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# Introduction

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## SYMPOSIUM

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### THE (RE)TURN TO HISTORY IN RELIGION CLAUSE LAW AND SCHOLARSHIP

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#### INTRODUCTION

*Lee J. Strang\**

One of the leading treatises on constitutional law, John Nowak and Ronald Rotunda's *Constitutional Law*, no doubt spoke for many when it noted the "seemingly irresistible impulse to appeal to history when analyzing issues under the religion clauses."<sup>1</sup> This Symposium focuses on that "impulse."

In this Introduction, I offer a brief review of and explanation for the role history has played in the Supreme Court's religion clause jurisprudence and scholarly efforts. History's role is powerful in the Establishment Clause context, which I will discuss first. In stark contrast, history played almost no role in the Free Exercise Clause context until 1990, in response to the (in)famous *Employment Division v. Smith*.<sup>2</sup> Thereafter, I will discuss the contributions of the Symposium partici-

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1 JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 17.2, at 1411 (7th ed. 2004). For Nowak and Rotunda, however, "[t]his tendency is unfortunate because there is no clear history as to the meaning of the clauses." *Id.*

2 494 U.S. 872, 879 (1990) (holding that the Free Exercise Clause does not require states to grant exemptions to general, neutrally applicable laws that burden religious exercise).

pants which better our understanding of the proper role of history in, and the historical background of, the religion clauses.

### I. THE ORIGINALIST RETURN TO HISTORY

In order for there to be a "(Re)turn" to history, there must first be a "turn" to history, and this occurred in *Everson v. Board of Education*,<sup>3</sup> the Court's first modern application of the Establishment Clause. In *Everson*, the Court purported to delve into the "background and environment" of the adoption of the Establishment Clause to ascertain its meaning.<sup>4</sup> The Court, through Justice Black, reviewed the religious history of the settlement of the United States<sup>5</sup> and especially that of newly-independent Virginia,<sup>6</sup> and concluded that the Establishment Clause incorporated the views of James Madison and Thomas Jefferson.<sup>7</sup> While the *Everson* Court's historical claims have received strong criticism, the Court's first modern case applying the Establishment Clause built its argument on historical claims, thereby setting the groundwork for future appeals to history.

The Court's next establishment case, *McCollum v. Board of Education*,<sup>8</sup> continued its historical elaboration of the meaning of the Establishment Clause and included a long debate about the historical merits (or lack thereof) of *Everson*'s separationist principle.<sup>9</sup> The *McCollum* Court ruled that an Illinois school district's voluntary, in-school, release-time religious education program violated the Establishment Clause.<sup>10</sup> Justice Frankfurter, concurring, reviewed the history of education in the United States, especially that of public schools and release-time religious education, and concluded that the separation "of the State from the teaching of religion"<sup>11</sup> was a "presupposition of our Constitutional system."<sup>12</sup> Justice Reed, in dissent, reviewed the historical practices of governmental accommodation of religion in

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3 330 U.S. 1 (1947). Prior to *Everson*, the Supreme Court (and commentators) had rarely addressed the history of the religion clauses. See *Reynolds v. United States*, 98 U.S. 145, 162-66 (1878) (containing the Court's only substantial discussion of the history of the religion clauses prior to *Everson*).

4 330 U.S. at 8.

5 *Id.* at 8-11.

6 *Id.* at 11-14.

7 *Id.* at 13; see also *id.* at 16 ("In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" (quoting *Reynolds*, 98 U.S. at 164)).

8 333 U.S. 203 (1948).

9 *Id.* at 212-31 (Frankfurter, J., concurring); *id.* at 238-41 (Reed, J., dissenting).

10 *Id.* at 210 (majority opinion).

11 *Id.* at 217 (Frankfurter, J., concurring).

12 *Id.* at 220.

educational contexts to argue that the Establishment Clause did not bar the school district's program.<sup>13</sup>

After *McCollum*, the Court's discussions of the historical background of the Establishment Clause lessened in frequency and depth until, by the late 1960s and early 1970s, the Court's opinions were nearly devoid of historical analysis and consisted instead of arguments from precedent and policy. In fact, after *McCollum* in 1948 and prior to *Marsh v. Chambers*<sup>14</sup> in 1983, the Court's substantive historical discussions generally occurred only when the Court was faced with a relatively novel issue.<sup>15</sup> For example, there is little discussion of history in *Zorach v. Clauson*<sup>16</sup> in 1952 which addressed a variation on the release-time religious education issue decided earlier in *McCollum*,<sup>17</sup> while in *McGowan v. Maryland*<sup>18</sup> and *Engel v. Vitale*,<sup>19</sup> decided in 1961 and 1962 respectively, the Court engaged in moderately extended discussions of the historical practices of Sunday closing laws and official prayers, both relatively novel issues not directly addressed by the Court's precedent.<sup>20</sup>

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13 *Id.* at 238–40 (Reed, J., dissenting).

14 463 U.S. 783, 786 (1983) (upholding the Nebraska state legislature's practice of opening sessions with a prayer).

15 One exception is Justice Brennan's concurrence in *School District v. Schempp*, 374 U.S. 203, 230–304 (1963) (Brennan, J., concurring), which broadly ranged through history and precedent to reach a synthesis of what the Establishment Clause means.

16 343 U.S. 306, 315 (1952) (upholding a school district's program of releasing students, upon parental request, to participate in religious instruction conducted off school grounds but during school hours).

17 See also *Schempp*, 374 U.S. 203, 205 (1963) (relying on precedent to rule that recitation of passages from the Bible or the Our Father violated the Establishment Clause). *Epperson v. Arkansas*, 393 U.S. 97, 106–07 (1968), relied on analogy to *Everson*, *McCollum*, *Engel*, and *Schempp* to rule that an Arkansas statute, which forbade the teaching of evolution, violated the Establishment Clause. *Stone v. Graham*, 449 U.S. 39, 40–42 (1980) (per curiam), analogized the posting of the Ten Commandments in public schools to the activities struck down in *Schempp* and *Engel*.

18 366 U.S. 420, 431 (1961) (“[I]nquiry into the history of Sunday Closing Laws in our country . . . is relevant to the decision . . .”).

19 370 U.S. 421, 425 (1962) (“It is a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America.”).

20 See also *Larson v. Valente*, 456 U.S. 228, 244–46 (1982) (recounting the history of the Constitution's prohibition of denominational preferences); *Walz v. Tax Comm'n*, 397 U.S. 664, 681–85 (1970) (reviewing the history of tax exemptions for religious bodies); *Torcaso v. Watkins*, 367 U.S. 488, 490–92, 494–95 (1961) (reviewing the history of test oaths).

