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JEFFERSON AND MADISON AS ICONS IN JUDICIAL HISTORY: A STUDY OF RELIGION CLAUSE JURISPRUDENCE

DAVID REISS*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof¹

Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of book-reading; and this they would say themselves, were they to rise from the dead.²

I. INTRODUCTION

Thomas Jefferson, neither Framer nor signer of the Constitution of the United States, has dominated Supreme Court discussions of the Religion Clause of the First Amendment.³ Seen as the proponent of a

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1. U.S. CONST. amend. I.

2. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 15 THE WRITINGS OF THOMAS JEFFERSON 32, 40 (Andrew A. Lipscomb & Albert E. Bergh eds., libr. ed. 1903).

3. I use the phrase Religion Clause to refer to both the Establishment Clause and the Free Exercise Clause. U.S. CONST. amend. I.

strict "wall of separation between Church and State,"⁴ Jefferson has been variously treated by Supreme Court Justices as a prophet, warrior, and a *persona non grata*.

James Madison, both Framer and signer of the Constitution of the United States, was at first presented in those same discussions as no more than Jefferson's able lieutenant. Only later has he come to play a greater role; indeed, his views regarding the meaning of the Religion Clause have, for now, taken center stage.⁵

This Article will provide a close reading of the parts assigned to Jefferson and Madison in four Supreme Court decisions. These decisions are selections from the ongoing drama of the development of religious liberty in America. *Reynolds v. United States*⁶ is the first Religion Clause case to introduce Jefferson, in 1878. He then reappears in *Everson v. Board of Education*,⁷ in 1946. Justice Black's majority opinion and Justice Rutledge's dissent give Jefferson, and Madison as well, a leading role.⁸ Jefferson and Madison then have frequent cameo appearances in a series of decisions that follow *Everson*. In two more recent opinions, Justice Rehnquist, dissenting in *Wallace v. Jaffree*,⁹ and Justice Souter, concurring in *Lee v. Weisman*,¹⁰ reevaluate the history of the adoption of the First Amendment, which leads them to recast Jefferson, and Madison as well, in more modest, supporting parts. Nonetheless, they have remained the spiritual fathers of American religious liberty.¹¹ The later Justices' revisionary impulse stems not only

4. Letter from Thomas Jefferson to Danbury Baptist Association (Jan. 1, 1802), in 16 THE WRITINGS OF THOMAS JEFFERSON 281, 282 (Andrew A. Lipscomb & Albert E. Bergh eds., libr. ed. 1903).

5. This point of view has been challenged by Justice Rehnquist in his dissent to *Wallace v. Jaffree*, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting). See *infra* Part II.C (discussing Justice Rehnquist's attempts to diminish the importance of both Jefferson and Madison).

6. 98 U.S. 145 (1878).

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

8. See *id.* at 11-13; *id.* at 28-43 (Rutledge, J., dissenting).

9. 472 U.S. at 91 (Rehnquist, J., dissenting).

10. 505 U.S. 577, 609 (1992) (Souter, J., concurring). Other opinions also address the history of the Religion Clause. See, e.g., *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (maintaining that the recitation of a prayer in New York's public schools upon the recommendations of the State Board of Regents was "a practice wholly inconsistent with the Establishment Clause"); *McCullum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948) (concluding that "the basic Constitutional principle of absolute Separation" was violated when Illinois public school teachers excused certain students from class so that the students could attend religious education classes). The four opinions addressed in this Article are, however, the most comprehensive in outlining the history of the adoption of the Religion Clause and the most thorough responding to the earlier versions of that history.

11. Even critics of the traditional understanding of the views of Jefferson and Madison have been reluctant to argue against the central role they have played in the development of American religious liberty. See, e.g., ROBERT L. CORD, SEPARATION OF CHURCH AND STATE

from a desire to present history more "accurately," but also from a desire to control the iconography of the Founding generation.

That generation has a hold on the American imagination unlike any other.¹² Thomas Jefferson, in particular, has been and continues to be a potent symbol of the radical democratic and Enlightenment tradition and is perceived as the foremost advocate of the strict separation of church and state.¹³ Social conservatives have attempted to diminish Jefferson's significance in this regard. One strand of this socially conservative tradition attempts to privilege certain religious behavior over non-religious behavior. The conflict between these two traditions continues today, within the law, among historians, and throughout popular culture.¹⁴

By highlighting how the opinions that are the subject of this Article make use of Thomas Jefferson and James Madison, two important points become clear. First, Religion Clause jurisprudence has been suffused with the story of the creation of the First Amendment. Second, because the historical record does not speak in a unified voice, the Court should reject history as the foundation for its Religion Clause jurisprudence. Rather, proponents of competing views of religious liberty must start with a sound theoretical basis in order to give meaning to the sometimes ambiguous text and historical record.¹⁵

In Part II of this Article, I examine the use of history in the five Supreme Court opinions mentioned above. This Part demonstrates how Religion Clause jurisprudence has been suffused with the story of the creation of the First Amendment. It also demonstrates that the historical record contains evidence for competing interpretations of the Religion Clause.

17-47 (1982) (arguing in favor of a new understanding of the views held by Madison and Jefferson regarding the Establishment Clause of the First Amendment).

12. See LANCE BANNING, *JEFFERSON AND MADISON: THREE CONVERSATIONS FROM THE FOUNDING*, at xi (1995) ("We still define ourselves, in part, by reference to the values of [the Founders and] their Revolution."); Evan Thomas, *Founders Chic: Live From Philadelphia*, *NEWSWEEK*, July 9, 2001, at 48 (discussing the enduring popularity and relevance of the Founders in American history and politics).

13. See generally MERRILL D. PETERSON, *THE JEFFERSON IMAGE IN THE AMERICAN MIND* 13 (1960) (discussing Jefferson's symbolism in the American mind, and noting that he is "the symbol of republican liberty").

14. See, e.g., Laurie Goodstein, *Fresh Debate on 1802 Jefferson Letter*, *N.Y. TIMES*, Sept. 10, 1998, at A20 (discussing a controversy over the original draft of the Danbury Baptists letter).

15. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-3, at 1158 (2d ed. 1988) ("The historical record is ambiguous, and many of today's problems were of course never envisioned by any of the Framers. Under these circumstances, one must consult the values and purposes underlying the religion clauses to decide what doctrinal framework might best realize those ends today.").

"History" in the context of this Article refers to what it is that historians produce.¹⁶ That is, it does not refer to the past itself, but to how we understand the past. Hayden White, a leading historian and philosopher of history, has drawn an important distinction between two types of historical narratives: the chronicle and the story. Each represents a process of selection and arrangement from the "unprocessed historical record," which is made up of facts from the past.¹⁷ In the former, "elements in the historical field are organized into a chronicle by the arrangement of the events to be dealt with in the temporal order of their occurrence . . ."¹⁸ Once the chronicle is compiled, it may be transformed into a story "by the further arrangement of the events into the components of a 'spectacle' or process of happening, which is thought to possess a discernable beginning, middle, and end."¹⁹ The story has a coherence that is not expected or required from a chronicle in that its elements all relate to each other.²⁰

The evaluation of each of the five opinions will present the chronicle of the historical events mentioned in it. The historical narrative in the opinion will then be analyzed as to its structure (Is it chronological? Who are the actors?), its framing of the historical discourse (When does it start and end? What is the relevant scope?), and its rhetorical approach to Jefferson and Madison (What literary techniques are employed to explain the significance of their actions?).

Part III will evaluate the use of history in these opinions, the rhetorical strategies that are employed in their histories, and the structure of the debate over Religion Clause jurisprudence as it has evolved over time. Part III will also explore the tension between the search for an objective understanding and the search for a narrative understanding of judicial opinions. Part III will then demonstrate how history is an insufficient basis for a Religion Clause jurisprudence and will argue that future debate should take place on the theoretical plane.²¹

16. KEITH JENKINS, ON "WHAT IS HISTORY?" 16-21 (1995) (distinguishing the "past" from "history" and describing history as "the various accounts constructed about the past by historians").

17. HAYDEN WHITE, *METAHISTORY: THE HISTORICAL IMAGINATION IN NINETEENTH CENTURY EUROPE* 5 (1973) (emphasis omitted). White points out that the way in which a particular historian/author selects and arranges the facts from the "unprocessed historical record" is done with the intent of "rendering that record more comprehensible" to an audience of choice. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 6-7.

21. See TRIBE, *supra* note 15, § 14-3, at 1158.

Before proceeding, the focus of this Article should be clarified. The scope of this Article will be the analysis of the literary technique used in *Reynolds*, *Everson*, *Jaffree*, and *Weisman* and how the narratives in those opinions inform their holdings. The merits of the substantive law at issue in these cases is beyond its scope. Furthermore, this Article will not argue that one of the judicial histories is "truer" than the others. Others have trod that path, to mixed effect.²² Finally, other than assuming that the history of the First Amendment is relevant to understanding its meaning, this Article will not evaluate the merits of "originalism," a topic which is well-covered elsewhere.²³ That said, the narrative content of these opinions is rich, has not yet been comprehensively evaluated, and deserves our attention.²⁴

The remainder of this introduction will introduce the key players in the historical drama of Religion Clause jurisprudence—Thomas Jefferson, James Madison, Joseph Story, and Roger Williams—and describe their competing views of religious liberty.

22. See THOMAS J. CURRY, *THE FIRST FREEDOMS*, at vii (1986) (noting that "[a] study of the modern literature on the meaning of the religious clauses of the First Amendment might well lead one to the conclusion that opposing scholars had checkmated each other, and that history had nothing more to offer by way of clarification"); LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE*, at xix (2d ed. 1994) (surveying colonial and state establishments of religion prior to the framing of the Establishment Clause, to conclude that "[s]cholars or judges who present an interpretation as the one and only historical truth . . . delude themselves and their readers"); Rodney K. Smith, *Getting Off on the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religious Clauses of the First Amendment and a Critique of the Reynolds and Everson Decisions*, 20 WAKE FOREST L. REV. 569, 572-73 (1984) (acknowledging that an interpretivist analysis is "somewhat more than indulging in ideological speculation and somewhat less than an objective reconstruction of true historical fact"); see also TRIBE, *supra* note 15, § 14-3, at 1158; Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 841 (1986) ("[W]e cannot definitively read the minds of the Founders except, usually, to create a choice of several possible meanings for the necessarily recondite language that appears in much of our charter of government. Indeed, evidence of different meanings likely can be garnered for almost every disputable proposition . . .").

23. See, e.g., JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996) (analyzing the authority the "original meaning" of the Constitution should have in modern interpretation); Larry Kramer, *Fidelity to History—And Through It*, 57 FORDHAM L. REV. 1627 (1997) (arguing that the use of history in constitutional interpretation must include both the founding moments and subsequent developments); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (describing the problems of both originalism and nonoriginalism and concluding that, on a theoretical and practical level, originalism is the lesser of the two evils).

24. Various writers mentioned throughout this Article have evaluated aspects of the narrative component of the opinions examined in this Article, but few have attempted to do so comprehensively. One who has done so regarding *Everson* is L.H. LaRue. See L.H. LARUE, *CONSTITUTIONAL LAW AS FICTION* 9-11 (1995).

A. *Thomas Jefferson*

Professor Merrill D. Peterson, in his book *The Jefferson Image in the American Mind*, documents how Americans have viewed Thomas Jefferson over the last 200 years and reveals that we have typically ended up with one form or another of hagiography.²⁵ Peterson notes the irony of this, as by "Jefferson's account, the Revolutionary Heroes and Founding Fathers were not the pure and disinterested patriots of the mythic mind."²⁶ Yet, a People will have its way with its symbols. Peterson notes the importance of such symbolism in the political process:

Every political party has, in some measure, its canonized texts and doctrines, its fabled heroes and demons, its legend and tradition and ritual, its moral posture, its emotive rhetoric, its ideological distortions and disguises. The total composition is the party's myth, an imaginative projection of the party's history and destiny. It invokes commonly shared values and ideals, inspires sentiments of loyalty, and induces the widest possible response in its support. Symbols are objective representations and vehicles of the myth, most successful when they are charged with its whole emotional background. They make the abstract vivid, the chaotic symmetrical, the drab colorful, the sordid struggles of interests struggles of high principle. No myth is true in the sense of correspondence to objective reality; but this does not diminish the importance of its shaping power in history, which is "determined no more by what is true than by what men believe to be true."²⁷

25. PETERSON, *supra* note 13. There has been a recent movement to portray Jefferson in a less saintly light. See generally JOSEPH ELLIS, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON*, at xi (1997) (concluding "[t]he best and the worst of American history are inextricably tangled together in Jefferson, and anyone who confines his search to one side of the moral equation is destined to miss a significant portion of the story"); LEONARD W. LEVY, *JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE* (1963) (examining the paradox between Jefferson's espoused libertarian principles and his occasionally unlibertarian behavior); PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 98-99 (1997) (examining the creation of the Declaration of Independence and concluding that Jefferson "was no Moses receiving the Ten Commandments from the hand of God, but a man who had to prepare a written text with little time to waste . . . producing a draft that revealed both splendid artistry and signs of haste"); CONOR CRUISE O'BRIEN, *THE LONG AFFAIR: THOMAS JEFFERSON AND THE FRENCH REVOLUTION, 1785-1800* (1996) (contrasting Thomas Jefferson's role in the French Revolution with the traditional, romantic image of Jefferson).

26. PETERSON, *supra* note 13, at 35.

27. *Id.* at 69-70. While Jefferson was a potent image in the political arena during the nineteenth century, he was rarely so in the judicial realm until *Reynolds v. United States*, 98 U.S. 145 (1878). Prior to *Reynolds*, he is generally only mentioned in connection with Supreme Court cases pertaining to trusts and estates and land acquisition. See Armstrong

Peterson's study of Jefferson as a symbol sheds light on both the underlying principles and the social movements that have shaped America.

Jefferson's sanctification began in his own lifetime: "[i]n the political arena, the [Jefferson] *Memoirs* became the canon, the Koran, the textbook, the Bible, the touchstone, to which men turned as they competed for the favors of the Jefferson symbol."²⁸ Some of the rhetoric surrounding Jefferson was deployed for political reasons. Peterson writes that "[w]ithin the new political design of the Jackson era, [Jefferson] was transformed into a democratic saint."²⁹ Peterson argues that the Jacksonians successfully portrayed Jefferson as the founder of both democracy and the Democratic Party, an approach which so intermingled Jefferson, democracy, and the Democratic Party that "one scarcely existed in the public mind apart from the others and attempts to disengage them met with fleeting success."³⁰ The influence of the name "Jefferson" runs just as deeply throughout the Civil War, the Progressive Era, the New Deal, and today as people attempt to cultivate their contemporary notions of freedom from the original Jeffersonian soil.³¹

A fundamental component of Jefferson's image and his democratic agenda was his belief that religious liberty should be guaranteed by the state.³² Indeed, Jefferson fought for religious liberty through-

v. Lear, 33 U.S. (8 Pet.) 52 (1834) (addressing the validity and effect of a will in which Thomas Jefferson was the named executor); *Johnson & Graham's Lessee v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) (noting that Jefferson was one of a number of representatives from Virginia to sign over Virginia's claims to the land northwest of the Ohio River). Note, also, that the Supreme Court was dominated by Jefferson's ideological opponents, such as Chief Justice Marshall, Justice Story, and other federalists, for much of the nineteenth century. DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 265-66 (1994).

28. PETERSON, *supra* note 13, at 35 (internal quotation marks omitted).

29. *Id.* at 66.

30. *Id.* at 69.

31. See generally *id.* (surveying the impact of Jefferson's image and the democratic ideals he fostered throughout American history); ELLIS, *supra* note 25, at 3-10 (describing the use of the Jefferson image during various times in American history).

32. Although some commentators have noted some apparent anomalies, most would agree that he "was a remarkably consistent and zealous defender of religious freedom." MAYER, *supra* note 27, at 158. Even Leonard Levy, a scholar who has been critical of Jefferson's record on civil liberties, writes that Jefferson's "record on religious liberty was really quite exceptional" for its "almost consistent demonstration of devotion to principle." LEVY, *supra* note 25, at 21. But see ROBERT M. HEALEY, *JEFFERSON ON RELIGION IN PUBLIC EDUCATION* 133 (1962) (arguing that Jefferson displayed many "apparent" inconsistencies in his attempts to implement "the wall of separation" between church and state); 2 GEORGE L. HASKINS & HERBERT A. JOHNSON, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 9 (1981) (arguing that the contradictions in Jefferson's thinking and character are numerous but should not always be taken at face value); Joel F. Hansen, Comment, *Jefferson and*

out his career. In 1776, he proposed a constitution for Virginia that included a religious freedom provision.³³ He soon thereafter wrote the Bill for Establishing Religious Freedom, which Virginia enacted in slightly different form in 1786.³⁴

In 1802, while President, Jefferson wrote a letter to the Danbury Baptist Association that summarized his position on the proper relationship between church and state:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," *thus building a wall of separation between Church and State*. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.³⁵

This letter has come to have central importance for judicial thinking about the Religion Clause, and the wall of separation metaphor has come to be closely identified with Jefferson.³⁶

As President, Jefferson consistently refused to call for days of thanksgiving and fasting in contrast to his predecessors, Washington

the Church-State Wall: A Historical Examination of the Man and the Metaphor, 1978 BYU L. REV. 645, 661-72 (noting apparent inconsistencies in Jefferson's view of church-state relations).

