineteenth century presidents, save Andrew Johnson, adhered to the forms of presidential rhetoric first used by Washington and his immediate successors).

156. Id. at 46.

157. Id. at 47.
nents of ascendant constitutional visions.”

In sum, the rhetorical presidency hypothesis posits no more than that, unlike their successors, early presidents faced restrictions on the scope of their rhetoric depending on their audience. This observation is simple enough, but it can have far-reaching implications when used as an analytical tool to categorize historical evidence.

B. CATEGORIZATION USING THE RHETORICAL PRESIDENCY

For presidential scholars, the foregoing summary of Tulis’s hypothesis can be mundane. For the Court, however, the rhetorical presidency represents one of a number of analytical tools that can aid in categorizing evidence. Applying the rhetorical presidency and other tools like it to categorize evidence by type can prevent what has gone wrong in the Court’s Establishment cases. Given even the limited observations from the rhetorical presidency hypothesis outlined above, several categorizations can be made.

1. Historical vs. Modern Practice

A rather obvious but important application of the rhetorical presidency is that the conduct of modern presidents should not be equated with that of early presidents. Changes in constitutional structure since the Framing era prohibit that kind of straightforward calculation. After all, one would not say that Adams and Jefferson were political allies based merely on the historical evidence that Jefferson had been Vice President under Adams. To do so would conflate the modern relationship of president and vice president with that of their pre-Twelfth Amendment relationship. On the other hand, evidence of a long-accepted practice may bear some weight on historical understanding. By inference, it may show that the historical understanding of that practice was so prevalent that later generations continued in it without question and for the same reasons. But this inferential step makes the evidence of continued practice much less weighty than evidence of its actual practice during the Framing era.

The Court has sometimes conflated these two types of evidence. For example, in Marsh v. Chambers, the majority relied on the sound principle that an act “‘passed by the first Congress . . . is contemporaneous and weighty evidence of [the constitutional provision’s] true meaning.’” Yet the Court twice stated that the evidence on which it relied was the coexistence of the Establishment Clause with laws creating legislative chaplaincies during the Framing and “ever since.” The Court never explained why evidence of long-accepted practice

159. The remainder of the rhetorical presidency hypothesis concerns the transformation of the early vision of the presidency into its modern conception. The issues involved in that transformation and the theories attempting to explain it do not concern this Note.
161. Id. at 786, 788 (emphasis added).
has any relevance. It only explained that it should not be cast aside lightly and seemed to give it near the same weight as evidence from the Framing era—the First Congress established a legislative chaplaincy three days after reaching final agreement on the language of the Bill of Rights.\textsuperscript{162}

The Court has engaged in the same conflation in the context of presidential rhetoric. Historical evidence of the early presidents concluding their oaths with “so help me God,” praying during inauguration ceremonies, and issuing Thanksgiving proclamations has been equated with the evidence of the tradition of presidents doing the same up until now.\textsuperscript{163} Again, evidence from tradition may have an independent weightiness to it, but the Court does not clearly separate evidence of a historical practice from evidence of a continuing tradition. Using the rhetorical presidency hypothesis as an analytical guide, the Court could narrow the focus to the weightier evidence of presidential practice during the Framing era by simply saying that evidence of tradition is not as weighty.

2. Hortatory vs. Policy Rhetoric

As an analytical tool, the rhetorical presidency also differentiates between the purposes of early presidential speech, that is, whether it was instructive or persuasive. As an initial matter, the historian would first have to assign meaning to a speech to determine whether it should be categorized as hortatory or policy-oriented rhetoric. The rhetorical presidency offers some guidance here. When addressed to the public, presidential speech should be presumed hortatory in nature, not indicative of the President’s position on a contestable constitutional interpretation, unless circumstances indicate otherwise. Evidence that the speech was controversial indicates it should not be placed in the hortatory category. For example, speech contained in inaugural addresses should, in the main, fit under the hortatory designation because inaugural addresses were not considered controversial and were intended to expound on unity rather than partisanship.\textsuperscript{164}