By the late 1960s and early 1970s, history's only appearance was generally as rhetorical window dressing for substantive conclusions which were already arrived at through other means. For example, Justice Douglas argued at length in his dissent in *Board of Education v. Allen*<sup>21</sup> over the harm caused by "public funds . . . being poured into sectarian schools,"<sup>22</sup> which he supported with a brief quote from James Madison at the very end of his opinion.<sup>23</sup>

The turn away from history by the Court during this period is likely explainable in large measure by the central role of precedent in our legal practice.<sup>24</sup> Traditionally, once a court decides the meaning of the law in a case, that case becomes an authoritative legal material that courts in later analogous cases are, absent unusual circumstances, obliged to follow.<sup>25</sup> Later courts will not repeatedly return to and discuss the foundations of the initial case. Instead, the issue is settled by the initial case and discussion of its foundations is therefore closed. As noted by the Court in *Committee for Public Education & Religious Liberty v. Nyquist*,<sup>26</sup> "[t]he history of the Establishment Clause has been recounted frequently and need not be repeated here."<sup>27</sup>

Many of the establishment cases that faced the Court in the late 1960s and 1970s involved governmental assistance to religious schools, which the Court decided on the basis of earlier decisions. Consequently, the Court did not engage in repeated returns to the historical foundations of *Everson*. For instance, in *Board of Education v. Allen*,<sup>28</sup> the Court upheld a state textbook loan program by analogy to *Everson*

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21 392 U.S. 236, 266 (1968) (Douglas, J., dissenting).

22 *Id.* at 266 n.18.

23 *Id.* at 266. ("Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" (quoting 2 THE WRITINGS OF JAMES MADISON 186 (Gaillard Hunt ed., 1901))).

24 For discussions on the role stare decisis plays in our legal practice, see generally Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987). See also Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. (forthcoming 2006) (discussing stare decisis and the role it plays in American legal practice).

25 See cases cited *infra* note 29.

26 413 U.S. 756 (1973).

27 *Id.* at 770.

28 392 U.S. 236.

and *Cochran v. Louisiana State Board of Education*.<sup>29</sup> Similarly, in *Lemon v. Kurtzman*<sup>30</sup> the Court struck down state private school aid statutes and created the (in)famous *Lemon* test on the basis of its precedent.<sup>31</sup>

Moreover, during this period a working majority of Justices subscribed to *Everson's* separationist principle and were therefore not inclined to challenge the historical basis of *Everson* and instead were content to apply precedent to new situations as they arose. Justices White and Rehnquist were the only Justices who consistently voted to affirm the constitutionality of the governmental accommodations of religion at issue, with Chief Justice Burger generally aligning with them.<sup>32</sup> However, prior to the return to history I discuss below, even

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29 See *id.* at 241–47 (majority opinion) (discussing *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), and *Cochran v. La. State Bd. of Educ.*, 281 U.S. 370, 375 (1930)); see also *Wolman v. Walter*, 433 U.S. 229, 235–36 (1977) (“The mode of analysis for Establishment Clause questions is defined by the three-part test that has emerged from the Court’s decisions.”); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 754 (1976) (concluding, after extensively discussing the Court’s precedent, that “the slate we write on is anything but clean” and that the Court’s “purpose” is to “merely . . . insure that [the principles governing public aid to religious schools] are faithfully applied in this case”); *Hunt v. McNair*, 413 U.S. 734, 741–49 (1973) (upholding a state bond statute on the basis of precedent); *Tilton v. Richardson*, 403 U.S. 672, 678–88 (1971) (upholding a federal program that provided funds to religious colleges and universities for construction of academic buildings).

30 403 U.S. 602 (1971).

31 *Id.* at 612–24; see also *Meek v. Pittenger*, 421 U.S. 349, 358 (1975) (relying on the *Lemon* test which was an “accurate distillation of this Court’s efforts over the past decades to evaluate a wide range of governmental action challenged as violative” of the Establishment Clause); *Sloan v. Lemon*, 413 U.S. 825, 828 (1973) (“Because we find no constitutionally significant difference between [the legislation at issue in *Nyquist* and the legislation at issue here], that decision compels our affirmance of the District Court’s decision here.”); *Nyquist*, 413 U.S. at 770–89 (relying on what the Court’s precedent held as “firmly established” to strike down a state aid statute that provided aid to nonpublic schools); *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 479–81 (1973) (striking down state statutes that provided aid to nonpublic schools by relying on *Everson*, *Lemon*, and *Nyquist*).

32 During the late 1960s and 1970s, Justice White voted to affirm the governmental accommodation of religion at issue in the following cases: *Wolman*, *Roemer*, *Meek*, *Sloan*, *Hunt*, *Nyquist*, *Levitt*, *Lemon*, *Walz*, *Allen*. See *Wolman v. Walter*, 433 U.S. 229, 255 (1977); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 770 (1976); *Meek*, 421 U.S. at 396; *Sloan*, 413 U.S. at 820; *Nyquist*, 413 U.S. at 820; *Hunt*, 413 U.S. at 749; *Levitt*, 413 U.S. at 482; *Lemon*, 403 U.S. at 665; *Walz v. Tax Comm’n*, 397 U.S. 664, 680 (1970); *Allen*, 392 U.S. at 238. Justice Rehnquist voted with Justice White, after he came on the Court in 1972, in every case except *Levitt*, his first Establishment Clause case while on the Court. See *Levitt*, 413 U.S. at 482. Chief Justice Burger voted with Justice White in *Wolman*, *Roemer*, *Meek*, *Sloan*, *Hunt*, *Nyquist*, and *Walz*. See *Wolman*, 433 U.S. at 255; *Roemer*, 426 U.S. at 766–67; *Meek*, 421 U.S. at 385; *Sloan*, 413 U.S. at 798; *Nyquist*, 413 U.S. at 798; *Hunt*, 413 U.S. at 749; *Walz*, 397 U.S. at 680. Burger voted against the

Justices White and Rehnquist did not rely on history to support their arguments so much as analysis of precedent.<sup>33</sup>

Scholarly examination of the history behind the Establishment Clause—and whether the Supreme Court's "official" version of the history was accurate—occurred throughout this period, but it ebbed and flowed in rough correlation to the use of history in the Court's opinions (and to the occurrence of the Court's opinions themselves). For instance, the number of scholarly books and articles on the subject dramatically increased during the period when the Court decided *Torcaso*, *McGowan*, *Engel*, and *Schempp* (between 1962–1965).<sup>34</sup> And

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governmental accommodations of religion at issue in *Levitt* and *Lemon*. See *Levitt*, 413 U.S. at 482; *Lemon*, 403 U.S. at 606–07.