33. Thomas Jefferson, Third Draft of the Virginia Constitution, in 1 THE PAPERS OF THOMAS JEFFERSON, 1760-1776, at 356, 363 (Julian P. Boyd ed., 1950) ("All persons shall have full and free liberty of religious opinion; nor shall any be compelled to frequent or maintain any religious institution.").

34. Thomas Jefferson, A Bill for Establishing Religious Freedom, in 2 THE PAPERS OF THOMAS JEFFERSON, 1777-1779, at 545 (Julian P. Boyd ed., 1950) [hereinafter A Bill for Establishing Religious Freedom]; William Jennings Bryan, *The Statute for Establishing Religious Freedom*, in 8 THE WRITINGS OF THOMAS JEFFERSON, at iii (Andrew A. Lipscomb & Albert E. Bergh eds., libr. ed. 1903).

35. Letter from Thomas Jefferson to Danbury Baptist Association, *supra* note 4, at 281-82 (emphasis added).

36. Jefferson was not the first to use the "wall of separation" metaphor. Roger Williams used the same metaphor to advocate a wall protecting religion from the influence of civil government. See MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS* 5-9 (1965) (discussing how Jefferson and Williams differed in their separate usages of the "wall" metaphor).

and Adams.³⁷ In the original draft of the letter to the Danbury Baptists, Jefferson had noted that the First Amendment prohibited Congress from enacting laws respecting religion,³⁸ and that the executive was authorized only to execute legislative acts; therefore, he explained, he had refrained from ordering "exercises of a religious character."³⁹

Jefferson was more concerned with protecting the civil sphere from the pernicious influences of religion than with protecting the spiritual realm from governmental interference.⁴⁰ Notwithstanding this focus, Jefferson's Bill for Establishing Religious Freedom did acknowledge that religion might need to be protected from the civil sphere as well:

[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.⁴¹

That said, one is hard pressed to find many other examples of Jefferson's concern for the vitality of religious practice.

B. *James Madison*

Madison, although a key figure in the fight for religious liberty in colonial Virginia, an author of the *Federalist Papers*, and a leading member of the Constitutional Convention and the First Congress (not to mention Secretary of State and President), has never maintained

37. LEVY, *supra* note 25, at 7 (noting that Jefferson maintained that "[c]ivil powers alone . . . were vested in the President of the United States; he therefore possessed no authority to direct or even recommend exercises of a religious character").

38. See MAYER, *supra* note 27, at 164.

39. LEVY, *supra* note 25, at 7. The meaning and relevance of the letter to the Danbury Baptists is debated even today. A recent movement argues that it has been seriously misunderstood to be a "statement of fundamental principles" when it was really "meant to be a political manifesto, nothing more." Goodstein, *supra* note 14. James H. Hutson, Chief of Manuscript Division, Library of Congress, asserted that Jefferson had never intended his letter to the Danbury Baptist Association to be the foundation for law (i.e. the Establishment Clause), rather his letter was meant to garner political favor from New England constituents. *Id.* Some conservative Christian leaders have argued that this analysis is proof that Jefferson's wall metaphor should not stand in the way of a greater intermingling of church and state. *Id.*

40. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1453 (1990).

41. A Bill for Establishing Religious Freedom, *supra* note 34, at 546.

the same hold on the American imagination as Jefferson. And while his contributions to the *Federalist Papers* and his notes from the Constitutional Convention are considered to be of singular importance, Madison has never been as potent an icon of the American political tradition as Jefferson.

Madison's career in government was, like Jefferson's, extraordinary. Among other accomplishments, he led Virginia, which in turn led other states, in organizing the federal convention.⁴² He wrote resolutions that provided the initial outline for constitutional reform. His leading role in the Constitutional Convention has given him the moniker of the "Father of the Constitution."⁴³ In the First Congress, he used his leadership role to fight for the adoption of the Bill of Rights.⁴⁴ Prior to his role in national government, he served in the Virginia Assembly and was a member of the Virginia Convention of 1776, which drafted Virginia's first republican constitution. He is credited with authoring its landmark religious liberty provision.⁴⁵ Notwithstanding his own accomplishments, it is generally agreed that "Madison has been unjustly consigned to the shadow of his ostensibly more brilliant and captivating colleague Jefferson"⁴⁶

Madison's views on religious liberty were similar, but not identical, to Jefferson's. He emphasized that the civil and the religious spheres needed to be protected from each other—that a perfect separation must be maintained between them.⁴⁷ But more than Jefferson, he emphasized the threats to religion from civil interference, particularly in his *Memorial and Remonstrance Against Religious Assessments*.⁴⁸

C. Joseph Story

Justice Joseph Story, although originally a Jeffersonian from the post-Revolutionary generation, opposed Jefferson's stance on the rela-

42. LANCE BANNING, *THE SACRED FIRE OF LIBERTY* 1 (1995).

43. DREW R. MCCOY, *THE LAST OF THE FATHERS*, at xii (1989).

44. BANNING, *supra* note 42, at 1.

45. JACK N. RAKOVE, *JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC* 13 (1990).

46. MCCOY, *supra* note 43, at xv.

47. Letter from James Madison to Edward Livingston (July 10, 1822), in *IX THE WRITINGS OF JAMES MADISON, 1819-1836*, at 98, 102 (Gaillard Hunt ed., 1910). In contrast to the belief that "[r]eligion by law, was right & necessary; that the true religion ought to be established in exclusion of every other; And that the only question to be decided was which was the true religion," Madison maintained that both religion and government will "exist in greater purity, the less they are mixed together." *Id.*

48. JAMES MADISON, *MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS* (1785), reprinted in *8 THE PAPERS OF JAMES MADISON 1784-1786*, at 295 (Robert A. Rutland et al. eds., 1973).

tionship between religion and civil society. In particular, he directly attacked Jefferson's conception of religious liberty after Jefferson argued that Christianity was not part of the common law.⁴⁹ Story was shocked by this claim and mounted a full-scale assault in response.⁵⁰ Story even went so far as to doubt Jefferson's loyalties to the Union because of his radical views.⁵¹

In his *Commentaries on the Constitution of the United States*, Story provides an alternative reading of the meaning of the Religion Clause to that of Jefferson. Justice Story maintained:

[T]he right of a society or government to interfere in matters of religion will hardly be contested by any persons who believe that piety, religion, and morality are intimately connected with the well-being of the state, and indispensable to the administration of civil justice. . . . And at all events, *it is impossible for those, who believe in the truth of Christianity, as a divine revelation, to doubt, that it is the especial duty of government to foster and encourage it among all the citizens and subjects.* This is a point wholly distinct from that of the right of private judgment in matters of religion, and of the freedom of public worship according to the dictates of one's conscience.⁵²

Story then supports his interpretation with historical and philosophical arguments,⁵³ and speculates:

Probably at the time of the adoption of the constitution, and of the [First] amendment to it, . . . *the general, if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship.* An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would

49. JAMES McCLELLAN, *JOSEPH STORY AND THE AMERICAN CONSTITUTION* 118-20 (1971). Jefferson criticized the widely held belief that Christianity was an integral part of English and American common law. Jefferson maintained that the idea that Christianity had been incorporated in the common law was a "judicial forgery." *Id.* at 118.

50. *Id.* at 119-28. Justice Story maintained that there was an inseparable bond between Christianity and the common law. In fact, Story opined that "[i]t appears to me inconceivable . . . how any man can doubt, that Christianity is a part of the common law." *Id.* at 120.

51. *Id.* at 119. Justice Story "frequently warned his friends and associates that Jefferson was in all probability the evil-minded genius behind the spreading disintegration of the country. Jefferson's sympathies toward the common law were also suspect, and his unorthodox religious opinions constituted a favorite subject of public gossip." *Id.* (footnote omitted).

52. 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1871, at 661 (3d ed. 1858) (emphasis added).

53. *Id.* §§ 1873-1874, 1876.

have created universal disapprobation if not universal indignation.⁵⁴

Story further opines that the “real object of the amendment was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to a hierarchy the exclusive patronage of the national government.”⁵⁵ Story concludes that the United States is a Christian nation, and therefore Christianity should receive support from the state.⁵⁶ Thus, Story provides a stark alternative to Jefferson and Madison—rather than religion and civil society needing to be protected from each other, he believes that they must be commingled in order to support each other.

D. Roger Williams

The American tradition of religious liberty contains one other significant thread, one that tends to get less attention in the Court’s Religion Clause jurisprudence than those outlined above. Roger Williams, the seventeenth century founder of Rhode Island, is considered the most eloquent proponent of the pietistic view that a “wall of separation” was needed to protect the church from worldly corruption.⁵⁷ Williams’s writings were not well known during the Revolutionary period and it does not appear Jefferson was even aware of Williams’s

54. *Id.* § 1874, at 663 (emphasis added).

55. *Id.* § 1877, at 664. Unsurprisingly, Jefferson would not agree with Story’s interpretation. In his 1821 autobiography, he wrote that the Act for Establishing Religious Freedom (in Virginia) was meant to be universal—“to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and Infidel of every denomination.” Thomas Jefferson, *Autobiography*, in 1 THE WRITINGS OF THOMAS JEFFERSON 1, 67 (Andrew A. Lipscomb & Albert E. Bergh eds., libr. ed. 1903) (emphasis added).

Madison would not agree with Story either. In his *Memorial and Remonstrance*, he asks, “[w]ho 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?” MADISON, *supra* note 48, at 300. Madison indicates that no Christian can be free to practice his or her religion if non-Christians are not equally free to practice theirs. He continues, “the proposed establishment [of Christianity] is a *departure from that generous policy, which, offering an asylum to the persecuted and oppressed of every Nation and Religion*, promised a lustre to our country, and an accession to the number of its citizens.” *Id.* (emphasis added).

56. 2 STORY, *supra* note 52, § 1874, at 663.

57. Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1565-66 (1989). Roger Williams “announced the wall of separation metaphor over 150 years before Thomas Jefferson.” *Id.* at 1566; see Howe, *supra* note 36, at 5-6 (quoting Roger Williams’s “wall of separation metaphor” to illustrate the pietist fear that “wordly corruptions . . . might consume the churches if sturdy fences against the wilderness were not maintained”).

prior use of the phrase "wall of separation." Nonetheless, other Revolutionary Era figures reiterated such "pietist" views at that time.⁵⁸

* * * *

A number of important theoretical issues have arisen in Religion Clause jurisprudence that remain unsettled.⁵⁹ For the purposes of this article, Religion Clause "theory" relates solely to the following issue: to what extent does the Clause require church and state to be separated? This Article does not outline the various policy arguments in favor of Jeffersonian, Madisonian, or Williamsian separationism; Storyian preferentialism; (as we shall later see) Rehnquistian non-preferentialism; or any other approach to religious liberty. Such a task is for another day. The claim throughout this Article that Religion Clause jurisprudence must be based upon theory is a claim that our past is insufficient to tell us which approach is superior. Rather, proponents of every view should describe how Americans should want the relationship of the civil and religious spheres in our polis to be structured.

Part II will document how several Supreme Court Justices have attempted to control the content of judicial discourse regarding the Religion Clause by controlling the iconography of members of the Founding generation and by reworking the history of the origin of the Religion Clause itself. I find that in large part, the Justice who can define that iconography dominates the discourse.

II. THE RELIGION CLAUSE CASES

A. *Reynolds v. United States*

In *Reynolds v. United States*,⁶⁰ the Court upheld the conviction of a Mormon man, the petitioner, found guilty of bigamy under federal law in what was then the Territory of Utah.⁶¹ The petitioner had argued in his defense that the Federal government could not "interfer[e] by positive enactment with the social and domestic life of [the Territory's] inhabitants and their internal police."⁶² The Court denied that this was the relevant issue of inquiry and instead asked whether the defendant would be guilty for "knowingly violat[ing] a

58. McConnell, *supra* note 40, at 1426-27 (noting that Williams's writings were "lost and forgotten" until Isaac Backus rediscovered them in 1773).

59. See generally TRIBE, *supra* note 15, §§ 14-2 to 14-14 (outlining differing perspectives on substantive Religious Clause issues and providing references to relevant sources).

60. 98 U.S. 145 (1878).

61. *Id.* at 168.

62. *Id.* at 152.

law which has been properly enacted, if he entertains a religious belief that the law is wrong.”⁶³ In order to answer this question, the Court found it necessary to define the word “religion” as it is used in the First Amendment.

Noting that religion is not defined in the text of the Constitution itself, Chief Justice Waite, writing for the Court, stated that “[w]e must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted.”⁶⁴ After defining the word “religion” as it is used in the First Amendment to his satisfaction, Waite reviewed the history of polygamy and its attendant punishments.⁶⁵ Finally, Waite evaluated polygamy in the context of the First Amendment and found that its punishment did not violate the First Amendment.⁶⁶

The chronicle of the adoption of the First Amendment told in *Reynolds* is straightforward, and even appears simplistic. Colonists were persecuted for their religious beliefs until Madison and Jefferson fought off such persecutors.⁶⁷ Jefferson supplanted official persecution with official toleration of all religious belief.⁶⁸ Madison and Jefferson began their fight for toleration in Virginia, but soon extended it to the federal government.⁶⁹ Madison and Jefferson conquered the persecutors and erected a strict wall of separation between church and state.⁷⁰

Waite’s history commences at some undated and nearly primeval period when American colonists were persecuted for their religious beliefs.⁷¹ It appears to begin with the arrival of colonists in America and continues until the adoption of the Constitution. The events of this period are presented indistinctly, with no mention of any individuals, save Jefferson and Madison. Those two represent the only beings who Waite differentiates from the United States as a whole. Waite’s narrative is almost self-consciously mythical, as it looks back to the

63. *Id.* at 162.

64. *Id.*

65. *Id.* at 164-66.

66. *Id.* at 166 (maintaining that “[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices”).

67. *See id.* at 162-63. Madison and Jefferson began their fight for religious freedom in 1784 in the Virginia House of Delegates. *Id.* at 163.

68. *See id.* at 163.

69. *Id.* at 163-64.

70. *Id.* at 164.

71. *See id.* at 162-63.

"times in the midst of which" the First Amendment was written,⁷² a period which is surely proximate to "once upon a time . . ." He was not looking back to a particular event, but rather to an era. Consistent with this undifferentiated view of the history of the adoption of the First Amendment, Waite does not end with its adoption, as would a more standard history. Rather, he ends with Jefferson's post-enactment interpretation of the First Amendment, which, as will be seen below, has questionable relevance to the interpretation of that Amendment.⁷³

Throughout Waite's narrative, Jefferson is presented as an author, Minister to France, and President. Madison is simply presented as an author.⁷⁴ Besides Jefferson and Madison, there are only a handful of actors in this history, none of them individuals. There are the colonists, the Virginia House of Delegates, the Constitutional Convention, and the states. These actors do little more than respond to the intellectual and political leadership of Jefferson and Madison.⁷⁵

No one would dispute any of the discrete facts presented in this history, although many might argue that it is a simplistic account of complicated events. Waite has presented Jefferson, and Madison to a lesser extent, as Mosaic lawgivers who need almost no assistance but from each other. Everyone else is obscured. For instance, in describing the "determined opposition" to "a bill establishing provision for teachers of the Christian religion" (Assessment Bill), Waite notes that Madison acted "[a]mongst others," but no others are named.⁷⁶ Nor are the "others" ascribed any action more significant than signing the "Remonstrance" authored by Madison.⁷⁷ But even that "Remonstrance" appears as only a factotum to Jefferson's bill "for establishing religious freedom."⁷⁸

For Waite, it is this Bill that presents the "true distinction between what properly belongs to the church and what to the State."⁷⁹ Waite proceeds to demonstrate how this colonial Virginia Bill is relevant to understanding the First Amendment to the Federal Constitution. His first step is to focus on Virginia, for although the controversy over

72. *Id.* at 162.

73. *See id.* at 164 (describing Jefferson's interpretation of the First Amendment).

74. *See id.* at 163-64 (discussing the various roles Madison and Jefferson played).

75. *See id.* at 162-64.

76. *Id.* at 163.

77. *Id.*

78. *Id.*

79. *Id.* In keeping with the Biblical tone of Waite's history, this passage resonates with the New Testament commandment to "[r]ender therefore to Caesar the things which are Caesar's, and to God the things that are God's." *Matthew* 22:21.

religious liberty “was animated in many of the States,” it “seemed at last to culminate in Virginia.”⁸⁰

Once the reader is focused on Virginia, Waite proceeds to conflate certain events in his narrative: “In a little more than a year after the passage of this statute [the Bill for Establishing Religious Freedom] the convention met which prepared the Constitution of the United States.”⁸¹ Thus, Waite makes a syntactical connection between the enactment of Jefferson’s Bill and the commencement of the Constitutional Convention; he also makes a close temporal connection between Jefferson’s Bill (written in the 1770s but enacted in 1786) and the Constitution (the Constitutional Convention occurred in 1787 and the Constitution was adopted in 1789).⁸² Moreover, the relevant Constitutional text is the First Amendment (which was not proposed until 1789 and was not adopted until 1791).⁸³ Not only is there over a decade separating Jefferson’s last obviously relevant act and the enactment of the First Amendment, but Waite failed to identify any direct connection between those events. He either has assumed it or has left it to the reader to make such a connection.