On the other hand, presidential Thanksgiving proclamations arguably should

\begin{footnotes}
\item[162.] \textit{Id.} at 788–91.
\item[163.] \textit{See} McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 886–89 (2005) (Scalia, J., dissenting) (recounting the histories of the presidential oath of office and presidential Thanksgiving proclamations and arguing therefore that “the history and traditions that reflect our society’s constant understanding of [the First Amendment]” do not require neutrality between religion generally and non-religion); Lee v. Weisman, 505 U.S. 577, 631–35 (1992) (Scalia, J., dissenting) (reporting presidential prayer at inaugurations and Thanksgiving proclamations from George Washington to George W. Bush and finding these sufficient to inform the Court’s use of history).
\item[164.] \textit{See} TULIS, \textit{supra} note 149, at 47–51 (explaining that presidents from Jefferson to Buchanan attempted to articulate only general constitutional principles in inaugural addresses). Two early inaugural addresses can be considered exceptions to this general rule. Washington’s first address was delivered to “Fellow Citizens of the Senate and House of Representatives,” not to the public at large. \textit{Id.} at 48; George Washington, First Inaugural Address (Apr. 30, 1789), in \textbf{SACRED RIGHTS}, \textit{supra} note 2, at 446. Adams apparently attempted to replicate the style of Washington’s first inauguration speech. TULIS, \textit{supra} note 149, at 49; John Adams, Inaugural Address (March 4, 1797), in \textbf{1 A COMPI leaking the MESSAGES AND PAPERS OF THE PRESIDENTS}, 1789–1897, at 228–32 (James D. Richardson ed., Washington,
\end{footnotes}
not enjoy the hortatory presumption because such proclamations were a matter of some controversy. The first House Resolution asking President Washington to recommend a day of Thanksgiving and prayer was opposed by two representatives on the grounds that it was a religious matter for the states. As President, Madison initially refused to issue Thanksgiving proclamations and later issued them only during the War of 1812 and in a manner stressing the voluntariness of response to the proclamation. President Jefferson refused to issue any Thanksgiving proclamation during his administration. In fact, his refusals became the impetus for writing the Danbury Letter as a means of explaining his break from the practice of his predecessors. Because these proclamations were issued under some amount of controversy, they might reflect a more polemic interpretation of the Constitution, and their meaning should not be considered hortatory.

Once the interpreter decides to assign meaning, in part by determining whether certain speech fits within the hortatory or policy categories, she has yet to assign that category its relative weight. In this case, weighting depends on what subject is under analysis. If the interpreter is measuring the view of the overall Framing generation, then hortatory rhetoric would be weightier than policy rhetoric. Hortatory speech reflects an interpretation of constitutional values that listeners would have received without objection and thus represents a consensus of sorts concerning historical understanding. If, however, the interpreter seeks to measure the view of one of the early presidents, then...
policy-oriented speech would be weightier. Use of persuasive rhetoric, when anti-demagoguery custom dictated abstention from it, indicates the intensity of the speaker’s conviction.

3. Speech to Congress vs. Speech to the Public

The rhetorical presidency can also be used to categorize early presidential speech according to audience. One key feature of the anti-demagoguery principle is that it only operated to constrain presidential rhetoric when spoken to the public.\textsuperscript{173} When presidents spoke to Congress, however, they were free to discuss policy and to use the art of persuasion. Consequently, no weight should be added to or detracted from speech delivered to Congress; its weight must rely on other factors. On the other hand, speech directed to the public takes on additional weight depending on the subject under analysis.

A corollary to this general principle is that as the type of communication from early presidents becomes more private, the subject of the analysis may increase or decrease in weightiness. A non-hortatory statement confided to a personal friend in a letter holds great weight for determining the views of the writer but may have little weight when appraising the general views of the Framing generation. Conversely, a hortatory statement made to a crowd of people should be weighted more heavily when the interpreter seeks the historical understanding of the public, as opposed to the historical understanding of the speaker himself.

The three categorizations made above serve merely as examples of the results that can be achieved using only one analytical tool. Standing alone, the rhetorical presidency hypothesis offers no concrete solution to any church-state controversy that has come before the Court. However, the hypothesis and similar analytical tools, when used in concert, may be able to narrow the type of evidence the Court should consider most relevant. Most importantly, tools of this kind enable the Court to avoid the deleterious effects of perceived eisegesis.

This Part has attempted to provide a brief example of what an “analytical tool” might look like and describe how one could be used to categorize evidence by type to allow for a more robust weighting analysis than the one that has been used by the Court thus far. Fully examining the meaning of and assigning weight to early presidential speeches using the rhetorical presidency hypothesis is far beyond the reach of this Note. Even further beyond the purposes of this Note would be any attempt to comprehensively list potential analytical tools for future use. Efforts in that vein must be left to another forum. However, the rhetorical presidency does allow for at least one conclusion: tools of analysis need not be technical or complicated; they can be derived from simple observations and can be intuitively applied. In short, they are well within the Court’s competence.

\textsuperscript{173} See supra notes 156–57.
CONCLUSION

History still matters. In their exchange, James Madison and Jasper Adams’s surest common ground was that interpretation of the Establishment Clause must be informed by history. That principle remains intact for originalists and non-originalists alike. Despite the need for accurate historical analysis resulting from this fact, the Court seems intent to remain entrenched in its bad history, each side ignoring the other’s evidence. With the Court steadfastly refusing to acknowledge or handle contrary evidence, observers are left to assume the worst. They assume the Court does not enforce the rule of law because it seems that its members come to the constitutional text answer firmly in hand and then use it to bludgeon the desired narrative out of the historical record. The outcome is a shredded history and a tarnished Court.

This does not have to be the case. The Court can still use history, and yes, even argue over history without doing violence to it. The rhetorical presidency hypothesis illustrates one tool the Court may use to more responsibly engage in the weighting of evidence required by skilled historical analysis, but many more tools await discovery and delineation. A renewed emphasis on weighting, rather than focusing nearly exclusively on meaning, can protect the Court’s legitimacy while allowing it to develop, and even dispute, the historical narrative.