33 The lack of arguments based on history by Justices White and Rehnquist prior to the originalist movement discussed below could have resulted from the intellectual climate which was hostile to originalism and/or a pragmatic calculation on the part of the Justices that originalist arguments were not, as a practical matter, going to succeed on the Court at that time.

34 See, e.g., CHESTER JAMES ANTIEAU ET. AL., *FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES* (1964); *CHURCH AND STATE UNDER GOD* (Albert G. Huegli ed., 1964); DAVID FELLMAN, *RELIGION IN AMERICAN PUBLIC LAW* (1965); PAUL A. FREUND & ROBERT ULICH, *RELIGION AND THE PUBLIC SCHOOLS* (1965); MARK DeWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* (1965); WILBUR G. KATZ, *RELIGION AND AMERICAN CONSTITUTIONS* (1964); PAUL G. KAUPER, *RELIGION AND THE CONSTITUTION* (1964); J. MARCELLUS KIK, *CHURCH AND STATE* (1963); MARTIN A. LARSON, *CHURCH WEALTH AND BUSINESS INCOME* (1965); FRANKLIN H. LITTELL, *FROM STATE CHURCH TO PLURALISM: A PROTESTANT INTERPRETATION OF RELIGION IN AMERICAN HISTORY* (1962); WILLIAM H. MARNELL, *THE FIRST AMENDMENT: THE HISTORY OF RELIGIOUS FREEDOM IN AMERICA* (1964); ANSON PHELPS STOKES & LEO PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* (rev. ed. 1964); *THE SUPREME COURT ON CHURCH AND STATE* (Joseph Tussman, ed. 1962); ARTHUR E. SUTHERLAND, *THE CHURCH SHALL BE FREE* (1965); *THE WALL BETWEEN CHURCH AND STATE* (Dallin H. Oaks ed., 1963); Allen C. Brownfield, *The Constitutional Intent Concerning Matters of Church and State*, 5 WM. & MARY L. REV. 174 (1964); Paul M. Butler & Alfred L. Scanlan, *Wall of Separation—Judicial Gloss on the First Amendment*, 37 NOTRE DAME LAW. 288 (1962); Edmond Cahn, *The "Establishment of Religion" Puzzle*, 36 N.Y.U. L. REV. 1274 (1961); Edmond Cahn, *On Government and Prayer*, 37 N.Y.U. L. REV. 981 (1962); Clifton B. Kruse, Jr., *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment*, 2 WASHBURN L.J. 65 (1962); Philip Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961); Leo Pfeffer, *Religion-Blind Government*, 15 STAN. L. REV. 389 (1963) (reviewing PHILIP B. KURLAND, *RELIGION AND THE LAW OF CHURCH AND STATE AND THE SUPREME COURT* (1962)); Jeffrey Dean Stone, *The Supreme Court, the First Amendment, and Religion in the Public Schools*, 63 COLUM. L. REV. 73 (1963).

The other phase of major scholarly activity, not surprisingly, was during the period of *Everson*, *McCullum*, and *Zorach* (between 1948–1953) See, e.g., JOSEPH L. BLAU, *CORNERSTONES OF RELIGIOUS FREEDOM IN AMERICA* (1949); R. FREEMAN BUTTS, *THE AMERICAN TRADITION IN RELIGION AND EDUCATION* (1950); MARK DeWOLFE HOWE,

the number of scholarly works was relatively low between the Court's decisions in *Zorach* and *Torcaso*, and again after 1965. Scholarly discussion of the history behind the Establishment Clause remained relatively low throughout the 1970s.

The return to history in religion clause law and scholarship—especially in the Establishment Clause context—is, I believe, a manifestation of the rise of originalism that occurred in the late 1970s and early 1980s.<sup>35</sup> In response to the perceived excesses of the Warren Court era, a reevaluation of constitutional interpretative methodologies occurred. The first prominent salvo was an article by then law professor Robert Bork, published in 1971.<sup>36</sup> Then came Raoul Berger's 1977 *Government by Judiciary*.<sup>37</sup> When Ronald Reagan took

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CASES ON CHURCH AND STATE IN THE UNITED STATES (1952); ALVIN W. JOHNSON & FRANK H. YOST, *SEPARATION OF CHURCH AND STATE IN THE UNITED STATES* (1948); J. M. O'NEILL, *RELIGION AND EDUCATION UNDER THE CONSTITUTION* (1949); WILFRID PARSONS, S.J., *THE FIRST FREEDOM: CONSIDERATIONS ON CHURCH AND STATE IN THE UNITED STATES* (1948); LEO PFEFFER, *CHURCH, STATE, AND FREEDOM* (1953); ANSON PHELPS STOKES, *CHURCH AND STATE IN THE UNITED STATES* (1950); WILLIAM GEORGE TORPEY, *JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA* (1948); Irving Brant, *Madison: On the Separation of Church and State*, 8 WM. & MARY Q. (3D SERIES) 3 (1951); ROBERT FAIRCHILD CUSHMAN, *Public Support of Religious Education in American Constitutional Law*, 45 ILL. L. REV. 333 (1950); Charles Fahy, *Religion, Education, and the Supreme Court*, 14 LAW & CONTEMP. PROBS. 73 (1949); Wilber G. Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426 (1953); Milton R. Konvitz, *Separation of Church and State: The First Freedom*, 14 LAW & CONTEMP. PROBS. 44 (1949); Conrad Henry Moehlmann, *The Wall of Separation: The Law and the Facts*, 38 A.B.A. J. 281 (1952); John Courtney Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROBS. 23 (1949); James M. O'Neill, *Nonpreferential Aid to Religion Is Not an Establishment of Religion*, 2 BUFF. L. REV. 242 (1953); Leo Pfeffer, *Church and State: Something Less Than Separation*, 19 U. CHI. L. REV. 1 (1951); Leo Pfeffer, *No Law Respecting an Establishment of Religion*, 2 BUFF. L. REV. 225 (1953); Arthur E. Sutherland, Jr., *Due Process and Disestablishment*, 62 HARV. L. REV. 1306 (1949); T. Raber Taylor, *Equal Protection of Religion: Today's Public School Problem*, 38 A.B.A. J. 277 (1952); Edward F. Waite, *Jefferson's "Wall of Separation": What and Where?*, 33 MINN. L. REV. 494 (1949).

35 For a thorough discussion of the history of originalism, see JOHNATHAN O'NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS* (2005). See also RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 89–100 (2004) (describing the death, transformation, and resurrection of originalism); DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* 20–54 (2005) (discussing the political motivations behind and goals of the rise of originalism); Steven K. Green, "Bad History": *The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. REV. 1717, 1736–37 (2006) (discussing briefly the turn to originalism); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599–612 (2004) (discussing the political motivations behind and goals of the rise of originalism).