Waite goes on to excuse Jefferson for failing to attend the Convention, “he being then absent as minister to France.”⁸⁴ While Jefferson is absent in body, Waite does not find him absent in spirit. After Jefferson expressed his disappointment at the absence of a declaration regarding freedom of religion in the new Constitution, Waite notes that Jefferson “was willing to accept it as it was”⁸⁵ This comment is striking not only because it portrays Jefferson as one who had the authority to accept or reject the Constitution, but also because it appears as if Waite willingly surrenders that authority to him. Waite then notes that Jefferson, perhaps in his role as the “Father of Democracy,”⁸⁶ was “trusting that the good sense and honest intentions of the people would bring about the necessary alterations.”⁸⁷

Waite’s narrative then reveals that Jefferson’s faith in the “people” was justified. Five states proposed amendments before adopting the Constitution. Three of these states—Virginia, New York, and New

80. *Reynolds*, 98 U.S. at 163.

81. *Id.*

82. *See id.*

83. U.S. CONST. amend. I.

84. *Reynolds*, 98 U.S. at 163.

85. *Id.*

86. *See* PETERSON, *supra* note 13, at 68 (“[I]t was precisely because Jefferson combined, or seemed to combine, the traits of the man-of-the-people and the man-of-vision that he was capable of being mythicized as the *Father of Democracy*.”) (emphasis added).

87. *Reynolds*, 98 U.S. at 163.

Hampshire—proposed amendments to secure religious freedom.⁸⁸ In response to the states' proposed amendments, Madison, Jefferson's disciple, proposes in the First Congress the first draft of what will become the First Amendment.⁸⁹ The confluence of all of these events makes it seem only natural for Jefferson to be able to define the "true" meaning of the First Amendment. With these events serving as the contextual backdrop for a First Amendment analysis, Waite then proceeds to quote Jefferson's letter to the Danbury Baptist Association, in which Jefferson describes the First Amendment as having built "a wall of separation between church and State."⁹⁰ Waite concludes his history of the Religion Clause of the First Amendment by noting that Jefferson's letter, "[c]oming as [it] does from an acknowledged leader of the advocates of the measure, . . . may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured."⁹¹

This passage is general enough to gloss over the fact that Jefferson was not present at the adoption of the First Amendment, yet it still anoints him as an "acknowledged leader" of the measure, whose interpretation of it is "authoritative."⁹² Waite implicitly recognized this when he fudged his language: Jefferson's words "may be accepted *almost* as an authoritative declaration."⁹³ This version of the history of the adoption of the First Amendment was very much a story about Jefferson. He opens the story, appears throughout it, and the story closes with him as well.

After reading such a spirited defense of religious liberty, the reader may be left somewhat befuddled by the Court's holding in *Reynolds*. Justice Waite ultimately concluded that "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."⁹⁴ Accordingly, the Court upheld Reynolds's conviction for bigamy.⁹⁵ Clearly, such a holding did not need the mythic context of American religious liberty that Waite had provided. If Reynolds's actions were not protected by the First Amendment, why did Waite spend so much time explaining its meaning?

88. *Id.* at 164.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* (emphasis added).

94. *Id.* at 166.

95. *Id.* at 168.

Chief Justice Waite's opinion in *Reynolds* later becomes a seminal text for future judicial readings of the Religion Clause of the First Amendment. The *Reynolds* opinion provides a compact account of the role of religion in American and constitutional history. It anoints Thomas Jefferson, and to a lesser extent, James Madison, as American prophets. The Court's opinion in *Reynolds* presents Jefferson's Bill for Establishing Religious Freedom and his letter to the Danbury Baptist Association as required texts for interpreting the Religion Clause. Finally, *Reynolds* relegates all of the other potential participants in the forming of the Constitution and the First Amendment to unnamed, absent, or inactive status.

B. *Everson v. Board of Education*

In *Everson v. Board of Education*,⁹⁶ the Court held that a state law authorizing the transportation of school children to religious schools at public expense does not violate the Establishment Clause of the First Amendment.⁹⁷ After reviewing the facts of the case, Justice Black evaluates the plaintiff/petitioner's two claims that the state statute and resolution authorizing reimbursement to parents of children attending parochial schools violate the United States Constitution.⁹⁸ The petitioner's first claim alleged a violation of the Due Process Clause of the Fourteenth Amendment.⁹⁹ The petitioner's second claim alleged that the statute and resolution violate the First Amendment, made applicable to the states by the Fourteenth Amendment, because they use state power to support church schools.¹⁰⁰ After finding that the first claim overlapped with the second, Black turned to the second claim and, like Waite in *Reynolds*, reviewed "the background and environment of the period in which that constitutional language [the First Amendment] was fashioned and adopted."¹⁰¹ After presenting his history of the adoption of the First Amendment, Black evaluates the New Jersey statute and resolution in accordance with his understand-

96. 330 U.S. 1 (1947).

97. *Id.* at 18.

98. *Id.* at 5 (outlining the substance of each of the two claims).

99. *Id.* The petitioner claimed that the resolution empowering the Board of Education to reimburse parents of parochial school students for expenses associated with bus transportation "authorize[d] the State to take by taxation the private property of some and bestow it upon others, to be used for their own private purposes," thus violating the Due Process Clause of the Fourteenth Amendment. *Id.*

100. *Id.*

101. *Id.* at 8.

ing of the First Amendment.¹⁰² Black concludes that neither the New Jersey statute nor the resolution violate the First Amendment.¹⁰³

Like Chief Justice Waite in *Reynolds*, Justice Black in *Everson* presents a simple chronicle of the history of the adoption of the First Amendment. Black, like Waite, begins with a primeval period, "[t]he centuries immediately before and contemporaneous with the colonization of America," which "had been filled with turmoil, civil strife, and persecutions"¹⁰⁴ He then writes of the religious persecution in early America and the fight against it in Virginia, led by Thomas Jefferson and James Madison.¹⁰⁵ Black, however, offers a more detailed version of that fight than did Waite. He describes the legislative battle between those favoring the Assessment Bill—which proposed to levy a tax in support of various Christian denominations—and those favoring Jefferson's Bill for Establishing Religious Freedom.¹⁰⁶ He also reviews what happened in other states after the adoption of Jefferson's Bill and the First Amendment.¹⁰⁷ Black then notes that the Establishment Clause was characterized by Jefferson as erecting "a wall of separation between church and State";¹⁰⁸ that *Reynolds* identified the First Amendment as an extension of the Virginia Bill for Establishing Religious Freedom;¹⁰⁹ and that the First Amendment was incorporated as against the states by the Fourteenth Amendment.¹¹⁰

Like Waite, Black focuses on the role of two individuals, Jefferson and Madison, who conquer the forces of intolerance. As in Waite's opinion, the other historical actors are unnamed entities such as early American settlers, Virginia, the Virginia Assembly, and the states.¹¹¹ After Jefferson and Madison exit the narrative, Black returns to a grand scale of history. Individuals recede from the narrative, and

102. *Id.* at 16-18.

103. *Id.* at 18.

104. *Id.* at 8.

105. *Id.* at 11-13.

106. *Id.* at 11-12.

107. *Id.* at 14 (observing that some states persisted in imposing restrictions on religious groups and discriminating based on religion for another half century).

108. *Id.* at 16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

109. *Id.* at 13.

110. *Id.* at 15. There has been some academic (although not judicial) controversy regarding the appropriateness of incorporating the Establishment Clause. See, e.g., LEVY, *supra* note 22, at 148 ("The preponderance of evidence suggests that the framers of the Fourteenth Amendment intended its provisions neither to incorporate any part of the Bill of Rights [including the Establishment Clause] nor to impose on the states the same limitations previously imposed on the United States only.").

111. *Everson*, 330 U.S. at 11-14.

states and the nation fall in step with the concept of religious liberty espoused by these two Founding Fathers.¹¹²

Black acts more the modern-day historian to Waite's myth-maker. He footnotes to reliable sources, to historical events beyond the handful of Virginia events referred to in the text, and to texts that portray the events occurring within colonial Virginia.¹¹³

But Black is more like Waite than not in his use of rhetorical devices. He mythicizes Madison and others as "freedom-loving colonials" who were made to feel indignant by religious persecution, and "[i]t was these feelings which found expression in the First Amendment."¹¹⁴ Here, Black compresses years of events, as Waite did in *Reynolds*, into a single sentence. This compression results in a dramatic identification of Madison and his compatriots with the *true* meaning of the First Amendment, an effect of which Black was surely aware. He warns that "[n]o one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in adoption of the Bill of Rights' provisions embracing religious liberty."¹¹⁵ Yet, he quickly adds, "Virginia . . . provided a great stimulus and able leadership for the movement."¹¹⁶ Black's conflation of Madison, his compatriots, and Virginia with the authorship of the First Amendment intensifies. He continues, explaining that the people in Virginia, "as elsewhere, reached the conviction that individual religious liberty could be achieved best" under a government that is independent of religion.¹¹⁷ Thus, Madison, his peers, and his state are merged into one unified voice speaking against religious persecution.

Conflation complete, Black returns to the particular and explains that "[t]he movement toward [separation of church and state] reached its dramatic climax in Virginia in 1785-86 when the Virginia legislative body was about to renew Virginia's tax levy for the support of the established church."¹¹⁸ It is at this point that Jefferson, of whom the reader has so far heard little, is introduced. Jefferson and Madison are the leaders in the fight against this tax.¹¹⁹ Madison writes his "great" *Memorial and Remonstrance* and Jefferson's "famous" Bill for

112. *Id.* at 11-13.

113. *See id.* at 9 nn.6-14 (providing examples in support of the Court's historical analysis).

114. *Id.* at 11.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 11-12.

Establishing Religious Freedom is enacted.¹²⁰ In a footnote, Black adds that “[i]n a recently discovered collection of Madison’s papers, Madison recollected that his Remonstrance met with the approbation of the Baptists, the Presbyterians, the Quakers, and the few Roman Catholics, universally; of the Methodists in part; and even of not a few of the Sect formerly established by law.”¹²¹ Once again, Madison speaks for the American people, in all of their religious diversity.

Black then quotes at great length from Jefferson’s Bill for Establishing Religious Freedom.¹²² Immediately after this quotation, Black writes that “[t]his court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the *same objective and were intended to provide the same protection* against governmental intrusion on religious liberty as the Virginia statute.”¹²³ Here, Jefferson and Madison are fused together as Black finds that Jefferson’s statute and “Madison’s” First Amendment had the “same objective.”¹²⁴ By linking the acts of “drafting” and “adoption,” Black implies that Jefferson had a role in adopting one or both of these documents. In fact, Jefferson had no such concrete role, as he was not present for the struggle surrounding the enactment of either the Bill for Establishing Religious Freedom or the First Amendment.¹²⁵ At most, Jefferson affected the process by writing letters to key players in both struggles.¹²⁶

Importantly, Black does not rely on historians to support this argument, as he does in his footnotes throughout the opinion, but rather on the history of the Court itself and its precedent.¹²⁷ That is, through 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.¹²⁸

120. *Id.* at 12. He fails to mention that Jefferson wrote the Bill in the 1770s, years before the struggle Black describes. Bryan, *supra* note 34, at iii. Drawing attention to this fact, of course, would diminish Jefferson’s role in the struggle to enact the Bill.

121. *Everson*, 330 U.S. at 12 n.12 (internal quotation marks omitted).

122. *Id.* at 12-13.

123. *Id.* at 13 (emphasis added).

124. *Id.*

125. See MAYER, *supra* note 27, at 91, 162 (observing that Jefferson was in France during the years when the Constitutional Convention was convened (1787) and the Bill for Establishing Religious Freedom was enacted (1786)).

126. *Id.* at 96-97 (citing a letter from Jefferson to Madison expressing both disappointment in, and acquiescence to, the Constitution).

127. *Everson*, 330 U.S. at 13.

128. See *id.*

At this point, Black's history of the adoption of the First Amendment is nearly complete. He notes that until the adoption of the Fourteenth Amendment, the First Amendment did not apply as a restraint against the states.¹²⁹ He then adds that most of the other states did soon provide similar constitutional protections for religious liberty.¹³⁰ Some states, however, "persisted for about half a century in imposing restraints upon the free exercise of religion and in discriminating against particular religious groups."¹³¹ Here, Black's history is unapologetically teleological. He has identified a certain momentum in the historical record that moves from religious persecution to religious liberty. By identifying this trend, Black is able to explain away any inconsistent evidence in the historical record. Any "apparent" inconsistencies are merely laggards in the inevitable race to freedom, as opposed to inconsistent historical evidence which may cause one to question Black's conclusions.

It is against this history of the First Amendment that Black considers the specific factual issue before the Court and finds for the School Board. In language drawn directly from Jefferson, Black explains: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here."¹³²

The use of history in judicial decisions has a life of its own. By relying on the Supreme Court's prior interpretations of the past, the Justices put less emphasis on the historical record itself and more on the meaning that the Supreme Court has previously attached to that record.¹³³ Of course, consistent with the institutional conservatism of the Supreme Court and buttressed by interpretative principles such as *stare decisis*, the Court's history of the First Amendment must now include the *Reynolds* decision. A twentieth century Supreme Court Justice can no longer follow Waite's hermeneutic approach of simply

129. *Id.*

130. *Id.* at 13-14.

131. *Id.* at 14.

132. *Id.* at 18. Black's rationale for the holding is that "[the First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Id.* In this instance, the State of New Jersey had not contributed any money to the parochial schools and, therefore, did not support them. Accordingly, the Court concluded that New Jersey's "legislation, as applied, does no more than provide a *general* program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Id.* (emphasis added). This general program was entirely consistent with New Jersey's compulsory education laws, which permitted parents to "send their children to a religious rather than a public school if the school meets the secular educational requirements" *Id.*

133. *See id.* at 13.

looking for guidance from "the times in the midst of which the provision was adopted."¹³⁴ Rather, the nineteenth century Supreme Court's history of the Religion Clause has now become part of the twentieth century meaning of the Religion Clause.

As with *Reynolds*, the reader may be left confused by the contrast between the decision and its holding. Why is such dramatic language used to lead up to a decision that appears to increase the intermingling of church and state? Furthermore, Black had little need to embellish on the story told by Waite in *Reynolds*, as their holdings are not in tension.¹³⁵ Yet Black has told a vivid tale instead of merely referring the reader to the generally similar tale told by Waite. He found it important to retell it, add details, and to fortify, in principle, the "wall of separation" that *Reynolds* had constructed.

* * * *

Justice Rutledge's impassioned dissent in *Everson* constructs a story that is intended to fortify that wall.¹³⁶ Rutledge writes in inflammatory prose, infused with the imagery of a battle between the forces of liberty and bigotry. The structure of his opinion is as striking as the language with which he writes. Rutledge begins with the full text of the Religion Clause of the First Amendment. Following that is a substantial selection from the Preamble to Jefferson's Bill for Establishing Religious Freedom.¹³⁷ Rutledge then outlines the issue before the Court and the facts of the case.¹³⁸ The dissent's comprehensive structure appears as if it is intended to displace Black's opinion as the opinion of record. Part I of the opinion defines "religion" as it is used in the First Amendment.¹³⁹ Part II presents Rutledge's version of the history of the adoption of the First Amendment.¹⁴⁰ Part III applies Rutledge's understanding of the First Amendment to the issue before the Court,¹⁴¹ and Part IV responds to objections to his position.¹⁴²

134. *Reynolds v. United States*, 98 U.S. 145, 162 (1878).

135. Recall that the *Reynolds* Court upheld Reynolds's conviction for bigamy, arguing that to do otherwise would "make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.* at 167.

136. 330 U.S. at 28 (Rutledge, J., dissenting). Justice Rutledge was joined by Justices Frankfurter, Jackson, and Burton in his dissent. Justice Jackson authored his own dissent as well.

137. *Id.*

138. *Id.* at 29-31.

139. *Id.* at 31-33 (observing that the word "religion" is used in the First Amendment in its broadest meaning).

140. *Id.* at 33-43.

141. *Id.* at 44-49.

142. *Id.* at 49-58.

Part V provides a coda that explains why the burdens of a strict wall of separation between church and state must be borne by families that make use of parochial schools.¹⁴³ Part VI addresses ancillary matters.¹⁴⁴

Rutledge ends his opinion as he opened it, with selections from two documents. He appends, in full, Madison's *Memorial and Remonstrance Against Religious Assessments*,¹⁴⁵ and he places, in a "supplementary appendix," the complete text of the Assessment Bill.¹⁴⁶ This structure surrounds the chronological narrative with documents that are not presented chronologically. Rather, the narrative history is supplemented by texts and ideas, which are presented in full so that they may speak for themselves. For Rutledge, the "true" meaning of his history is found as much in the ideas contained in these texts as it is in a chronological set of events.

The outline of Rutledge's chronicle of the adoption of the First Amendment in Section II follows that of the opinions of Waite and Black, but it adds greater detail of the struggles that Jefferson and Madison faced.¹⁴⁷ Rutledge, just as Black and Waite before him, begins with the long struggle for religious freedom in America, particularly in Virginia.¹⁴⁸ Rutledge then refers to the religion clause of Virginia's Declaration of Rights, written by Madison and George Mason in 1776.¹⁴⁹

Jefferson is then introduced. After returning from the Continental Congress in 1776, he undertakes a "broad program of democratic reform."¹⁵⁰ At this point, the battle over religious liberty begins in earnest. Jefferson submits his Bill for Establishing Religious Freedom.¹⁵¹ The Assessment Bill is submitted.¹⁵² Jefferson departs for Europe and passes the torch to Madison.¹⁵³ Madison delays the Assessment Bill at the moment before its passage.¹⁵⁴ Madison issues

143. *Id.* at 58-60.