36 Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

37 RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977).



office, originalism found a political advocate, and the Reagan Justice Department under Attorney General Edwin Meese began a concerted effort to advance originalism.<sup>38</sup> One of the fruits of this effort was a return to history in the Establishment Clause context.

Prominent originalists, both within and without the Administration, filed briefs<sup>39</sup> at all levels of the litigation in *Wallace v. Jaffree*.<sup>40</sup> Then Justice Rehnquist, one of the Court's earliest explicit proponents of originalism,<sup>41</sup> wrote a dissenting opinion in *Jaffree*<sup>42</sup> that re-

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38 See O'NEILL, *supra* note 35, at 134-60 (discussing the relationship between originalism and the Reagan Administration).

39 *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting); see also *Jaffree v. Bd. of Sch. Comm'rs*, 554 F. Supp. 1104, 1113 n.5 (S.D. Ala.) ("At the start the Court should acknowledge its indebtedness to several constitutional scholars. If this opinion will accomplish its intent, which is to take us back to our original historical roots, then much of the credit for the vision lies with Professor James McClellan and Professor Robert L. Cord. Their work and the historical sources cited in their work have proven invaluable to the Court in this opinion."), *aff'd in part and rev'd in part sub nom. Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983) ("The appellee [State of Alabama] and the district court rely heavily on the research of historians. These historians believe the Supreme Court misread the history surrounding the establishment clause. They submit that the establishment clause has a dual purpose (1) to guarantee the people of this country that the federal government will not impose a national religion, and (2) to guarantee states the right to define the meaning of religious establishment under their state constitutions and laws."), *aff'd*, 472 U.S. 38; O'NEILL, *supra* note 35, at 149-51 (discussing the concerted effort to change the Court's Establishment Clause interpretation in *Wallace*).

40 472 U.S. 38. The Court's opinion in *Marsh v. Chambers*, 463 U.S. 783 (1983), delved deeply into the history of legislative prayer two years prior to Rehnquist's dissent in *Jaffree*. However, *Marsh*'s use of history was not the coherently originalist use of history found first in Rehnquist's dissent and in many subsequent opinions by the Justices. Instead, the *Marsh* Court, focusing solely on legislative prayer, argued that it was "deeply embedded in the history and tradition of this country" and is "part of the fabric of our society." *Id.* at 786-92. Without explanation, the history of legislative prayer was viewed as a carve-out of the Court's previous precedent. *Id.* at 795. It was not part of an overarching originalist interpretation of the Establishment Clause.

The difference between *Marsh* and Rehnquist's dissent was recognized by both Justices O'Connor and White in *Jaffree*, although they had different reactions. O'Connor noted that Rehnquist "suggest[ed] that a long line of this Court's decisions are inconsistent with the intent of the drafters of the Bill of Rights," but found that since the history was inconclusive, the Court must "employ both history and reason." *Jaffree*, 472 U.S. at 79, 80 (O'Connor, J., concurring). White, by contrast, "appreciate[d] Justice Rehnquist's explication of the history of the Religion Clauses" and thought "it would be quite understandable if we undertook to reassess our cases dealing with these Clauses, particularly those dealing with the Establishment Clause." *Id.* at 91 (White, J., dissenting).

41 William Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 704 (1976) ("The brief writer's version of the living Constitution, in the last analysis, is a formula for an end run around popular government.").

lied on the originalist arguments presented to the Court.<sup>43</sup> Rehnquist argued that the “true meaning of the Establishment Clause can only be seen in its history” and that “the Framers inscribed the principles that control today.”<sup>44</sup> He further argued that the Court should abandon the historically inaccurate *Everson* “wall” metaphor.<sup>45</sup>

Recent scholarly work had strongly challenged the Court’s historical claims that undergirded its separationist holdings, most prominent among them Robert Cord’s *Separation of Church and State*.<sup>46</sup> Rehnquist’s opinion was an extended discussion of the history of the Establishment Clause building on that recent scholarship.<sup>47</sup> Rehnquist’s dissent was, unlike cases decided in the previous twenty years, a return to the historical foundations of the Court’s establishment jurisprudence and an explicit calling-into-question of that precedent. Rehnquist’s dissent became a starting point for future originalist arguments on and off the Court regarding the original meaning of the Establishment Clause.<sup>48</sup> The change in modes of argumentation in the Court’s opinions from the 1970s, and since Rehnquist’s dissent in *Jaffree*, is striking.

The originalist return to history in the Establishment Clause context has continued on the Court to the present. In the Court’s recent Ten Commandments decisions, for instance, the Justices debated the historical origins and the impact (or lack thereof) of that history on the questions facing the Court. In *McCreary County v. ACLU*,<sup>49</sup> Justice

42 472 U.S. at 91–114 (1985) (Rehnquist, J., dissenting).

43 O’NEILL, *supra* note 35, at 150–51.

44 *Jaffree*, 472 U.S. at 113 (Rehnquist, J., dissenting).

45 *Id.* at 107.

46 ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE*, at xiv (1982) (“In this book, with the use of mostly primary historical documents, I show conclusively that the United States Supreme Court has erred in its interpretation of the First Amendment.”). Cord’s book was cited by both Justices O’Connor and Rehnquist in *Jaffree*. *Jaffree*, 472 U.S. at 79 (O’Connor, J., concurring); *id.* at 104 (Rehnquist, J., dissenting).

47 *Jaffree*, 472 U.S. at 91–113 (Rehnquist, J., dissenting).

48 See, e.g., *Van Orden v. Perry*, 125 S. Ct. 2854, 2876 (2005) (Stevens, J., dissenting) (“Strong arguments to the contrary have been raised from time to time, perhaps the strongest in then Justice Rehnquist’s scholarly dissent in *Wallace v. Jaffree*.” (emphasis omitted)); John S. Baker, Jr., *The Establishment Clause as Intended: No Preference Among Sects and Pluralism in a Large Commercial Republic*, in *THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* 41 (Eugene W. Hickok, Jr., ed., 1991) (relying extensively on Rehnquist’s dissent); Richard S. Myers, *The Establishment Clause and Nativity Scenes: A Reassessment of Lynch v. Donnelly*, 77 Ky. L.J. 61, 99 (1989) (proposing a view of the Establishment Clause “in [the] long tradition . . . [including] now-Chief Justice Rehnquist”).

49 125 S. Ct. 2722 (2005).

Souter delivered the Court's opinion, which relied primarily on precedent to reach its conclusion, but he also engaged with Justice Scalia's explicitly originalist dissent by arguing that Scalia was wrong as an historical matter,<sup>50</sup> that the original meaning is indeterminate,<sup>51</sup> and that originalism is unworkable in any event.<sup>52</sup> Justice O'Connor, though she did not directly engage Scalia, argued that the Court has been "guid[ed]" by the Framers' principle of religious liberty, which, because of changed circumstances, the Court would apply in unforeseen ways.<sup>53</sup> Lastly, Justice Scalia, in dissent, engaged the majority, Justice O'Connor, and Justice Stevens' dissent in *Van Orden v. Perry*,<sup>54</sup> and argued that the original meaning of the Establishment Clause was authoritative, and that it permitted public display of the Ten Commandments.<sup>55</sup>

The continuing appeal of (and to) history has been aided by the appointment of Justices Scalia and Thomas, two prominent and vocal originalists who complimented Rehnquist, and occasionally O'Connor and Justice Kennedy.<sup>56</sup> As in other areas of the Court's jurisprudence, those Justices who might not otherwise be disposed to discuss the original meaning of the Constitution are required to respond to the originalist arguments put forward by the originalist Justices (especially in the establishment context). This occurred in the *Van Orden* and *McCreary County* cases where nonoriginalist Justices, such as Justice Stevens,<sup>57</sup> engaged in extended historical argument.

Partly in response to then Justice Rehnquist's dissent in *Jaffree*, the history of the Establishment Clause also received renewed attention by scholars. For instance, Leonard Levy published *The Establishment Clause* in 1986 in which he labeled Rehnquist's history "fiction."<sup>58</sup> The scholarly attention to the historical background of the Establish-

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50 *Id.* at 2742–44.

51 *Id.* at 2744 ("The fair inference is that there was no common understanding about the limits of the establishment prohibition."). For discussions of legal indeterminacy, see, e.g., Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987); Lee J. Strang, *The Role of the Common Good in Legal and Constitutional Interpretation*, 3 U. ST. THOMAS L.J. 48 (2005).

52 *McCreary*, 125 S. Ct. at 2745.

53 *Id.* at 2746–47 (O'Connor, J., concurring).

54 125 S. Ct. 2854.

55 *McCreary*, 125 S. Ct. at 2748–57 (Scalia, J., dissenting).

56 There is no indication, as of yet, whether the recently confirmed Justices, Chief Justice Roberts and Justice Alito, will be strongly originalist.

57 *Van Orden*, 125 S. Ct. at 2882–90 (Stevens, J., dissenting).

58 LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 155 (1986); see also LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAM-*

ment Clause has continued unabated to the present, as the scholars participating in this Symposium exemplify.<sup>59</sup>

## II. THE TOO-LATE(?) RETURN TO HISTORY

In comparison to the often determinative role history has played in the Establishment Clause context, history had no discernable impact on the Supreme Court's free exercise case law prior to *Smith*, and similarly, there was little scholarly focus on the historical origins of the Free Exercise Clause during this period.

The initial—albeit limited—turn to history in the Court's free exercise jurisprudence occurred in its first Free Exercise Clause cases.<sup>60</sup> In *Reynolds v. United States*,<sup>61</sup> the Court upheld application of a federal criminal bigamy statute to a member of the Church of Jesus Christ of Latter-Day Saints.<sup>62</sup> Reynolds argued that application of the statute to him would violate his right to free exercise because Mormonism required him to take more than one wife “and that the penalty for such failure and refusal would be damnation in the life to come.”<sup>63</sup>

The *Reynolds* Court engaged in a brief survey of the history of religious freedom contemporaneous to Ratification (less than three pages in the U.S. Reports)<sup>64</sup> and concluded that “Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.”<sup>65</sup> The Court then—again briefly—reviewed the history of legal prohibitions against polygamy at common law and in the United States contemporaneous with Ratification, and thereafter.<sup>66</sup> Given this unbroken history of legal prohibition, the Court concluded that “it is impossible” to find that the Free Exercise Clause prevented Congress from proscribing polygamy.<sup>67</sup>

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ERS' CONSTITUTION 174–94 (1988) (discussing the history of the Establishment Clause); LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 79–102 (1999) (same).

59 See, e.g., DANIEL L. DREIBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION OF CHURCH AND STATE (2002); NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT (2005); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002).

60 In *Davis v. Beason*, 133 U.S. 333, 343–44 (1890), the Court also briefly referenced the history of the Free Exercise Clause and *Reynolds v. United States*, 98 U.S. 145 (1878).

61 98 U.S. 145.

62 *Id.* at 166–67.

63 *Id.* at 161 (internal quotation marks omitted).

64 *Id.* at 162–64.

65 *Id.* at 164.

66 *Id.* at 164–65.

67 *Id.* at 165.

After this brief, initial flirtation, the Court turned from history. The Court's first modern free exercise case was *Cantwell v. Connecticut*.<sup>68</sup> The Court in *Cantwell* did not address history and instead offered policy arguments why protection of religious activities, but not unlimited protection, was necessary in the United States, "a people composed of many races and of many creeds."<sup>69</sup>

The absence of history in *Cantwell* continued in *Sherbert v. Verner*,<sup>70</sup> where the Court established the "compelling interest test" for free exercise exemption cases.<sup>71</sup> The Court began its opinion with a discussion of the scope of the Free Exercise Clause, which was determined exclusively by precedent.<sup>72</sup> And the Court simply cited to *NAACP v. Button*<sup>73</sup> to support its conclusion that South Carolina must support its burden on Sherbert's religious exercise with a compelling state interest.<sup>74</sup>

The absence of history continued after *Sherbert*.<sup>75</sup> As Justice Souter has noted: "Save in a handful of passing remarks, the Court has not explored the history of the [Free Exercise] Clause since its early attempts in 1879 and 1890."<sup>76</sup> The Court's case law until after *Smith* consisted of analyses of free exercise precedent and policy claims.<sup>77</sup>

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68 310 U.S. 296 (1940).

69 *Id.* at 310.

70 374 U.S. 398 (1963).

71 *Id.* at 406.

72 *Id.* at 402-03.

73 371 U.S. 415 (1963).

74 *Sherbert*, 374 U.S. at 403 (citing the discussion of the compelling state interest test in *Button*, 371 U.S. at 438).

75 See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1413 (1990) ("The Court made no effort in *Sherbert* or subsequent cases to support its holdings through evidence of the historical understanding of 'free exercise of religion' at the time of the framing and ratification of the first amendment."); see also Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 247-48 (1991) (pointing out the lack of discussion of historical meaning in the Court's free exercise jurisprudence).