144. *Id.* at 60-63.

145. *Id.* at 63-72.

146. *Id.* at 72-74.

147. *See id.* at 33-43.

148. *Id.* at 33-34.

149. *Id.* at 34 (noting also that Madison "is credited with changing [the Declaration's religion clause] from a mere statement of the principle of tolerance to the first official legislative pronouncement that freedom of conscience and religion are inherent rights of the individual").

150. *Id.* at 35.

151. *Id.*

152. *Id.* at 36.

153. *Id.* at 35-36.

154. *Id.* at 37.

his *Memorial and Remonstrance*.¹⁵⁵ The Assessment Bill dies.¹⁵⁶ Jefferson's Bill is enacted.¹⁵⁷ Madison goes on to the Constitutional Convention and Congress, where he leads the successful fight to enact the First Amendment.¹⁵⁸

Perhaps because Rutledge is not attempting to radically alter the Court's history of the First Amendment, the structure and tone of the narrative of his history remains fundamentally similar to those of the earlier tellings. The story begins with a long and intensive struggle for religious freedom in America, especially in Virginia, and ends with the enactment of the First Amendment. There is a background of persecution from which heroic individuals break free. Jefferson and Madison stand out as beacons of tolerance and justice.

Rutledge's framing does differ from those of Waite and Black in that he does not feel obligated to look after the time of the adoption of the First Amendment in order to fully explicate its meaning. For Rutledge, the acts and words of Jefferson and Madison are sufficient to give it meaning.

Rutledge also summons a familiar cast of characters, including Virginia, the Continental Congress, the Virginia General Assembly, a Committee of the General Assembly, the Constitutional Convention, the First Congress, and one additional identified individual, George Mason. As with earlier tellings, these entities and individuals are typically foils for the thoughts and deeds of Jefferson and Madison.

Justice Rutledge, however, has a different task from that of Waite and Black. His deployment of history and language is intended to make the strongest rhetorical case for an absolute separation of church and state.¹⁵⁹ His version of the story is more vivid and detailed than those of Waite and Black. Madison and Jefferson are no longer the isolated prophets of *Reynolds*, but are now the heroes of an ongoing battle between the forces of liberty and bigotry.

In his dramatic opening, Rutledge quotes the Religion Clause of the First Amendment, followed by a portion of the Preamble to Jefferson's Bill for Establishing Religious Freedom.¹⁶⁰ Rutledge then writes, "I cannot believe that the great author of those words, or the men who

155. *Id.*

156. *Id.* at 38.

157. *Id.*

158. *Id.* at 38-39.

159. *See id.* at 41 ("In view of this history no further proof is needed that the Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises.").

160. *Id.* at 28.

made them law, could have joined in this decision.”¹⁶¹ Because of Rutledge’s wording, it appears as if he is referring to Jefferson as the author of both the Bill *and* the First Amendment. Rutledge continues, “[n]either so high nor so impregnable today as yesterday is the wall raised between church and state by Virginia’s great statute of religious freedom and the First Amendment”¹⁶²

In this opening, Rutledge has conflated the First Amendment, Jefferson’s Bill for Establishing Religious Freedom, Jefferson, the enactors of the First Amendment, and the enactors of Jefferson’s Bill into one entity. In his coup de grâce, he links them all with Jefferson’s “wall of separation” metaphor. Rutledge spends the remainder of his opinion pulling apart these texts and actors and putting them back together in order to impart his meaning to the text of the First Amendment. In conflating these actors, Rutledge has created, perhaps, a unitary mythic author of texts supporting religious freedom—as if the idea of religious freedom is the dramatist and the historical actors merely speak its lines.

After reviewing the procedural history of the case, Rutledge begins to lay out his history of the First Amendment, which he characterizes as “the compact and exact summation of its author’s views formed during his long struggle for religious freedom.”¹⁶³ That author, according to Rutledge, is James Madison. Rutledge continues, “[i]n Madison’s own words characterizing Jefferson’s Bill for Establishing Religious Freedom, the guaranty he put in our national charter, like the bill he piloted through the Virginia Assembly, was ‘a Model of technical precision, and perspicuous brevity.’”¹⁶⁴

As he does in the opening paragraphs of his dissent, Rutledge again merges a number of people and documents. The First Amendment is completely ascribed to Madison, with no mention of input by other members of the First Congress.¹⁶⁵ Rutledge then uses the fact that Madison supported Jefferson’s revision of the entire Virginia Code to support his contention that Madison’s First Amendment was

161. *Id.* at 29.

162. *Id.*

163. *Id.* at 31.

164. *Id.* (quoting Letter from James Madison to Nicholas Biddle (May 17, 1827), in IX THE WRITINGS OF JAMES MADISON, 1819-1836, at 288 (Gaillard Hunt ed., 1910)). In a footnote, Rutledge concedes that he has taken this quotation somewhat out of context. He writes that “Madison’s characterization related to Jefferson’s entire revision of the Virginia Code, of which the Bill for Establishing Religious Freedom was part.” *Id.* at 31 n.8.

165. *See id.* at 31 (characterizing the First Amendment as “the guaranty *he* [Madison] put in our national charter” (emphasis added)).

itself well-written.¹⁶⁶ In this way, Madison is coupled with Jefferson and Jefferson's Bill is coupled with "Madison's" Amendment. Rutledge is thereby constructing a coherent narrative that operates independent of any chronological account of events.

After providing a close reading of the text of the First Amendment, Rutledge returns to his history of its adoption, as "[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment."¹⁶⁷ This assertion allows Rutledge to link his reading of the First Amendment with the "true" historical record.

Given how he has written so far, it is not surprising that Rutledge's continuing history is again presented in an atypical fashion. As Rutledge explains, "[t]he history includes not only Madison's authorship and the proceedings before the First Congress, but also the long and intensive struggle for religious freedom in America, more especially in Virginia, of which the Amendment was the direct culmination."¹⁶⁸ This narrative is not presented in chronological order or even reverse chronological order. It skips around the events occurring between 1776 and 1789.¹⁶⁹ Rutledge's narrative begins with a national event, moves on to a Virginia event, and then returns to a national event.¹⁷⁰ His dissent glosses over the fact (one which Justice Rehnquist will later emphasize) that Madison's version of the First Amendment was rejected by Congress.¹⁷¹ It also relegates the struggle for religious liberty in states other than Virginia to a mere footnote.¹⁷²

Once again, Rutledge conflates the documents of Madison, Jefferson, and the unnamed "others" as the source of the content of the First Amendment. He writes that "[i]n the documents of the times, particularly of Madison, who was leader in the Virginia struggle before

166. See *id.* at 31 ("Madison could not have confused 'church' and 'religion,' or 'an established church' and 'an establishment of religion.'").

167. See *id.* at 33.

168. *Id.* at 33-34 (footnote omitted).

169. See *id.* at 34-43.

170. See *id.*

171. See *id.* at 42-43 & nn.33-34.

172. In footnote 11 of his dissent, Rutledge writes that "[c]onflicts in other states, and earlier in the colonies, contributed much to generation of the Amendment . . ." *Id.* at 33 n.11. Rutledge then repeats the point that he made in the text of the opinion, "but none so directly as that in Virginia or with such formative influence on the Amendment's content and wording." *Id.* He then refers to a number of historical texts to support this proposition. *Id.* Rutledge also notes the existence of the Charter of Rhode Island, "the first colonial charter to provide for religious freedom," but he sandwiches this between the previous sources and a substantial paragraph outlining other sources (particularly biographies of Jefferson and Madison) relating to the "climactic period of the Virginia struggle." *Id.*

he became the Amendment's sponsor, but also in the writings of Jefferson and others and in the issues which engendered them is to be found irrefutable confirmation of the Amendment's sweeping content."¹⁷³

Throughout his dissent, Rutledge constantly couples Jefferson with Madison. For example, Rutledge writes that "[f]or Madison, as also for Jefferson, religious freedom was the crux of the struggle for freedom in general."¹⁷⁴ When describing Madison's role as coauthor with George Mason of the religious clause in Virginia's "great" Declaration of Rights of 1776,¹⁷⁵ Rutledge (gratuitously) adds in a footnote that "Jefferson of course held the same view."¹⁷⁶ Jefferson and Madison are linked in this event that foreshadows the enactment of the First Amendment and their linkage remains uninterrupted in this narrative through Rutledge's retelling of the history of the Amendment's adoption. For instance, Rutledge writes that the "test" for establishment "remains undiluted as Jefferson and Madison made it" ¹⁷⁷ Rutledge also cites to the text of the Virginia Statute for Establishing Religious Freedom, written by Jefferson, but enacted under the guidance of Madison.¹⁷⁸

Rutledge constantly connects Jefferson and Madison in his text and in his narrative. Rutledge, like Waite in *Reynolds*, apologizes for Jefferson's leaving Virginia with his Bill unenacted, noting that Jefferson departed for Europe in 1784.¹⁷⁹ He then indicates that when Jefferson left for Europe, Madison became the prime sponsor of Jefferson's Bill.¹⁸⁰ Rutledge also notes that "Jefferson, and Madison by his sponsorship, sought to give the Bill for Establishing Religious Freedom as nearly constitutional status as they could at the time," by declaring that religious freedom was a natural right.¹⁸¹ Here, Jefferson is directly, although tenuously, linked with the attempt to protect

173. *Id.* at 34.

174. *Id.*

175. *Id.* Rutledge cannot resist giving Madison top billing over the older, more experienced, and highly respected Mason: Madison "is credited with changing it [Virginia's Declaration of Rights of 1776] from a mere statement of the principle of tolerance to the first official legislative pronouncement that freedom of conscience and religion are inherent rights of the individual." *Id.*

176. *Id.* at 34 n.13.

177. *Id.* at 44; *see also id.* at 46 (stating that New Jersey's action was "the kind of evil at which Madison and Jefferson struck"); *id.* at 54 (noting that establishment "is the very thing Jefferson and Madison experienced and sought to guard against").

178. *Id.* at 44 n.38.

179. *Id.* at 35.

180. *Id.* at 35-36.

181. *Id.* at 35 n.15.

religious freedom constitutionally, even though he was absent from the country when this issue was ultimately decided. By using Jefferson's Bill to foreshadow the First Amendment, Rutledge further conflates the two. If Rutledge includes Madison in this narrative as a matter of historical fact, Jefferson is included as the First Amendment's spiritual guide. Both Madison and Jefferson are necessary for Rutledge's position, for Madison alone does not convey the meaning of his First Amendment narrative.

Throughout his description of the roles that Madison and Jefferson played in the fight for religious freedom, Rutledge employs the imagery of war. When Madison fails to have the Declaration of Rights "expressly condemn the existing Virginia establishment," it is because the opposing "forces supporting it were then too strong."¹⁸² Although Madison "yielded," it was not for long.¹⁸³ He resumed the "fight" in the General Assembly and "threw his full weight" behind Jefferson's Bill for Establishing Religious Freedom.¹⁸⁴ Although enactment failed, "the fight for religious freedom moved forward in Virginia on various fronts with growing intensity. Madison led throughout, against Patrick Henry's powerful opposing leadership" ¹⁸⁵ The "climax" of this battle came in the "struggle" over the Assessment Bill.¹⁸⁶ The Assessment Bill "incurred the active and general hostility of dissentient groups."¹⁸⁷ When the Assessment Bill was broadened to mollify them, "some subsided temporarily in their opposition,"¹⁸⁸ which Madison regarded as a "desertion."¹⁸⁹ In this battle, "Madison was unyielding at all times, opposing [the Assessment Bill] with all his vigor," and he "maneuvered deferment of final consideration" of the Bill.¹⁹⁰

Rutledge's battle imagery extends beyond a description of people to include texts that fight alongside their authors. Madison's *Memorial*

182. *Id.* at 34-35.

183. *Id.* at 35.

184. *Id.*

185. *Id.* at 36.

186. *Id.* The Assessment Bill "was nothing more nor less than a taxing measure for the support of religion, designed to revive the payment of tithes suspended since 1777." *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 36 n.17. Rutledge not only uses battle imagery in telling his story, he also uses battle imagery to evaluate the events in it. In footnote 17 of his dissenting opinion, Rutledge disagrees with Madison's assessment that the dissentient groups had deserted, citing a historian who suggests that it was "surrender to the inevitable." *Id.* He also notes that the Assessment Bill played a "crucial role in the Virginia struggle." *Id.* For Rutledge, Jefferson and Madison are no longer the prophets of the Waite opinion, they are now warriors.

190. *Id.* at 37.

and *Remonstrance* is described as a "broadside attack" against the Assessment Bill.¹⁹¹ The *Memorial and Remonstrance*, "stirring up a storm," "killed the Assessment Bill."¹⁹² Now, "the way was cleared" for Jefferson's Bill, and Madison "promptly drove it through."¹⁹³ Rutledge concludes that "[t]his dual victory substantially ended the fight over establishments, settling the issue against them."¹⁹⁴

Once Madison has won this battle, he becomes a member of the Constitutional Convention. He then moves on to fight "valiantly" for ratification of the Constitution.¹⁹⁵ Madison also pledges to his constituents that he will fight for a Bill of Rights.¹⁹⁶ Virginia, along with other states, "ratified the Constitution on this assurance."¹⁹⁷ As he had done in earlier portions of his dissent, Rutledge implies that Virginia and other states ratified the Constitution because of Madison's personal assurance. This is further implied in a footnote when Justice Rutledge writes that "[t]he assurance made first to his constituents was responsible for Madison's becoming a member of the Virginia Convention which ratified the Constitution."¹⁹⁸ Madison kept his pledge and "[w]ithin a little more than three years from his legislative victory at home he had proposed and secured the submission and ratification of the First Amendment as the first article of our Bill of Rights."¹⁹⁹ It is only in a footnote that Rutledge acknowledges that Madison's version of the Amendment was substantially different from the version that was ratified.²⁰⁰

Rutledge then describes the ascension of his heroic Madison to the American pantheon:

All the great instruments of the Virginia struggle for religious liberty thus became warp and woof of our constitutional tradition, not simply by the course of history, but by the common unifying force of Madison's life, thought and sponsorship. He epitomized the whole of that tradition in

191. *Id.*

192. *Id.* at 38.

193. *Id.*

194. *Id.*

195. *Id.*

196. *See id.* at 39.

197. *Id.*

198. *Id.* at 39 n.26. Madison, like Jefferson in other passages, is closely identified with the people who elected him and placed their trust in him.

199. *Id.* at 39.

200. *Id.* at 39 n.27. The amendment that Madison had introduced read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." *Id.*

the Amendment's compact, but nonetheless comprehensive, phrasing.²⁰¹

Rutledge has identified Madison as the "warp and woof"—the basis—of "our constitutional tradition."²⁰² Rutledge reasons that by unpacking Madison's meaning through the texts that he has left behind, we are able to unpack the meaning of the First Amendment itself. Rutledge has returned full circle to the conflation of texts and actors with which he opened the dissent. He concludes:

In view of this history no further proof is needed that the Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises. But if more were called for, the debates in the First Congress and this Court's consistent expressions, whenever it has touched on the matter directly, supply it.²⁰³

Rutledge states that his history is complete, requiring "no further proof," but he provides more nonetheless. He then immediately discounts much of this additional evidence in the face of the story that he has provided when he writes, "[b]y contrast with the Virginia history, the congressional debates on consideration of the Amendment reveal only sparse discussion, reflecting the fact that the essential issues had been settled."²⁰⁴ No sooner is the evidence of the congressional debates introduced then it is disposed of. Rutledge also leaves to the footnotes the Supreme Court precedents that support his narrative.²⁰⁵ His narrative and the texts he presents apparently provide sufficient and self-evident support for his position.

After concluding that there is an Establishment Clause violation in the case before the court,²⁰⁶ Rutledge returns to his depiction of Madison as a warrior. Rutledge writes: "Now as in Madison's day it is one of principle, to keep separate the separate spheres as the First Amendment drew them We should not be less strict to keep strong and untarnished the one side of the shield of religious freedom than we have been of the other."²⁰⁷ Finally, and mirroring the beginning of his dissent, Rutledge appends Madison's *Memorial and Remonstrance* and, for contrast, the Assessment Bill.²⁰⁸ Rutledge, now a

201. *Id.* at 39.

202. *Id.*

203. *Id.* at 41 (footnote omitted).

204. *Id.* at 42.

205. *Id.* at 43 n.35 (citing *Quick Bear v. Leupp*, 210 U.S. 50 (1907)).

206. *Id.* at 51.

207. *Id.* at 63.

208. *Id.* at 63-74.

warrior himself, stands with his heroes, opposing the forces of intolerance, and wielding the shield of religious freedom contained in the First Amendment.²⁰⁹

In writing his history of the First Amendment, Rutledge has used a dizzying array of rhetorical devices to combine Jefferson and Madison, Virginia and the United States, the Bill for Establishing Religious Freedom and the First Amendment. In order for him to give a new meaning to the Clause, he could not merely refer to the opinions of Black and Waite, but had to infuse his whole history with a new ethos. This impassioned, complex dissent altered Religion Clause discourse. The result is the first opinion to combine eloquent appeals for religious toleration with a recommendation to actually fortify the wall of separation between church and state. Rhetorically, it also marks the ascendance of Madison as the primary historical actor in the fight for religious toleration. Madison's ascension transforms Jefferson into the spiritual guide who informed Madison's thought.

Rutledge's dissent signals a change in First Amendment jurisprudence as the Court thereafter begins to fortify the wall of separation between church and state.²¹⁰ Rehnquist's dissent in *Wallace v. Jaffree*²¹¹ responds to Rutledge's now-prevailing version of history.²¹² He finds that history does not support Rutledge's understanding of the First Amendment.²¹³ As a necessary part of his response, Rehnquist attempts to write Jefferson out of the history of the First Amendment altogether.²¹⁴

C. *Wallace v. Jaffree*

In *Wallace v. Jaffree*, the Court held that a state law authorizing a one-minute period of silence in public schools for meditation or silent prayer violated the Establishment Clause of the First Amendment.²¹⁵ Rutledge's interpretation of the First Amendment triumphed. Justice Stevens wrote the opinion of the Court.²¹⁶ Stevens's opinion is re-

209. *Id.* at 63.

210. *See, e.g.*, *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 205 (1963) (concluding that public school sponsored religious activities violates the Establishment Clause); *Engel v. Vitale*, 370 U.S. 421, 436 (1962) (holding that prayer in public school violates the Establishment Clause); *McCullum v. Bd. of Educ.*, 333 U.S. 203, 209-10 (1948) (holding that the utilization of public school buildings to allow religious groups to provide religious education to public school students violates the Establishment Clause).

211. 472 U.S. 38 (1985).

212. *Id.* at 91 (Rehnquist, J., dissenting).

213. *Id.* at 92.

214. *Id.*

215. *Id.* at 60-61.

216. *Id.* at 40.

markably short on history compared to the decisions looked at so far; however, in a series of footnotes that appear to have been included to respond to Rehnquist's scathing dissent, Stevens recognizes two opposing schools of thought regarding the Establishment Clause—one arguing that it only limits the government from discriminating between sects but does not bar favoring religion over non-religion (non-preferentialism),²¹⁷ and the other arguing that it limits the government from preferring religious beliefs in any way over nonreligious beliefs such as atheism (strict separationism).²¹⁸ Stevens dismisses the former by an oblique reference to *Everson*.²¹⁹

Justice O'Connor, in her concurring opinion, responds more directly to Justice Rehnquist's review of the text and history of the First Amendment²²⁰ and foreshadows Justice Souter's opinion in *Lee v. Weisman*.²²¹ While O'Connor does not comment on the accuracy of any version of the events surrounding the adoption of the First Amendment, she does draw attention to the importance of history itself in the Court's decision-making.²²² She notes that "a page of history is worth a volume of logic" when interpreting the Constitution.²²³ She also believes that there are certain constitutional limitations on government actions.²²⁴ While she does not explain the nature of such constitutional—which she distinguishes from judicial—limitations, one may assume that they are historical and textual; that is, they are rooted in the constitutional document, and duly enacted by the citizens governed by it.²²⁵ These constitutional limitations make history a key component of judicial reasoning whenever previously accepted practices are challenged as unconstitutional.²²⁶ O'Connor notes, however, that in some cases, including the case before the Court, even history is an incomplete guide and "the Establishment Clause concern for religious liberty is dispositive here."²²⁷

217. *Id.* at 52 n.36. This school of thought is represented by Joseph Story in Stevens's opinion.

218. *Id.* at 53 n.37 (quoting separationist language from *Everson*).

219. *Id.* at 52-53. In the text, Stevens merely refers to *Everson* as the "crucible of litigation." *Id.* at 52. He leaves the name of the case to a footnote. *Id.* at 53 n.37.

220. *Id.* at 79 (O'Connor, J., concurring).

221. 505 U.S. 577 (1992).

222. *Jaffree*, 472 U.S. at 79-80 (O'Connor, J., concurring).

223. *Id.* at 79 (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

224. *Id.*

225. *See id.* at 79-80.

226. *See id.*

227. *Id.* at 81. Justice O'Connor adds:

This uncertainty as to the intent of the Framers of the Bill of Rights does not mean we should ignore history for guidance on the role of religion in public

In response to the received history,²²⁸ Rehnquist wrote a dissent that matches that of Rutledge for its passion and its rhetorical complexity.²²⁹ Taking up Rutledge's challenge to evaluate the debates of the First Congress, Rehnquist concludes that those debates support an interpretation of the First Amendment that is diametrically opposed to the conclusion reached by Rutledge in his dissenting opinion in *Everson*.²³⁰

In his dissent, Justice Rehnquist presents a history of the First Amendment that appears both familiar and foreign to readers of *Reynolds* and *Everson*. It is familiar because many of the actors are the same,²³¹ but his historical narrative is framed very differently from earlier ones. Rehnquist's dissent begins rather abruptly and lingers on for quite some time after the enactment of the First Amendment.²³²

Rehnquist opens his dissent by dissecting the historical bases for *Everson* and *Reynolds*.²³³ He then presents his version of the history of the adoption of the First Amendment.²³⁴ He follows this history of events preceding the adoption of the First Amendment with a series of episodes that occurred after the enactment of the First Amendment, in which activities of church and state have been intermingled.²³⁵ Rehnquist next turns to nineteenth century commentary regarding the Religion Clause.²³⁶ Finally, he returns to contemporary Religion Clause jurisprudence and reevaluates it in light of his version of the history of the relationship between church and state in the United States.²³⁷ This dissent attempts to reframe and redefine First Amendment discourse by attacking the "received" history and attempting to offer a nonpreferentialist substitute drawn from the writings of Jefferson's opponents.

education. . . . When the intent of the Framers is unclear, I believe we must employ both history and reason in our analysis.

Id. at 80-81.

228. See TRIBE, *supra* note 15, § 14-3, at 1160 ("Whether the Black-Rutledge version is accurate history has been disputed vigorously off the Court . . . ; what is undisputable is that, with remarkable consensus, later Courts accepted the perspective of these Justices as historical truth.").

229. *Jaffree*, 472 U.S. at 91 (Rehnquist, J., dissenting).

230. *Id.* at 98-99.

231. Compare *id.* at 91-98, with *Reynolds v. United States*, 98 U.S. 145, 162-64 (1878), and *Everson v. Bd. of Educ.*, 330 U.S. 1, 11-13 (1947).

232. *Jaffree*, 472 U.S. at 91-106 (Rehnquist, J., dissenting).

233. *Id.* at 91-92.

234. *Id.* at 92-100.

235. *Id.* at 100-04.

236. *Id.* at 104-06.

237. *Id.* at 107-12.

Rehnquist attacks on all fronts the law and the history upon which Establishment Clause jurisprudence is based.²³⁸ He opens with reference to a selection from *Everson* that contains, in miniature, much of what he disagrees with in Religion Clause jurisprudence: "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.'"²³⁹ Rehnquist proceeds to unpack this quotation from *Everson*, quoting *Reynolds*, quoting Jefferson, to demonstrate that it rests on bad history and that, more importantly, it is bad law.²⁴⁰

Rehnquist first distinguishes *Reynolds* from *Jaffree* as a Free Exercise Clause case and isolates it (*Reynolds*) as "the only authority cited as direct precedent for the 'wall of separation theory.'"²⁴¹ He further characterizes it as "truly inapt."²⁴² He then describes Jefferson's choice of words as a "misleading metaphor."²⁴³ For Rehnquist, the "wall of separation" is neither a historically relevant metaphor nor is it a useful one with which one can make sense of the First Amendment.

Next, Rehnquist criticizes the earlier chronicles and provides what he presents as a more accurate one. Rehnquist notes that, "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."²⁴⁴ Although this fact is not new to readers of Establishment Clause case law, the manner in which it is presented certainly is.²⁴⁵ No longer is Jefferson's absence excused, rather it is stated bluntly and left naked of explanation. It is also presented as a not-so-oblique criticism of the historical narratives in *Reynolds* and *Everson*. According to Rehnquist's logic, if a Framer is one who wrote, voted for, or voted to ratify an Amendment, then

238. Rehnquist's dissent is not the first opinion to rely on revisionist history in an attempt to change the course of Religion Clause jurisprudence. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 674-78 (1984) (charting the "unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789").

239. *Jaffree*, 472 U.S. at 91 (Rehnquist, J., dissenting) (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1879))).

240. *Id.* at 92.

241. *Id.* at 92 n.1.

242. *Id.* Without reaching the merits of the dispute, I note that other Justices disagree about the "aptness" of Free Exercise precedents to Establishment Clause cases. See, e.g., *Everson*, 330 U.S. at 15 ("There is every reason to give the same application and broad interpretation to the 'establishment of religion' clause [as to the Free Exercise Clause].").

243. *Jaffree*, 472 U.S. at 92 (Rehnquist, J., dissenting).

244. *Id.*

245. See, e.g., *Reynolds v. United States*, 98 U.S. 145, 163 (1878) (describing Jefferson's involvement with the Constitution despite his absence).

Thomas Jefferson was no Framer and his views on the subject merit no special recognition.²⁴⁶

Rehnquist then dismisses Jefferson's letter referring to the "wall of separation" as a "short note of courtesy, written 14 years after the Amendments were passed by Congress."²⁴⁷ In his coup de grâce, Rehnquist completely dismisses Jefferson, and those who have relied on him, from the terms of the debate. Rehnquist maintains that "[Jefferson] 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."²⁴⁸ Like Rutledge, Rehnquist makes a clear appeal to the "detached observer" as his primary audience. In doing so, he is again criticizing the First Amendment history established and adopted by the Court in its previous Establishment Clause jurisprudence. That is, what is clear to the "detached observer" was obviously not clear to Waite, Black, or Rutledge. Rehnquist has already implicitly reframed the history of the adoption of the First Amendment. For him, the historical narrative should start with the First Congress, no earlier. This new framing does away with the tale told in *Reynolds* and *Everson* about the exploits of Jefferson and Madison in Virginia.

Rehnquist does not, however, completely dismiss Madison from his historical narrative. He acknowledges that Madison "did play as

246. See *Jaffree*, 472 U.S. at 92 (Rehnquist, J., dissenting). Justice Scalia, for one, disagrees with this logic:

I will consult the writings of some men who happened to be delegates to the Constitutional Convention—Hamilton's and Madison's writings in *The Federalist*, for example. I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood. Thus I give equal weight to Jay's pieces in *The Federalist*, and to *Jefferson's* writings, even though neither of them was a Framer. What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.

ANTONIN SCALIA, A MATTER OF INTERPRETATION 38 (Amy Gutmann ed., 1997) (emphasis added).

247. *Jaffree*, 472 U.S. at 92 (Rehnquist, J., dissenting). Nonpreferentialists have argued that new evidence demonstrates that Jefferson's letter should never have been used as a foundation for constitutional jurisprudence. Goodstein, *supra* note 14 (noting that according to an analysis done by the Library of Congress, Thomas Jefferson's historic letter to the Danbury Baptist Association was never intended "to be used as the foundation for law, but instead as a way to win political favor with New England constituents"). For a critique of those who minimize the importance of the Danbury Letter, see Robert S. Alley, *Public Education and the Public Good*, 4 WM. & MARY BILL RTS. J. 277, 309-15 (1995).

248. *Jaffree*, 472 U.S. at 92 (Rehnquist, J., dissenting).

large a part as anyone in the drafting of the Bill of Rights.”²⁴⁹ Yet, even Madison’s role has been reduced from that of a leader to a member of a group.²⁵⁰ Furthermore, Rehnquist’s use of Madison is more as a tool to continue disparaging Jefferson and minimizing his impact. For example, Rehnquist writes that “[Madison] had two advantages over Jefferson . . . he was present in the United States, and he was a leading Member of the First Congress.”²⁵¹ This is a purely rhetorical flourish; for the first advantage is redundant with the second, as one cannot be a leading member of Congress and be absent while it meets.

Rehnquist next turns to the First Congress and finds that its proceedings regarding the Establishment Clause, including Madison’s “significant contributions,” present a “far different picture of its purpose than the highly simplified ‘wall of separation between church and State.’”²⁵² Again, Madison’s role is both reduced to that of a contributor and yet shown to be more significant than that of Jefferson, who only offers “misleading metaphors” to shape constitutional doctrine.²⁵³

Rehnquist then gives a detailed history, compared to those found in *Reynolds* and *Everson*, of the ratification of the Constitution and the Bill of Rights.²⁵⁴ He notes that some states refused to ratify the Constitution in the absence of some form of Bill of Rights and that other states proposed amendments guaranteeing religious freedom.²⁵⁵

Next, Rehnquist notes that Madison introduced proposed amendments to the Constitution in the First Congress.²⁵⁶ Without strong supporting evidence, Rehnquist characterizes Madison’s motives in so doing. Rehnquist maintains that Madison’s

subsequent remarks in urging the House to adopt his drafts of the proposed amendments were less those of a dedicated advocate of the wisdom of such measures than those of a prudent statesman seeking the enactment of measures

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* at 93-100.

255. *Id.* at 93. Eleven colonies ratified the Constitution by early 1789, five of them proposing amendments guaranteeing individual freedoms, and three of them—New Hampshire, New York, and Virginia—including religious freedom. *Id.*

256. *Id.*

sought by a number of his fellow citizens which could surely do no harm and might do a great deal of good.²⁵⁷

Rehnquist supports this characterization with an extensive quotation from Madison that does indicate that he had political reasons in proposing the Amendment, but in no way indicates that such reasons were his sole motivation.²⁵⁸ In fact, Madison's quotation does not address the merits of the debate regarding religious liberty, rather it speaks directly to bridging the struggle between the Federalists and the Anti-Federalists regarding the necessity of a Bill of Rights.²⁵⁹ Rehnquist's juxtaposition of the history of the ratification of the Constitution with Madison's remarks on his proposed Amendments reveals an apparent motivation for Madison's actions. Yet while this juxtaposition is narratively coherent, the quoted text does not support Rehnquist's conclusion that political expediency was Madison's sole, or even dominant, motivation; rather, it merely demonstrates that it was *one* motivation.²⁶⁰

Having recharacterized Madison's motives, Rehnquist then proceeds to redefine Madison's importance in the passage of the Amendment. Rehnquist includes Madison's proposal for the language of what has become the First Amendment.²⁶¹ Rehnquist thereby emphasizes that this is not the language that is finally adopted. And, unlike the narratives in *Reynolds* and *Everson*, Madison is not the only named member of the First Congress.²⁶²

Several other events in Rehnquist's narrative conspire to further diminish Madison's role. Madison is no longer portrayed as the towering lawgiver; he is now one of many members of Congress. Congress refers Madison's proposed amendments to a "Committee of the Whole," which, "after several weeks' delay," refers them "to a Select

257. *Id.* at 93-94.

258. *Id.* at 94. Offering reasons for the proposal of the Amendment, Madison wrote that "[i]t will be a desirable thing to extinguish from the bosom of every member of the community, any apprehensions that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled." *Id.* (quoting 1 ANNALS OF CONG. 432 (Joseph Gales ed., 1789)).

259. *Id.*

260. *Id.* Moreover, if one were to read Madison's entire speech, one would see that he outlines his substantive arguments for each of his proposed amendments in addition to his strategic arguments. See 1 ANNALS OF CONG. 432-442.

261. *Jaffree*, 472 U.S. at 94 (Rehnquist, J., dissenting). The proposal reads: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." *Id.* (quoting 1 ANNALS OF CONG. 434).

262. *Id.* at 95 (naming, along with Madison, representatives Peter Sylvester of New York, John Vining, Elbridge Gerry, Roger Sherman of Connecticut, and Daniel Carroll of Maryland).

Committee consisting of Madison and 10 others.”²⁶³ The Committee revises Madison’s proposal.²⁶⁴ The entire Congress debates the Committee’s proposed revisions.²⁶⁵

Rehnquist’s version of events succeeds in further diminishing Madison’s role in the creation of the First Amendment. He is no longer the author of the Amendment, but rather its proposer. His work gets passed around, delayed, and treated as communal property. At the end of this narrative, the reader is left feeling that the First Amendment was the creation of an ill-run bureaucracy. Where the earlier opinions had various actors responding to Madison and Jefferson, Rehnquist has the House, the Senate, various Committees, and members of Congress enacting, approving, appropriating, voting, proposing, revising, and speaking. By placing Madison’s words amidst the cacophony of other voices and views in the First Congress, Rehnquist diminishes Madison’s centrality to his First Amendment narrative. By identifying these other voices, Rehnquist also makes it more difficult to ignore them in future judicial histories.

This narrative approach is not without its dangers. As Rehnquist diminishes Madison’s role, he also veers toward incoherence. Rehnquist’s story has so many gaps relating to the intent of the actors that it begins to sound more like a chronicle—a list of events that begins and ends without forming a coherent narrative—and less like a meaningful story.²⁶⁶ Rehnquist may have been aware of this effect. While he transcribes substantial portions of the Congressional debates, he characterizes them as not “particularly illuminating.”²⁶⁷ Moreover, Rehnquist notes that the House later voted to modify the language of the Amendment “without any apparent debate” on the matter.²⁶⁸ Furthermore, Rehnquist notes that the Senate debates regarding the Amendment were conducted in secret, the final version came out of a conference with no further reporting as to the intent of the Amendment’s ultimate authors, and that there were no further reported de-

263. *Id.*

264. *Id.* The revision read, “no religion shall be established by law, nor shall the equal rights of conscience be infringed.” *Id.* (quoting 1 ANNALS OF CONG. 729).