76 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 574 (1993) (Souter, J., concurring in part and concurring in the judgment) (citing *Reynolds v. United States*, 98 U.S. 145, 162-66 (1878), and *Davis v. Beason*, 133 U.S. 333, 342 (1890)); see also McConnell, *supra* note 75, at 1413 ("Yet neither *Sherbert* nor any other Supreme Court opinion—majority, concurring, or dissenting—has ever grounded the interpretation of the free exercise clause in its historical meaning.").

77 See Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1109 (1990) (stating that for most of the twentieth century the Court's Free Exercise Clause doctrine was settled and scholars "were content to work out the implications of the doctrine rather than to challenge it at its roots").

For instance, in *Wisconsin v. Yoder*<sup>78</sup>—perhaps the high point of free exercise exemptions—Chief Justice Burger’s opinion found that the Amish defendants were entitled to a free exercise exemption from Wisconsin’s compulsory school attendance law through application of precedent to the facts of the case.<sup>79</sup> Discussion of the history of the Clause was absent.

During most of this period, legal scholars were concerned primarily with analyzing the Court’s precedent.<sup>80</sup> However, a few scholars did discuss the original meaning of the Free Exercise Clause.<sup>81</sup> But their impact on the Court was negligible, at least if one takes the Court’s opinions at face value, which litigants and scholars did.<sup>82</sup>

A number of factors, I believe, contributed to the marked disparity in the role of history between the Free Exercise and Establishment Clauses. The most important factor was the relative favor that religiously-based, constitutionally-mandated free exercise exemptions received across political and religious lines.<sup>83</sup> Most Americans agreed that free exercise exemptions were good policy and hence there was no strong motivation to critique the Court’s jurisprudence. As then

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78 406 U.S. 205 (1972).

79 *Id.* at 213–21, 230–34.

80 See McConnell, *supra* note 75, at 1414 (“[L]ittle or no scholarly work has been devoted primarily to the history of the concept of ‘free exercise of religion.’”).

81 See, e.g., WALTER BERNs, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* 1–32 (1976) (discussing the Founders’ interpretation of religious freedom); MICHAEL J. MALBIN, *RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT* 19–37 (1978) (providing some of the historical context of the Free Exercise Clause); Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1625–34 (1989) (arguing that one of the original animating principles of the religion clauses was accommodation of religious exercise); Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 843–60 (1986) (providing a generic history of the religion clauses); William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 375–79 (1989) (arguing that free exercise exemptions are not historically rooted); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 14–24 (proposing that the Court interpret the religion clauses to promote religious liberty based, in part, on the original political theory of the Constitution); Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691, 1695–99 (1988) (arguing that governmental accommodation of religious exercise within otherwise neutral and generally applicable laws is not supported by the original meaning of the Constitution).

82 This is shown, for example, by the briefs submitted to the Court in *Smith*, which noticeably lacked any historical challenge to the compelling interest test.

83 This remarkable consensus was displayed in the hostile reaction to *Smith*’s repudiation of free exercise exemptions. See Bradley, *supra* note 75, at 246 (listing many of the strange bedfellows who opposed *Smith*); see also McConnell, *supra* note 77, at 1111 (noting that *Smith* was opposed by “an unusually broadbased coalition”).

Professor McConnell noted: "The great debates over the relation of religion to government in our pluralistic republic . . . almost without exception were issues of establishment. Government support for religion, not government interference with religion, was the issue."<sup>84</sup> This was especially the case when compared to the strong motivation religious conservatives had to challenge the Court's historically-based interpretation of the Establishment Clause.<sup>85</sup>

As discussed above in Part I, the move toward originalism was strongly supported in the Reagan Administration's Department of Justice.<sup>86</sup> Originalists such as Attorney General Meese had the ambitious overarching goal of creating a "Jurisprudence of Original Intention"<sup>87</sup> along with many specific goals, including changes to the Court's separationist interpretation of the Establishment Clause.<sup>88</sup> Much lower on the list of sought-after changes was alteration of the Court's exemption interpretation of the Free Exercise Clause.<sup>89</sup> With finite time and resources, originalists concentrated their fire on what they saw as the

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84 McConnell, *supra* note 77, at 1109.

85 See McConnell, *supra* note 75, at 1413 (noting the disparity between the role of history in the two clauses).

86 See *supra* text accompanying notes 38-40.

87 Edwin Meese III, U.S. Attorney Gen., Address Before the American Bar Association (July 9, 1985), in MAJOR POLICY STATEMENTS OF THE ATTORNEY GENERAL 1, 7 (1989).

88 O'NEILL, *supra* note 35, at 149-51 (discussing the concerted effort to change the Court's Establishment Clause interpretation in *Wallace*).

89 See Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 409 (1986) (noting that "[p]olitically active fundamentalists" supported by the Reagan Administration have attacked the Court's Establishment Clause jurisprudence without noting a corresponding attack on the Court's free exercise jurisprudence).

The Reagan Administration's Justice Department issued a report detailing the Department's view on the correct interpretation of the Free Exercise Clause. U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: RELIGIOUS LIBERTY UNDER THE FREE EXERCISE CLAUSE (1986). The report concluded that a proper interpretation of the Free Exercise Clause permits governmental regulation of religious exercise "when government action is necessary to prevent manifest danger to the existence of the state; to protect public peace, safety, and order; or to secure the religious liberty of others." *Id.* at v. The report characterized these governmental interests as "compelling." *Id.*; see also *id.* at 57 (explaining that the state's burden is to "prove its regulation is the least restrictive means necessary to further a compelling state interest"). As a result, the official Reagan Justice Department interpretation of the Free Exercise Clause was relatively similar to the Supreme Court's exemption interpretation prior to *Smith*.

most egregious nonoriginalist errors in areas such as abortion and criminal procedure.<sup>90</sup>

A second reason for the lack of historical analysis in Free Exercise Clause cases is that court-granted free exercise exemptions did not have a large practical impact. This is true for a number of reasons. First, legislatures (on all levels) often provided for exemptions, either for altruistic or other reasons, and hence there was little need for courts to impose constitutional exemptions.<sup>91</sup> Second, given the political clout of mainstream religions, legislatures would only refuse to grant an exemption and burden religious exercise of minority religions whose adherents did not have the influence to motivate substantial criticism. Third, there were relatively few cases granting free exercise exemptions. Lastly, most of the United States has been relatively religiously homogeneous and most Americans' religious beliefs have been in accord with most acts of their elected branches.<sup>92</sup> As a result, no great need for religious exemptions ever arose.