265. *Id.*

266. This may be where O’Connor’s comments about history are directed. *See id.* at 81 (O’Connor, J., concurring) (stating that the uncertainty of the Framers’ intent does not mean the Court should ignore history for guidance—only that the historical interpretation should be tempered by reason).

267. *Id.* at 95 (Rehnquist, J., dissenting).

268. *Id.* at 97. The new language read: “Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.” *Id.* (quoting 1 ANNALS OF CONG. 766).

bates in the House or Senate.²⁶⁹ Rehnquist's narrative is clearly missing the motivations of its important actors. Moreover, the text of the debate indicates that the speakers had concerns regarding the purpose of what came to be the Religion Clause other than those with which modern courts struggle.²⁷⁰ For instance, the struggle between those who favored a weak and those who favored a strong central government was clearly a more pressing issue at that time than the issue of nonpreferentialism versus strict separation.²⁷¹ The fact that Religion Clause issues were a secondary concern in the Framers's discussions of the Bill of Rights makes reliance on the debates mostly unhelpful in contemporary debates about religious liberty.

Rehnquist also uses selections from Madison's contributions to the debate to bolster his argument that Madison was not acting as a zealous advocate for the separation of church and state.²⁷² Rehnquist argues that Madison merely wanted to clarify that Congress could not establish a "national religion."²⁷³ Rehnquist again infers Madison's motivations in this process, maintaining that Madison was "speaking as an advocate of sensible legislative compromise, not as an advocate of incorporating the Virginia Statute of Religious Liberty into the United States Constitution."²⁷⁴ Again, while this is not a wild inference, it does not seem to be as strongly supported by the contents of the quoted text as Rehnquist implies; in fact, the selected quotations are off point.²⁷⁵

Rehnquist then lists a number of arguments to support his interpretation of the Religion Clause. Rehnquist highlights Madison's ini-

269. *Id.* at 97.

270. *See id.* at 98-99.

271. *See* LEONARD W. LEVY, JUDGMENTS 171 (1972) (noting that the Framers "gave only slight attention to the subject of a Bill of Rights and even less to the subject of religion").

272. *Jaffree*, 472 U.S. at 93-98 (Rehnquist, J., dissenting). Rehnquist ultimately concludes that, "from these glimpses of Madison's thinking," Madison "saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion." *Id.* at 98.

273. *Id.* at 98. Others argue that Madison merely "intended to distinguish an act of the national government from that of a state, without regard to the preferential or nonpreferential character of the national act on a matter respecting religion." LEVY, *supra* note 22, at 121. Once again, I will not reach the merits of this complex debate in this Article.

274. *Jaffree*, 472 U.S. at 98 (Rehnquist, J., dissenting).

275. Rehnquist quotes extensively from Madison regarding Madison's attempt to bridge the divide between the Federalists and Anti-Federalists. However, he does *not* quote from Madison regarding his substantive positions on his proposed Bill of Rights from the same speech or, for that matter, from his other writings on religious liberty from the same period. *Id.* at 93-98.

tial opposition to the Bill of Rights.²⁷⁶ He claims that Madison's motives for sponsoring the proposal that became the First Amendment were "obviously" not that of a zealous separationist, but of one who "felt it might do some good [and] could do no harm."²⁷⁷ Rehnquist maintains that Madison's sponsorship was solely intended to satisfy those who had ratified the Constitution on the condition that Congress propose a Bill of Rights.²⁷⁸ As noted earlier, Justice Rehnquist argues that the language of Madison's version of the First Amendment does not conform to the "wall of separation" position which latter-day commentators have ascribed to it.²⁷⁹ Rehnquist also asserts that Madison's language during the floor debate does not support the "wall of separation" position.²⁸⁰ Rather, he interprets Madison's language on the floor as supporting the view that Madison wanted merely to prevent the creation of a "national" religion.²⁸¹

These arguments in themselves fall short of providing indisputable support for Rehnquist's hypothesis. Rehnquist admits that he only has access to incomplete "glimpses" into Madison's mind, which, a detached observer might find, do not provide "indisputable" answers.²⁸² As O'Connor noted in her concurrence, the historical record is incomplete on certain points.²⁸³ There is no way to definitively establish Madison's motivations. Furthermore, Rehnquist's narrative so undermines Madison's role in the creation of the First Amendment that it is unclear why Madison's motivations should be dispositive of the First Amendment's meaning anyway.

Jefferson is most conspicuous in Rehnquist's history by his absence. He is mentioned only at the beginning of the text, although his "wall of separation" metaphor dominates it.²⁸⁴ Each of Rehnquist's arguments is intended to chip away at that wall and remove the resulting rubble from the domain of Establishment Clause jurisprudence. Rehnquist's ultimate goal is to undercut *Everson's* narrative.

276. *Id.* at 98.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.* at 80-81 (O'Connor, J., concurring).

284. *Id.* at 91-92 (Rehnquist, J., dissenting). Rehnquist seems to purposefully write Jefferson out of his history by placing him in France at the time of the debates. *Id.* at 92. Unlike the other judicial historians discussed earlier, Rehnquist refuses to recognize that Jefferson might have played any role in the adoption of the First Amendment.

As was noted earlier, Rehnquist began his opinion with a quotation from *Everson* quoting *Reynolds* quoting Jefferson.²⁸⁵ Rehnquist concludes his history of the adoption of the First Amendment by noting:

[T]he Court's opinion in *Everson*—while correct in bracketing Madison and Jefferson together in their exertions in their home State leading to the enactment of the Virginia Statute of Religious Liberty—is totally incorrect in suggesting that Madison carried these views onto the floor of the United States House of Representatives when he proposed the language which would ultimately become the Bill of Rights.²⁸⁶

In this passage, he acknowledges that Black's opinion had its preadoption Virginian history correct, but attempts to distinguish that from the history of the adoption of the First Amendment.²⁸⁷ He then argues that it is "totally incorrect" to believe that Madison could have brought any of his views regarding religious liberty that he held for the prior decade onto the floor of the House.²⁸⁸ This is highly implausible.

Rehnquist follows this up with a review of cases that he believes have repeated the errors of *Everson*. In particular, he criticizes the Court's opinion in *Abington School District v. Schempp*²⁸⁹ for stating that "the views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States.' On the basis of what evidence we have, this statement is demonstrably incorrect as a matter of history."²⁹⁰ In support of this view, Rehnquist cites four state constitutions that had some form of establishment of religion.²⁹¹ Again, Rehnquist does not adequately support his conclusion. Rehnquist's sources do not refer at all to Madison, Jefferson, or Williams.²⁹² If anything, they support the contention that only a few states—four of the original thirteen—supported the establishment of religion.²⁹³

285. *Id.* at 91.

286. *Id.* at 98-99.

287. *Id.*

288. *Id.* at 99.

289. 374 U.S. 203 (1963).

290. *Jaffree*, 472 U.S. at 99 (Rehnquist, J., dissenting) (quoting *Schempp*, 374 U.S. at 214 (internal citation omitted)).

291. *Id.* at 99 n.4 (noting that Massachusetts, New Hampshire, Maryland, and Rhode Island had established religions in the late eighteenth and early nineteenth centuries).

292. *Id.*

293. *See id.*

Returning to the role that history plays in constitutional decision-making, Rehnquist notes that the repetition of a historical mistake in Court opinions "can give it no more authority than it possesses as a matter of fact; *stare decisis* may bind courts as to matters of law, but it cannot bind them as to matters of history."²⁹⁴ Here, as in his opening paragraphs, Rehnquist makes the key transition from his criticism of *Everson* as history to his criticism of *Everson* as law. Yet, when looked at carefully, this transition is logically flawed.

Rehnquist criticizes *Everson's* use of history and the repetition of that history in later decisions. Instead of just dismissing it as bad history, he uses a technical legal term, *stare decisis*, to dismiss it. By associating bad history with bad law, Rehnquist is attempting to have the reader agree that if a decision contains bad history it must be bad law. While the one does not necessarily follow the other, Rehnquist apparently hopes that the reader will so conclude.

By this point in his dissent, Rehnquist has distinguished *Reynolds* as a Free Exercise decision, dismissed Jefferson's "wall" as an anachronistic reference, and undermined the historical foundation of *Everson's* holding. The rhetorical task he set in the opening paragraphs is finally complete with Rehnquist believing that he has demonstrated that *Everson* is bad history and therefore bad law.

Rehnquist ends his dissent with a historical mop-up operation, identifying instances where the government has intermingled church and state.²⁹⁵ He first notes that the First Congress reenacted the Northwest Ordinance, which allowed for land grants to sectarian schools, on the same day that Madison introduced his proposed amendments to the Constitution.²⁹⁶ Presidents have issued Thanksgiving Day proclamations, laws have countenanced the support of religion through appropriations of monies and land grants, and even the zealously anti-establishment Thomas Jefferson signed a treaty with the Kaskaskia Indians that provided for support of a Roman Catholic priest and church.²⁹⁷ These examples, Rehnquist argues, demonstrate that the Executive and Legislative Branches have frequently intermingled the secular and the religious, even while the First Amendment was being argued and adopted. This ongoing state of affairs, he concludes "shows the fallacy of the notion found in *Everson* that 'no tax in any amount' may be levied for religious activities in any

294. *Id.* at 99.

295. *Id.* at 100-04.

296. *Id.* at 100.

297. *Id.* at 101-03 & n.5.

form.”²⁹⁸ Again, Rehnquist combines his critique of prior judicial history with a critique of a holding. Thus, Rehnquist claims that the *was* of his history should void the *ought* of precedent.

Instead of merely attempting to destroy the received interpretation of the First Amendment, Rehnquist also tries to provide an alternative. He offers selections from the writings of Justice Story, who sat on the Court from 1811 to 1845, and from Thomas Cooley, a nineteenth century constitutional scholar, to demonstrate that the Establishment Clause “had acquired a well-accepted meaning.”²⁹⁹ He quotes from both extensively to demonstrate that they believed that the Establishment Clause was intended to have only a limited scope.³⁰⁰ Story argued that the Clause was only meant to prevent the favoring of one Christian sect over another and that it was not meant to level all religions or make the government indifferent to all religions.³⁰¹ Cooley argued that the Clause did not cause the government to deny the role of Providence.³⁰²

Rehnquist’s reliance on Story and Cooley is most notable here because he had criticized other Justices for using Jefferson’s writings to interpret the First Amendment when Jefferson was absent from the Constitutional Convention and the First Congress.³⁰³ Now, obviously, Rehnquist is relying on the writings of others who were also absent from the Constitutional Convention and the First Congress to support his interpretation of the First Amendment. As his predecessors had relied on Jefferson’s post-enactment letter to the Danbury Baptists to interpret the meaning of the First Amendment, Rehnquist now relies on Story’s *Commentaries* and Cooley’s *Constitutional Limitations*.³⁰⁴ Without acknowledging this contradiction, Rehnquist writes that “[i]t would seem from this evidence [the selections from Story and Cooley] that the Establishment Clause of the First Amendment had acquired a

298. *Id.* at 104 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947)).

299. *Id.* at 106. Based upon the selections from Justice Story and Thomas Cooley, Rehnquist contends that the “well-accepted meaning” of the Establishment Clause of the First Amendment was that “it forbade establishment of a national religion, and forbade preference among religious sects or denominations.” *Id.* Rehnquist argues that this historical evidence does not support a “strict separationist” interpretation of the Establishment Clause. *Id.*

300. *Id.* at 104-06.

301. *Id.* at 104-05.

302. *Id.* at 105.

303. *Id.* at 92.

304. *Id.* at 104-06 (citing 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 630-32 (5th ed. 1891); THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS *470-71 (5th ed. 1883)). Rehnquist also relies on an 1828 dictionary definition of “establishment”—which came 39 years after the debate over the First Amendment—to support his position. *Id.* at 106.

well-accepted meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations."³⁰⁵ While audacious, such a rhetorical strategy is incoherent, opportunistic, and hypocritical.

The quotations from Story upon which Rehnquist has relied makes explicit the culturally conservative—some might even say xenophobic—tradition that is being presented as an alternative to the Jeffersonian tradition. Rehnquist, by relying on Story, appears to be arguing for the supremacy in the United States of Christianity among religions.³⁰⁶ Without drawing further attention to the preferentialist aspect of Story's writings, Rehnquist concludes that "[t]he Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the 'wall of separation' that was constitutionalized in *Everson*."³⁰⁷ After this complete dismissal of Jefferson and *Everson*, Rehnquist attacks the "wall" imagery as a useless and "misguided analytical concept."³⁰⁸ He spends the remainder of his dissent describing the chaos caused in Establishment jurisprudence by this figure of speech.³⁰⁹

Like Rutledge's dissent in *Everson*, Rehnquist's dissent is a revisionary tour de force that attempts to rewrite the law by rewriting history. He marginalizes the roles of Virginia, Jefferson, and Madison in the Supreme Court's history of the First Amendment and replaces them with a host of new actors who are neither "zealous" separationists nor coherent opponents. Rather, he relies on the conflicting and ambiguous statements of many actors to erode the accepted meaning of the First Amendment.

Rehnquist not only diminishes Madison's role in the adoption of the First Amendment from that in the narratives of Waite, Black, and Rutledge, he also attempts to write Jefferson completely out of his narrative. Yet, in his constant struggle with the "wall of separation" metaphor, Rehnquist is acknowledging the dominant role that Jefferson

305. *Id.* at 106.

306. *See id.* at 104.

307. *Id.* at 106.

308. *Id.*

309. *Id.* at 107-12. Rehnquist notes that "in the 38 years since *Everson* our Establishment Clause cases have been neither principled nor unified." *Id.* at 107. Continuing in this vein, Justice Rehnquist points at the fact that the Court's "recent opinions, many of them hopelessly divided pluralities, have with embarrassing candor conceded that the 'wall of separation' is merely a 'blurred, indistinct, and variable barrier,' which 'is not wholly accurate' and can only be 'dimly perceived.'" *Id.* at 107 (footnote omitted).

plays in this debate. Rehnquist cannot completely dispense with Jefferson, he can only try to hide him from view.

Rehnquist took an inherited story of the First Amendment, broke it down, reevaluated it, and reframed it. It is no longer a story about a long struggle begun in the Old World. It is now the story of a pragmatic compromise between (mostly) long forgotten members of Congress. If Rehnquist had succeeded in convincing the Court, not only would the importance of Madison and Jefferson have been diminished, but the wall of separation between church and state would also have been eroded.

D. *Lee v. Weisman*

In *Lee v. Weisman*,³¹⁰ a public school student and her father brought suit seeking a permanent injunction to prevent the inclusion of prayers in her public high school graduation ceremony.³¹¹ Justice Kennedy, delivering the opinion of the Court, held that the inclusion of prayers in public school graduation ceremonies violates the Establishment Clause.³¹²

Justice Souter wrote a concurrence that evaluated the ongoing debate regarding the history and meaning of the Religion Clause.³¹³ Justice Souter's concurrence is most notable for its initial, and practically unquestioning, reliance on Establishment Clause precedents dating back to *Everson*.³¹⁴ But, like Justices before him, he chooses his own frames for the history of the First Amendment and of Religion Clause jurisprudence.³¹⁵ Souter expands the roles of Jefferson and Madison in the creation of the First Amendment beyond those given by Rehnquist in *Jaffree*.³¹⁶ Yet, like Rehnquist, he adds a supporting cast of Framers.³¹⁷ Responding to Rehnquist's post-enactment history in *Jaffree*, Souter does not end his narrative immediately after the adoption of the First Amendment. Souter looks to the behavior of

310. 505 U.S. 577 (1992).

311. *Id.* at 584.

312. *Id.* at 609 (Souter, J., concurring). Justice Blackmun wrote a concurrence, joined by Justices Stevens and O'Connor, that emphasized the recent history of Establishment Clause jurisprudence. *Id.* at 599. (Blackmun, J., concurring). Justice Scalia, joined by Chief Justice Rehnquist and Justices White and Thomas, wrote a vitriolic dissent in which he reviewed the role of prayer in civic life. *Id.* at 631 (Scalia, J., dissenting).

313. *Id.* at 609 (Souter, J., concurring).

314. *Id.* at 610-11.

315. *Id.* at 612-16.

316. *See id.*

317. *See id.* at 613-16.

government officials after the adoption of the First Amendment in order to flesh out its meaning.³¹⁸

Souter's concurrence is highly structured. Part I.A outlines the history of Establishment Clause jurisprudence, beginning with *Everson*.³¹⁹ Part I.B presents and responds to the challenges to *Everson* and its progeny.³²⁰ Part I.C explains that nonpreferentialism requires "the courts to engage in comparative theology," which is something the courts lack the competence to do.³²¹ Part II.A evaluates precedents declaring the invalidity of noncoercive state laws and practices that convey a message of endorsement of religion.³²² Part II.B argues that coercion is not a necessary element of an Establishment Clause violation.³²³ Part II.C reviews post-ratification examples of the intermingling, and avoidance of intermingling, of church and state.³²⁴ Part III.A cautions that the separation of church and state does not imply that the government cannot ever accommodate religion.³²⁵ Finally, in Part III.B, Souter argues that prayers at a public high school graduation ceremony exceed accommodation and are a violation of the First Amendment.³²⁶

After a brief introduction, Souter writes that "[f]orty-five years ago, this Court announced a basic principle of constitutional law from which it has not strayed: the Establishment Clause forbids not only state practices that 'aid one religion . . . or prefer one religion over another,' but also those that 'aid all religions.'"³²⁷ He then concludes, "[t]oday we reaffirm that principle . . ."³²⁸ Souter explains that the Court's decision in *Weisman* "hold[s] true to a line of precedent from which there is no adequate historical case to depart."³²⁹ Souter has thereby judged that the Court's precedents have a presumption of validity that has not been overcome by Rehnquist's historical revisionism in his dissent in *Jaffree*. Reviewing the Court's precedents beginning with *Everson*, Souter finds that the Court has "consistently held the Clause applicable no less to governmental acts

318. *Id.* at 622-26.

319. *Id.* at 610-12.

320. *Id.* at 612-16.

321. *Id.* at 616-18.

322. *Id.* at 618-19.

323. *Id.* at 620-21.

324. *Id.* at 622-26.

325. *Id.* at 627-29.

326. *Id.* at 629-31.

327. *Id.* at 609-10 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)).

328. *Id.* at 610.

329. *Id.*

favoring religion generally than to acts favoring one religion over others."³³⁰

Souter then reviews the challenges to *Everson* and its progeny. He notes that Rehnquist's attacks on the use of history in earlier Religion Clause cases are supported by certain members of academia.³³¹ Souter, however, finds that the attack is "not so convincing as to warrant reconsideration of our settled law" ³³² Souter then limits the argument over the history of the clause to "the history of the Clause's textual development" and finds that his version of history gives a "more powerful argument supporting the Court's jurisprudence following *Everson*" than Rehnquist's.³³³

Acknowledging Madison's role in the development of the First Amendment, Souter begins his history of the Clause's textual development with Madison's initial proposal for the First Amendment.³³⁴ But Souter declares that "Madison's language did not last long."³³⁵ He then lists all of the individuals and committees in the House and the Senate that had any effect on the language of the proposal: the Select Committee rewrites it; the Committee on the Whole rewrites it, adopting Samuel Livermore's language; the House rewrites it, adopting Fisher Ames' language; the Senate rewrites it; and the House rejects the Senate version and calls for a joint conference committee in which the House conferees gain acceptance of their version.³³⁶

In his chronicle of the Religion Clause, Souter, like Rehnquist, relies most heavily on basic facts of enactment,³³⁷ and ignores Waite's spirit "of the times in the midst of which" the First Amendment was enacted.³³⁸ At this point, Souter has asserted that the process of adoption of constitutional text has primacy over the views of the individuals who participate in that process. Yet Souter acknowledges the degree of uncertainty that such an analysis entails. He speculates as to why Livermore's proposal was rejected, but ultimately concludes, "[w]e do not know."³³⁹ He also notes that there are no records of the Senate debates, which also limits the conclusions that one can draw.³⁴⁰ Sou-

330. *Id.*

331. *Id.* at 612 (referring specifically to ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982)).

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.* at 612-14.

337. *Id.*

338. *Reynolds v. United States*, 98 U.S. 145, 162 (1878).

339. *Weisman*, 505 U.S. at 613 (Souter, J., concurring).

340. *Id.* at 614.

ter is able, however, to draw at least one conclusion from all of these various versions of the text: "The Framers repeatedly considered and deliberately rejected . . . narrow language and instead extended their prohibition to state support for 'religion' in general."³⁴¹

Until this point in Souter's narrative, Jefferson and Madison are, at best, marginal actors. However, once this interpretation of the adoption of the First Amendment is provided, Souter reintroduces them as leading figures. Souter writes that "[t]he Virginia Statute for religious freedom, written by Jefferson and sponsored by Madison, captured the separationist response" to measures that would favor religion over nonreligion.³⁴² Souter then relies on Jefferson and Madison to guide his thinking about the appropriate relationship between church and state. Following Madison, he argues that the "judiciary should not willingly enter the political arena to battle the centripetal force leading from religious pluralism to official preference for the faith with the most votes."³⁴³ He also sides with Jefferson and Madison where they "opposed any political appropriation of religion."³⁴⁴

Although Souter could plausibly end his narrative regarding the meaning of the First Amendment at ratification, he does not. Apparently, he feels compelled to dispute Rehnquist's interpretation of those post-ratification actions of the early national government that demonstrated an intermingling of church and state.³⁴⁵ Souter dismisses them as trivial, intermittent, and proof of no more than that public officials occasionally "can turn a blind eye to constitutional principle."³⁴⁶

While acknowledging that the First Congress hired a chaplain and that Presidents Washington and Adams marked days of public thanksgiving and prayer, Souter notes that Jefferson "steadfastly refused" to do so as he believed that it would violate the Establishment Clause.³⁴⁷ He notes that Madison "also refused to call for days of

341. *Id.* at 614-15.

342. *Id.* at 615.

343. *Id.* at 617-18. He also relies on Madison's post-enactment interpretation of the Establishment Clause, writing that "[i]n Madison's words, the Clause in its final form forbids 'everything like' a national religious establishment, and, after incorporation it forbids 'everything like' a state religious establishment." *Id.* at 620 (internal citation omitted). Souter contends that the prohibition under the First Amendment is so broad that "Madison himself characterized congressional provisions for legislative and military chaplains as unconstitutional 'establishments.'" *Id.*

344. *Id.* at 622.

345. *Id.* at 616 n.3.

346. *Id.*

347. *Id.* at 623.

thanksgiving and prayer" until pressured by the political turmoil associated with the War of 1812.³⁴⁸ Souter defends Jefferson's and Madison's inconsistencies with respect to their absolute separationist views as evidence of no more than that "Homer nodded" and that principles sometimes give way to exigency.³⁴⁹

Souter notes other examples where supposedly fundamental rights were little more than "'paper parchments'—expressions of the most laudable sentiments, observed as much in the breach as in the practice."³⁵⁰ State bills of rights were frequently ignored; and Congress passed the Alien and Sedition Acts, an act deemed by Souter to go entirely against the letter and spirit of the First Amendment.³⁵¹ Souter comments that "[i]f the early Congress's political actions were determinative, and not merely relevant, evidence of constitutional meaning, we would have to gut our current First Amendment doctrine to make room for political censorship."³⁵²

In his concurrence in *Weisman*, Souter first provides a historical record of the adoption of the First Amendment—similar to that of Rehnquist—which is dominated by Congressional procedures. Then he provides a context—like those of Waite, Black, and Rutledge—that is dominated by Jefferson and Madison. Souter uses that context to give meaning to the bare historical record *and* to the First Amendment itself. But once Souter establishes the meaning of the First Amendment, any events that are inconsistent with that meaning must be no more than "trivial," intermittent and so on.³⁵³ Furthermore, by contrasting the coherent meaning that he has provided with the incoherence of the historical record, Souter dismisses Rehnquist's post-enactment historical arguments. Souter thereby concludes that the historical record that Rehnquist marshals does not rebut the traditional Supreme Court story about the adoption of the First Amendment. For Souter, where precedent rules, history may only serve.

348. *Id.* at 624.

349. *See id.* at 623 n.5 (noting that Jefferson "sometimes diverged from principle, for he did include religious references in his inaugural speeches"). *Cf.* Letter from Thomas Jefferson to Joseph Priestly (June 19, 1802), in 10 THE WRITINGS OF THOMAS JEFFERSON 324, 325 (Andrew A. Lipscomb & Albert E. Bergh eds., libr. ed. 1903) ("[I]t is still certain that though written constitutions may be violated in moments of passion or delusion, yet they furnish a text to which those who are watchful may again rally and recall the people; they fix too for the people the principles of their political creed.").

350. *Weisman*, 505 U.S. at 626 (Souter, J., concurring) (quoting Kurland, *supra* note 22, at 852).

351. *Id.*

352. *Id.*

353. *Id.* at 630.

III. THE NARRATIVE CHARACTERISTICS OF RELIGION CLAUSE JURISPRUDENCE

The Supreme Court has consciously based its Religion Clause jurisprudence on the historical record even though that record does not speak in one voice. One is left to wonder why that choice has been made and whether it was a wise one. First of all, while judges have expertise interpreting legal precedent, they do not have any particular expertise as historians and, as a general rule, do not conduct primary historical research.³⁵⁴ Rather, they rely on interpretations of other historians to bolster their historical narratives. They do not often directly and comprehensively compare these interpretations to the historical record. Hence the history that they rely upon, both primary documents and secondary materials, is often interpreted for them by others.³⁵⁵ This reliance affects the quality of such historical narratives as *history*.

Second, and more important for this Article, history has not seemed to offer them a firm basis for their Religion Clause jurisprudence. The chronicles and stories set forth in Part II are the basic script from which the Justices have drawn their theories of the Religion Clause. As discussed below, they are an insufficient basis for establishing the "true" account of the origin and meaning of the Religion Clause. The historical record is just too ambiguous. Meaningful Religion Clause jurisprudence must first ground itself in theory in order to offer a compelling explanation of the text of the Religion Clause.³⁵⁶ While history can help make sense of such a grounded explanation, it can not offer such a grounding itself.³⁵⁷

A. *Truth and History*

Professor Jerome Bruner has noted that

since the Enlightenment, if not before, the study of mind has centered principally on how man achieves a "true" knowl-

354. This is not just a problem for judges. The works of many constitutional theorists contain similar deficiencies. See Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 526 (1995) ("[H]abits of poorly supported generalization—which at times fall below even the standards of undergraduate history—pervade the work of many of the most rigorous theorists when they involve the past to talk about the Constitution.").

355. Emil A. Kleinhaus, Note, *History as Precedent: The Post-Originalist Problem in Constitutional Law*, 110 YALE L.J. 121, 130 (2000).

356. See TRIBE, *supra* note 15, § 14-3, at 1158.

357. See Richard A. Posner, *Post-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 594 (2000) ("History in the narrow sense of what happened does not reveal meaning.").

edge of the world. . . . The objective . . . has been to discover how we achieve "reality," that is to say, how we get a reliable fix on the world, a world that is, as it were, assumed to be immutable and, as it were, "there to be observed."³⁵⁸

And until the dawn of the twentieth century, many believed that the world about us and the past were essentially knowable.³⁵⁹ A corollary to that belief was the assumption that "language is an essentially transparent medium for the expression of ideas" and for describing the world.³⁶⁰ Those who approach the world in this way tend to have a "certaintist" belief in "objectivity, disinterestedness, the 'facts', unbiasedness," and "truth."³⁶¹

But the nature of the past, how we come to know it, and how we communicate that knowledge has been the subject of growing debate in the twentieth century.³⁶² The quest for epistemological certainty has been replaced by a set of critical approaches that have embraced the limits and ambiguity of human knowledge.³⁶³ Although differing in substantive ways, schools of thought that have been labeled "post-structuralism, deconstructionism, new historicism, . . . postmodernism and so on," share an aversion to certainty.³⁶⁴ These intellectual movements have replaced the quest for truth with explicitly rhetorical approaches that include "readings, positionings, perspectives, constructions," and "discourses."³⁶⁵ One is on notice then, if trying to determine the *truth* of the history found in judicial opinions, that the notion of truth itself is found to be suspect by many twentieth century historians.³⁶⁶ For them, the search for truth has been replaced by the search for how we interpret the world.

For his part, Bruner finds that "we organize our experience and our memory of human happenings mainly in the form of narrative—stories, excuses, myths, reasons for doing and not doing, and so

358. Jerome Bruner, *The Narrative Construction of Reality*, 18 CRITICAL INQUIRY 1, 1 (1991).

359. See KEITH JENKINS, RE-THINKING HISTORY 10 (1991) (critiquing certaintist accounts of history).

360. Martin Jay, *Should Intellectual History Take a Linguistic Turn? Reflections on the Habermas-Gadamer Debate*, in MODERN EUROPEAN INTELLECTUAL HISTORY 86 (Dominick La-Capra & Steven L. Kaplan eds., 1982).

361. JENKINS, *supra* note 16, at 7.

362. *Id.* at 6-7.

363. See *id.* at 3 (listing a range of theorists and their theories about historical representation).

364. *Id.*

365. *Id.* at 7.

366. See JENKINS, *supra* note 359, at 28 ("I have run arguments from Elton and others where the aim of historical study is to gain real (true) knowledge, and suggested this is, strictly speaking, unachievable.").

on.”³⁶⁷ Bruner does not claim that all thinking is narrative: certain logical and scientific discourses are not. He distinguishes narrative thinking from these other types because

unlike the constructions generated by logical and scientific procedures that can be weeded out by falsification, narrative construction can only achieve “verisimilitude.” Narratives, then, are a version of reality whose acceptability is governed by convention and “narrative necessity” rather than by empirical verification and logical requiredness, although ironically we have no compunction about calling a story true or false.³⁶⁸

In general, verisimilitude attaches to stories that are coherent and plausible. In historical narratives, verisimilitude has the additional characteristic of being consistent with agreed upon facts. This verisimilitude cannot be verified independent of its particular audience. Because we use a standard of verisimilitude for both fictional and historical narratives, Bruner suggests that “the distinction between narrative fiction and narrative truth is nowhere as obvious as common sense and usage would have us believe.”³⁶⁹

Professor Louis Mink argues that the primacy of narrative arises from the disconnect between the serial nature of how we perceive the world and the synthetic nature of our thought: “[t]he fact to which any theory of knowledge must return is the simple fact that experiences come to us *seriatim* in time and yet must be capable of being held together in an image of the manifold of events.”³⁷⁰ For Mink, “comprehension is an individual act of seeing-things-together, and only that.”³⁷¹ Hence, the narrative, while experienced incrementally, can represent the entirety of an experience. And because the transcribed narrative—unlike events in the “real” world—does not disappear, we can review it and absorb meaning until the increments of the narrative speak in a unified voice.³⁷²

The impulse to narratize may result from more than our cognitive design. As Mink writes:

[T]he value of narrativity derives from the force of an impulse to moralize events by investing them with a “coherence, integrity, fullness and closure” that is imaginary—a

367. Bruner, *supra* note 358, at 4.

368. *Id.* at 4-5.

369. *Id.* at 13.

370. LOUIS O. MINK, HISTORICAL UNDERSTANDING 36 (Brian Fay et al. eds., 1987).

371. *Id.* at 55.

372. *See id.* at 56-57 (noting that narratives strengthen the act of understanding).

fiction, though a necessary one which inherits its necessity not from the determinateness of the world but from our inability (however one explains that inability) to contemplate events without redescribing them as connected within a moral order.³⁷³

That is, Mink argues that we impose a moral order over what are morally indeterminate events, a process that provides those events with meaning. Thus, narrativity is a means of giving sense to the world as it is. Mink notes that history is only distinct from other types of stories because it relies "upon evidence of the occurrence in real space and time of what it describes and insofar as it must grow out of a critical assessment of the received materials of history, including the analyses and interpretations of other historians."³⁷⁴

Even this reliance on "real space and time" is not as fundamental as it may appear to a nonhistorian: "historians commonly say (if they are asked) that they think less and less of chronology as they learn more and more of their fields. The date of an event is functionally an artificial mnemonic by which one can maintain the minimum sense of its *possible* relation to other events."³⁷⁵ Like Bruner, Mink believes that the meaning of the historical record is not found by merely tracing the chronological sequence of events, but rather by evaluating the events in a holistic fashion, and using the chronological record solely as a means of falsifying certain historical hypotheses that are inconsistent with that chronology.³⁷⁶

Keith Jenkins adds that this lack of concern extends beyond dates to include discrete facts as well. Jenkins maintains:

[H]istorians are not too concerned about discrete facts (facts as individual facts), for such a concern only touches that part of historical discourse called its chronicle. No, historians have ambitions, wishing to discover not only what happened but how and why and what these things meant and mean. . . . So it is never really a matter of the facts *per se* but the weight, position, combination and significance they carry *vis-à-vis* each other in the construction of explanations that is at issue. . . . For although there may be methods of finding out 'what happened' there is no method whatsoever whereby one can definitely say what the 'facts' mean.³⁷⁷

373. Louis O. Mink, *Everyman His or Her Own Annalist*, in *ON NARRATIVE* 233, 234 (W.J.T. Mitchell ed., 1981).

374. MINK, *supra* note 370, at 47.

375. *Id.* at 57.

376. *See id.*

377. JENKINS, *supra* note 359, at 32-33.

For contemporary historians, then, history is about the interpretation of the meaning of the past as much as it is about the accurate representation of discrete events of the past. After reviewing the traces of the past that have survived as texts and artifacts, the historian chooses, emphasizes, and compresses aspects of the past to give it meaning.³⁷⁸ Necessarily, the accuracy of history is judged not against the past, but against other historians' interpretations.³⁷⁹

Abandoning the quest for objectivity, ideology can only take on a greater role in the contemporary historian's understanding of historical discourse. This idea is illustrated when Jenkins writes:

[S]ome groups want a sanitised history where conflict and distress are absent; some want history to lead to quietism; some want history to embody rugged individualism, some to provide strategies and tactics for revolution, some to provide grounds for counter-revolution, and so on. It is easy to see how history for a revolutionary is bound to be different from that desired by a conservative.³⁸⁰

History's audiences, actual and potential, also have needs that impinge upon history. They demand a history with which they may create their identities. Jenkins argues that "people(s) in the present need antecedents to locate themselves now and legitimate their ongoing and future ways of living."³⁸¹ Because of the subjective nature of history, Hayden White argues that "the historian performs an essentially *poetic* act."³⁸² As such, historical narratives can be analyzed as a form of literature.