A third reason why the *Sherbert* test was not challenged historically is the simple historical accident that the Court's modern free exercise jurisprudence was not premised on historical claims, as was its Establishment Clause interpretation.<sup>93</sup> In other words, the Court's fixation on history in the Establishment Clause context was the anomaly, and its lack of history in the free exercise context was the norm.<sup>94</sup> These different treatments of history persisted until *Smith*.

The return to history by both the Court and scholars occurred, in large measure, as a backlash against *Employment Division v. Smith*.<sup>95</sup>

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90 See U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 64–71 (1987). Section IV, titled "Cases Illustrating Non-Interpretive Jurisprudence," lists several examples of nonoriginalist cases and does not include any free exercise cases. *Id.*

91 See William K. Kelley, *The Primacy of Political Actors in Accommodation of Religion*, 22 U. HAW. L. REV. 403, 437–43 (2000) (arguing that the political process is very adept at providing accommodations for religious exercise by members of minority religions); see also Jesse H. Choper, *Comments on Stephen Carter's Lecture*, 87 CAL. L. REV. 1087, 1089–90 (1999) (gathering examples of legislative accommodation).

92 For statistics regarding America's religious beliefs, see GRADUATE CTR. OF THE CITY UNIV. OF N.Y., AMERICAN RELIGIOUS IDENTIFICATION SURVEY, available at [http://www.gc.cuny.edu/faculty/research\\_studies/aris.pdf](http://www.gc.cuny.edu/faculty/research_studies/aris.pdf) (last visited Apr. 23, 2006).

93 See David Reiss, *Jefferson and Madison as Icons in Judicial History: A Study of Religion Clause Jurisprudence*, 61 MD. L. REV. 94, 114 (2002) ("[T]hrough wholesale acceptance and adoption of Justice Waite's history in *Reynolds*, Black establishes a canonical Supreme Court history—a history which is more and more difficult to erase the more it is repeated.").

94 See McConnell, *supra* note 75, at 1413 (noting the anomaly).

95 494 U.S. 872 (1990).



*Smith* was the immensely controversial decision<sup>96</sup> that (re)interpreted the Court's free exercise jurisprudence to rule that the Free Exercise Clause does not require an exemption from neutral laws of general applicability.<sup>97</sup> None of the parties in *Smith* asked the Court to reevaluate its case law, and the opinion does not discuss the Court's motivation for its reevaluation. Justice Scalia, the Court's most prominent originalist,<sup>98</sup> wrote the Court's opinion but surprisingly<sup>99</sup> offered only two brief references to either the text or history of the Free Exercise Clause.<sup>100</sup> Instead, the bulk of the opinion was concerned with

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96 See, e.g., Bradley, *supra* note 75, at 248 (supporting *Smith* by asserting that the fixation on religious exemptions is the result of liberal individualism with its emphasis on privatized religion); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916 (1992) ("In fact, late eighteenth-century Americans tended to assume that the Free Exercise Clause did not provide a constitutional right of religious exemption from civil laws."); Douglas W. Kmiec, *The Original Understanding of the Free Exercise Clause and Religious Diversity*, 59 UMKC L. REV. 591, 592 (1991) ("Any, even unintended, prohibition of religious activity must be justified by its government proponents." (citation omitted)); Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 743-46 (1992) (arguing against religious accommodation); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 713-41 (1992) (reviewing arguments concerning constitutional religious exemptions); McConnell, *supra* note 77 (criticizing *Smith* as both historically and philosophically wrong); Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 117 (1992) (arguing that the religion clauses should be read together to promote religious freedom); Jane Rutherford, *Religion, Rationality, and Special Treatment*, 9 WM. & MARY BILL RTS. J. 303, 315-19, 332-45 (2001) (criticizing *Smith* and offering an alternative rationale for religious freedom); Ellis M. West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J.L. & RELIGION 367, 370-72 (1994) (arguing that the Free Exercise Clause's original meaning supports the result in *Smith*); John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 420 (1996) (criticizing *Smith* by arguing that *Smith* fails to recognize the four principles contained in the Free Exercise Clause).

97 *Smith*, 494 U.S. at 866 n.3 ("Our conclusion [is] that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest . . .").

98 See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed., 1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

99 See McConnell, *supra* note 77, at 1117 ("This is particularly surprising because the author of the majority opinion, Justice Scalia, has been one of the Court's foremost exponents of the view that the Constitution should be interpreted in light of its original meaning.").

100 See *Smith*, 494 U.S. at 878 (discussing permissible interpretations of the text of the Free Exercise Clause); *id.* at 885 (arguing that the compelling interest test contradicts our "constitutional tradition").

distinguishing the Court's precedent<sup>101</sup> and arguing that a pluralistic society such as our own "cannot afford the luxury of deeming presumptively invalid . . . every regulation of conduct that does not protect an interest of the highest order."<sup>102</sup>

Following *Smith*, both the Court and scholars dramatically returned to history. Members of the Court immediately questioned the historical validity of *Smith*'s holding. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,<sup>103</sup> Justice Souter urged the Court to reexamine *Smith* in light of historical scholarship showing that *Smith* was wrongly decided.<sup>104</sup> And more recently in *City of Boerne v. Flores*,<sup>105</sup> Justices Scalia and O'Connor engaged in a discussion over whether *Smith* was historically sound.<sup>106</sup>

The scholarly discussion of the history behind the Free Exercise Clause began immediately after *Smith* and continues.<sup>107</sup> Scholars have come to divergent conclusions on whether *Smith* is correct as an historical matter.<sup>108</sup>

### III. (RE)TURN TO HISTORY IN RELIGION CLAUSE LAW AND SCHOLARSHIP

Many of the questions that have animated the debate surrounding the Establishment Clause over the past sixty years, on and off the Court, remain with us today: What is the proper role of the historical background of the Clause? What does that history show regarding the meaning of the Clause? Other issues are relatively new, or have received renewed interest as of late. These include the constitutionality of the Pledge of Allegiance and of governmental displays of the Ten Commandments, the "federalism" or "jurisdictional" interpretation of the Establishment Clause, and the historical relevance of the Blaine

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Justice O'Connor in her concurrence also briefly addressed the text and history of the Free Exercise Clause, primarily by appealing to the Clause's purported historical purpose. *Id.* at 901–03 (O'Connor, J., concurring in part and concurring in the judgment). The bulk of her argument was spent analyzing precedent and making policy arguments.

101 *Id.* at 878–85 (majority opinion).

102 *Id.* at 888 (emphasis omitted).

103 508 U.S. 520 (1993).

104 *Id.* at 574–77 (Souter, J., concurring in part and concurring in the judgment).

105 521 U.S. 507 (1997).

106 *Id.* at 537–44 (Scalia, J., concurring in part); *id.* at 548–64 (O'Connor, J., dissenting).

107 See sources cited *supra* note 96 (listing articles discussing the original meaning of the Free Exercise Clause).

108 See sources cited *supra* note 96 (listing articles discussing the original meaning of the Free Exercise Clause).

Amendments to the meaning of the Clause. The scholars in this Symposium address many of these issues.

The scholars who participated in the American Association of Law Schools panel discussion on the *(Re)Turn to History in Religion Clause Law and Scholarship*, whose work is published in this Symposium issue of the *Notre Dame Law Review*,<sup>109</sup> all addressed aspects of history in the Establishment Clause context. Given the often critical role history has played in that context, the focus of the participants is not surprising.

Professor Green's contribution directly addresses the role of history and its continuing relevance.<sup>110</sup> First, Green briefly reviews history's role in Establishment Clause law and scholarship and the changing proponents of that role over time.<sup>111</sup> While those Green labels "separationists" initially used history to bolster the *Everson* account of the origins of the Establishment Clause, today "the Court's 'accommodationists[ ]' [are] now enjoying the fruits of the tree of history."<sup>112</sup> Green recounts this shift<sup>113</sup> and then critiques over-reliance on history by lawyers seeking to provide determinate answers to current questions.<sup>114</sup> Lastly, he critiques four specific, relatively recent uses of history: originalism in the Establishment Clause context generally; the history surrounding the Blaine Amendments; the Ten Commandments and Pledge of Allegiance cases; and Justice Thomas's "federalism" interpretation of the Establishment Clause.<sup>115</sup>

Like Green, Professor Laycock begins his article by questioning the uses to which history has been put in supporting "modern agendas" in religion clause litigation.<sup>116</sup> However, the primary focus of Laycock's contribution is his argument that—contrary to claims by some scholars—there is virtually no historical evidence that the Establishment Clause prohibits regulatory exemptions of religious exercise.<sup>117</sup> Laycock describes the history of exemptions for religious conduct beginning in the period of established churches. In those states with established churches, the members of the churches did not

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109 Symposium, *The (Re)Turn to History in Religion Clause Law and Scholarship*, 81 NOTRE DAME L. REV. 1697 (2006).

110 See Green, *supra* note 35.

111 *Id.* at 1717–19.

112 *Id.* at 1719.

113 *Id.* at 1720–28.

114 *Id.* at 1728–34.

115 *Id.* at 1734–53.

116 See Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1793–94 (2006).

117 *Id.* at 1837–40.

need religious exemptions, and by the time of the Founding, non-members had achieved many legislative exemptions.<sup>118</sup> Next, Laycock reviews the history of exemptions during the Founding period, both legislative and judicial, and concludes that there is “almost no evidence of anyone arguing that exemptions established religion.”<sup>119</sup> And Laycock finds that no scholars have “seriously argued that regulatory exemptions were forbidden.”<sup>120</sup> Lastly, Laycock argues that the origin of the exemption-equals-establishment argument is recent, not grounded in history, and is instead the result of misapplication of the principle of governmental neutrality.<sup>121</sup>

Professor Smith, in his contribution, clarifies the “jurisdictional interpretation” of the Establishment Clause and explains why he finds that interpretation persuasive.<sup>122</sup> The jurisdictional interpretation posits that the Establishment Clause did not embody a particular theory of religious freedom and instead reconfirmed the pre-constitutional jurisdictional arrangement: “religion was a subject within the domain of the states, not the national government.”<sup>123</sup> Smith argues that the jurisdictional interpretation best explains the historical evidence of, for example, the near-complete lack of debate over ratification of the Establishment Clause and the lack of a popular consensus on the necessity of disestablishment.<sup>124</sup> Thereafter Smith responds to criticisms of the jurisdictional interpretation.<sup>125</sup> His conclusion is that the jurisdictional interpretation, properly understood, is the best explanation for the historical meaning of the Establishment Clause, and that much of the resistance to the interpretation is the result of policy disagreements over the possible effects of the jurisdictional interpretation, not its historical accuracy.<sup>126</sup>

Professor Hamilton provides a “religious history of the Establishment Clause.”<sup>127</sup> After reviewing the unique religious background of the United States and the Establishment Clause, Hamilton argues that different denominations contributed distinct principles to the mean-

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118 *Id.* at 1808–10.

119 *Id.* at 1825.

120 *Id.* at 1830 (emphasis omitted).

121 *Id.* at 1827–33.

122 See Steven D. Smith, *The Jurisdictional Establishment Clause: A Reappraisal*, 81 NOTRE DAME L. REV. 1843, 1845 (2006).

123 *Id.* at 1843.

124 *Id.* at 1845–63.

125 *Id.* at 1863–91.

126 *Id.* at 1891–93.

127 See Marci A. Hamilton & Rachel Steamer, *The Religious Origins of Disestablishment Principles*, 81 NOTRE DAME L. REV. 1755, 1756 (2006).

ing of the Clause.<sup>128</sup> According to Hamilton, it was through the process of disestablishing state establishments that “religious leaders and their theologies . . . [developed] the principles of disestablishment that compose the doctrine today.”<sup>129</sup> The Calvinists, both Congregationalists and Presbyterians, contributed the principle of functional separation and nonpreferentialism.<sup>130</sup> The Baptists contributed the principle of the right to believe according to one’s own conscience.<sup>131</sup> The Quakers contributed the noncoercion principle.<sup>132</sup> And perhaps most controversially, Roman Catholics contributed to the understanding that “the separation of church and state in the United States requires intolerance of theocratic beliefs and conduct.”<sup>133</sup>

#### CONCLUSION

In this Introduction, I offered a brief review of and explanation for the role history has played in the Supreme Court’s religion clause jurisprudence and scholarly efforts. We have seen that history’s role is powerful in the Establishment Clause context, while history played almost no role in the Free Exercise Clause context until *Employment Division v. Smith*.<sup>134</sup> I suggested a number of explanations for the appeal of history, with the most prominent being the turn toward originalism that occurred on the Court and in the academy in the late 1970s and early 1980s. The strong role of history in religion clause scholarship continues today through the contributions of the Symposium participants. With the debate over history’s role and its content showing no signs of abating—spurred in large measure by the broader debate over constitutional interpretation—we can expect history to continue to play a central role.

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128 *Id.* at 1759–67.

129 *Id.* at 1767.

130 *Id.* at 1767–73.

131 *Id.* at 1773–76.

132 *Id.* at 1776–80.

133 *Id.* at 1788; 1780–88.

134 494 U.S. 872 (1990).