B. *Historical Narratives in Religion Clause Jurisprudence*

Narrative theory can help make sense of why Justices Waite, Black, Rutledge, Rehnquist, and Souter tell and retell the history of the adoption of the First Amendment. Employing literary, mythological, and cultural analyses, we can also see that these narratives do much more than set the stage for the presentation of legal doctrines. The use of history in these opinions is exposed as an integral part of the opinions and the constitutional doctrines that they embody, not

378. See *id.* at 13 (noting that "[h]istory always conflates, it changes, it exaggerates aspects of the past . . .").

379. *Id.* at 11 ("We judge the 'accuracy' of historians' accounts *vis-à-vis* other historians' interpretations and there is no real account, no proper history that, deep down, allow us to check all other accounts against it: there is no fundamentally correct 'text' of which other interpretations are just variations . . .").

380. *Id.* at 18.

381. *Id.*

382. WHITE, *supra* note 17, at x.

merely as a rhetorical flourish. As such, their validity—their truth value—has the same limitations as any other historical narrative. These limitations, as demonstrated below, keep historical narrative from being a solid basis for Religion Clause jurisprudence.

1. *Telling and Retelling the Story.*—Professor Mink writes that “history is not the writing but the *rewriting* of stories.”³⁸³ After Waite’s opinion in *Reynolds*, each of the succeeding opinions retells the story of the origin of the First Amendment. That is, they do not merely correct or amplify or emphasize what had been told previously. Rather, each opinion retells the entire story.³⁸⁴ By so doing, each seeks to control the meaning of the origin and to displace the meaning attached to it by others. This retelling of stories over time becomes integral to the creation of the canons of Supreme Court jurisprudence.³⁸⁵ But it is also the method by which Justices can challenge the established canon, as the retelling of the story allows each and every element of the versions that have come before to be questioned, reconsidered, and even discarded.

The historical narrative that dominates Religion Clause discourse intermingles with the doctrines of the Supreme Court’s Religion Clause jurisprudence and helps to determine the Court’s holdings in the future. For instance, Souter notes that “history neither contradicts nor warrants reconsideration of the settled principle [derived from *Everson*] that the Establishment Clause forbids support for religion in general no less than support for one religion or some.”³⁸⁶ Souter thereby acknowledges that *Everson* and its historical narrative have shaped current law.

Retelling also appears important in judicial opinions because it is only in the context of our earlier interpretations that we may understand the meaning of a new interpretation. Rehnquist’s opinion only makes sense as a response to Rutledge’s; Souter’s to Rehnquist’s. This is in large part how constitutional adjudication works. The meaning of each opinion is understood in the context of its adherence to and deviation from what has preceded it. The mere statement of holdings is an insufficient basis for the analysis of most constitutional doctrines. Narrative is integral to the continuity of doctrine and provides the

383. MINK, *supra* note 370, at 136.

384. See *supra* Part II.

385. Cf. Bruner, *supra* note 358, at 20 (“The perpetual construction and reconstruction of the past provide precisely the forms of canonicity that permit us to recognize when a breach has occurred and how it might be interpreted.”).

386. *Lee v. Weisman*, 505 U.S. 577, 616 (1992) (Souter, J., concurring).

context in which Justices place new holdings and new rationales. But the divergence in meaning of the various histories told by the Justices, as well as the act of retelling itself, highlights the shaky foundation that history provides for an understanding of the Religion Clause.³⁸⁷

2. *Framing.*—The skeletal histories that I have extracted from the opinions demonstrate that the Justices have paid immense attention to the framing of the narratives.³⁸⁸ Framing refers to the choice of chronological beginnings and endings as well as to the choice of narrative characteristics, such as who is a legitimate actor and what is a legitimate setting. As with retelling, the different framing choices of the Justices demonstrate the limitations inherent in narrative to provide a firm basis for Religion Clause jurisprudence.

Separating out the skeletal histories for these opinions highlights the framing choices of the Justices and thereby demonstrates how changing the juxtaposition of events can give those events new meaning. This exercise shows that in all of the opinions but Rehnquist's the events are presented as a coherent story. Rehnquist, on the other hand, presents events in such a fashion that they lack much intrinsic meaning.³⁸⁹ While this approach opens the door for Rehnquist to insert the latecomers Story and Cooley as the voices of the "true" meaning of the Religion Clause, it also exposes his narrative to serious internal inconsistencies.³⁹⁰

The histories in these opinions have, until Rehnquist's dissent, a structure that borders on that of a fairy tale. They open, essentially, with "once upon a time . . ." They trumpet the arrival of the heroic Jefferson and Madison. They end with that dynamic duo establishing religious freedom by means of the First Amendment.

Framing choices are obvious in the choice and type of actors presented in these opinions. Virginia is consistently privileged over the other original states, perhaps in part because it had a clear and well-documented struggle for religious liberty.³⁹¹ Virginia is also home to many of the acknowledged leaders of the Revolution—Jefferson and Madison, not to mention Washington, Henry, Mason, and Wythe. So, while scholars have documented the struggle for religious

387. See *supra* Part II.

388. See *id.*

389. See *supra* text accompanying note 266 (noting that Rehnquist's version lacks narrative unity).

390. See *supra* text accompanying notes 303-305.

391. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 11-13 (1947); *Reynolds v. United States*, 98 U.S. 145, 163 (1878).

liberty in other states as well,³⁹² Virginia remains the focus due to historiographic inertia or narrative necessity.³⁹³

Similarly, individuals remain more important for the Justices than groups and movements. The views that are found persuasive are those of the eloquent. Again, narrative necessity helps to explain this. Jefferson and Madison are relied upon in part because they are respected and because what they say is coherent and thought provoking—it *makes sense*. When a writer, like Rehnquist in *Jaffree*, attempts to look at the statements of various members of the First Congress, he veers toward incoherence and fails to persuade because those statements are incomplete, ambiguous, and the views expressed in those statements are not well understood today.³⁹⁴

Rehnquist's framing choices are also notable because he makes no real distinction between the beginning and the middle of his narrative. It jumps from Jefferson and Madison's fight for the Bill for Establishing Religious Freedom and moves directly to the enactment of the Constitution.³⁹⁵ In his version, there is no explicit narrative connection between these events. His detailed history of the First Congress debates does not come together to tell a coherent story—it appears as an arbitrary listing of events.³⁹⁶ Rehnquist's is the least chronological of all of the opinions. While his history ends more coherently than it begins, it leaves the overall impression of a tangled

392. See, e.g., CURRY, *supra* note 22, at viii (framing the First Amendment "within the overall picture of colonial and revolutionary America"). Professor Leo Pfeffer has explained:

Virginia, however, was not the only state that disestablished a church before the First Amendment became a part of the Constitution, and states other than Virginia enacted statutes guaranteeing religious liberty before the First Amendment was adopted. New York, for example, adopted a constitution that abrogated all laws "which may be construed to establish or maintain any particular denomination of Christians or their ministers" and guaranteeing forever the "free exercise of religious profession and worship without discrimination or preference."

Leo Pfeffer, *Madison's "Detached Memoranda": Then and Now*, in THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM 283, 285 (Merrill D. Peterson and Robert C. Vaughan eds., 1988).

393. See LEVY, *supra* note 22, at 75 (noting that historians focus on Virginia because of its ample and cogent historical record); Marvin K. Singleton, *Colonial Virginia as First Amendment Matrix*, in JAMES MADISON ON RELIGIOUS LIBERTY 157, 158 (Robert S. Alley ed., 1985) (stating that the Virginia struggle was vivid in the minds of Virginia delegates to the Constitutional Convention of 1787). But see LEVY, *supra* note 271, at 201 ("If, however, one is concerned with attempting to understand what was meant by 'an establishment of religion' at the time of the framing of the Bill of Rights, the histories of the other states are equally important, notwithstanding the stature and influence of Jefferson and Madison as individuals.").

394. See *Wallace v. Jaffree*, 472 U.S. 38, 95-98 (1985) (Rehnquist, J., dissenting).

395. See *id.* at 92.

396. See *id.* at 93-97.

web. The beginning is not chronological, but the end is, with its stream of post-enactment examples in which religion is privileged over nonreligion.³⁹⁷ These examples course through his dissent until they appear to Rehnquist to be improperly dammed up by *Everson* with its wrong-headed construction of Jefferson's "wall of separation."³⁹⁸ But Rehnquist has undermined his narrative by using historical evidence that comes after the adoption of the First Amendment itself: he has already claimed that it was illegitimate for other Justices to do so when interpreting the Constitution.³⁹⁹

An exploration of the framing of the First Amendment highlights an unstated, and sometimes unrecognized assumption in historical narratives: the narrative is framed by what is known and what is not known. The views of Jefferson and Madison have been widely disseminated from their own time until the present.⁴⁰⁰ It is only recently that scholars have made some of the lesser known voices available.⁴⁰¹ Even so, potentially relevant voices may have been lost for all time. For instance, there is little documentation of the views of state legislators who voted on the ratification of the First Amendment.⁴⁰² By default, the surviving voices dominate the story of the origin of the Religion Clause as well as its meaning.

397. *Id.* at 100-04.

398. *Id.* at 106-07.

399. *Id.* at 92.

400. LEVY, *supra* note 271, at 203. Professor Levy has explained:

The generation of the framers knew more about the opinions of Jefferson and Madison on the meaning of an establishment of religion than about those of anyone else. While their thinking on the subject cannot be taken as representative of their whole generation, it was surely the most influential. Moreover, these two were nearly the only men among the framers to express themselves on establishments of religion in the period after as well as before the adoption of the First Amendment.

Id.

401. See Marc M. Arkin, *Regionalism and the Religion Clauses: The Contribution of Fisher Ames*, 47 BUFF. L. REV. 763 (1999) (describing the views of Fisher Ames, a member of the First Congress); Hansen, *supra* note 32, at 652-53 (describing the views of lesser known delegates from New Hampshire and North Carolina).

402. See LEVY, *supra* note 271, at 187 ("Little or no new light on the meaning of the no-establishment clause is available as a result of the deliberations of the state legislatures to which the amendments to the Constitution were submitted for ratification. Records of state debates are nonexistent; private correspondence, newspapers, and tracts are no help."). But see 4 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 194 (2d ed. 1836) (quoting a North Carolina legislator's view of the proper relationship between the federal government and religion). Cf. John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169, 1173-74 (1999) (seeking to reconstruct the understanding of the ratifiers rather than the drafters of the Constitution).

Rutledge's and Souter's opinions use framing in a completely different sense. The structures of these opinions help the two Justices frame their arguments. Rutledge sandwiches his story between four texts: he opens with the Religion Clause of the First Amendment and portions of Jefferson's Bill for Establishing Religious Freedom, and he closes with Madison's *Memorial and Remonstrance* and the Assessment Bill.⁴⁰³ The order of these documents is neither chronological nor reverse chronological. It may be in order of importance: federal constitutional amendment; state statute; support for state statute; defeated bill. Or it may be in order of importance of author: Congress (and/or the American people), Jefferson, Madison, and the forces of intolerance. More likely, it is ordered by the importance of the ideas that they contain, as seen by Rutledge. The first text contains the essence of religious freedom, boiled down to a single clause. The next two contain expositions on the same theme. The final one is a foil to the first three. This framing of the narrative with ideas themselves emphasizes idea over event.

Souter's opinion, as much as his narrative, emphasizes the importance of precedent.⁴⁰⁴ On the most general level, the opinion is structured as a set of questions and answers. Part I asks what *Everson* stands for.⁴⁰⁵ Part II asks what *Everson* requires.⁴⁰⁶ Part III answers these questions as they relate to the case before the Court.⁴⁰⁷ Parts I and II each have a roughly dialectic structure in which Souter subjects Supreme Court precedent to criticism, both his own and that of others, in order to best understand the principle behind the precedent. This structure is clearly different from the other opinions. Here, history plays only a supporting role to that of Supreme Court precedent. Rutledge's and Souter's manner of framing their opinions adds a completely new layer of analysis, one that complements narrative with theory in one case, and with precedent in the other.

Framing choices are limitless. Even the handful of opinions discussed in this article demonstrate the variety of choices that are available to a Justice seeking to redefine the meaning of the Religion Clause. Indeed, one could imagine that without much effort, one could find support for the proposition that the Framers favored an out-and-out theocracy. The main constraint on such framing is verisimilitude—does such a choice make sense?

403. *Everson v. Bd. of Educ.*, 330 U.S. 1, 28, 63-74 (1947) (Rutledge, J., dissenting).

404. *Lee v. Weisman*, 505 U.S. 577, 609-10 (1992) (Souter, J., concurring).

405. *See id.* at 610.

406. *See id.* at 618.

407. *See id.* at 627.

3. *Metaphor*.—Metaphor is representational. It represents one fact, event, or state with a more accessible one in order to give meaning to the former (e.g., James Madison is the “Father of the Constitution” because he was so integral to its conception). In their extended study of metaphor, *More than Cool Reason*, Professors George Lakoff and Mark Turner conclude that part of the power of “metaphor is its ability to *create* structure in our understanding of life.”⁴⁰⁸ Lakoff and Turner look to metaphor not as a rhetorical device, but as a method of understanding the world: “We understand and reason using our conceptual system, which includes an inventory of structures, of which schemas and metaphors are established parts.”⁴⁰⁹ Metaphor, because we use it to aid understanding, is not merely a tool, but it is part of who we are and how we think:

For the same reasons that schemas and metaphors give us power to conceptualize and reason, so they have power over us. Anything that we rely on constantly, unconsciously, and automatically is so much part of us that it cannot be easily resisted, in large measure because it is barely even noticed. To the extent that we use a conceptual schema or a conceptual metaphor, we accept its validity. Consequently, when someone else uses it, we are predisposed to accept its validity. For this reason, conventionalized schemas and metaphors have *persuasive* power over us.⁴¹⁰

The use of metaphor is not merely a way to make the strange familiar to an audience, it is also a way to tap into and take advantage of how an audience thinks. Hence it has persuasive power.

Lakoff and Turner identify particular ways in which metaphor aids our thinking.⁴¹¹ It can structure our thought.⁴¹² It gives us new ways of seeing things and allows us to reason by analogy.⁴¹³ And it helps us to evaluate situations.⁴¹⁴ Metaphor is also a powerful tool for communicators.⁴¹⁵ By using ubiquitous metaphors (“the American Dream” for instance), one can tap into powerful currents of a Peo-

408. GEORGE LAKOFF & MARK TURNER, *MORE THAN COOL REASON: A FIELD GUIDE TO POETIC METAPHOR* 62 (1989).

409. *Id.*

410. *Id.* at 63.

411. *Id.* at 64-65.

412. *Id.* at 64 (“Metaphorical mappings allow us to impart to a concept a structure which is not there independent of the metaphor.”).

413. *Id.* at 65 (“Metaphors allow us to borrow patterns of inference from the source domain to use in reasoning about some target domain.”).

414. *Id.* (“We not only import entities and structure from the source domain to the target domain, we also carry over the way we evaluate the entities in the source domain.”).

415. *Id.*

ple's unconscious.⁴¹⁶ Metaphor, then, is not just a pretty flower with which we adorn our prose.

The most significant metaphor at issue here is, of course, Jefferson's "wall of separation between Church and State," evoking as it does completeness, impregnability, and absoluteness.⁴¹⁷ Black and Rutledge, for instance, build on the metaphor: the "wall must be kept high and impregnable" and cannot be "breach[ed]."⁴¹⁸

Rehnquist, apparently concerned that we are predisposed to accept its validity,⁴¹⁹ mounts a full scale attack on the wall as metaphor and the use of metaphor in general in Religion Clause jurisprudence. First, he attacks the usefulness of the metaphor. He argues that the wall is a "misguided analytical concept," which has not led to "unified and principled results."⁴²⁰ He notes that earlier cases describe the wall as "blurred," "indistinct" and as a "not wholly accurate" concept, one which can only be "dimly perceived."⁴²¹ Second, he seeks to undermine it on its own terms, as a "variable barrier" and notes that the Court has "attempted to add some mortar to *Everson's* wall."⁴²²

Rehnquist concludes by quoting Benjamin Cardozo's observation that "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."⁴²³ He condemns the metaphor as a "mischievous diversion" and hopes that it

416. *Id.* at 62 (maintaining that the ability to tap into an individual's unconscious is part of the power of metaphors because "[t]he things most alive in our conceptual system are those things that we use constantly, unconsciously, and automatically").

417. As Professors Dreisbach and Whaley have written:

In the twentieth century, Jefferson's "wall" has profoundly influenced discourse and policy on church-state relations. It is accepted by many Americans as a pithy description of the constitutionally prescribed church-state arrangement. More important, the judiciary has embraced the metaphor, adopting it not only as an organizing theme of church-state analysis, but also as a virtual rule of constitutional law.

Daniel L. Dreisbach & John D. Whaley, *What the Wall Separates: A Debate on Thomas Jefferson's "Wall of Separation" Metaphor*, 16 CONST. COMMENT. 627, 628 (1999).

418. *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1946); *id.* at 29 (Rutledge, J., dissenting). Rutledge also makes compelling use of metaphor. His entire history—the enactment of the Bill for Establishing Religious Freedom, the enactment of the First Amendment, the issue before the Court—is expressed by the metaphor of battle. See *supra* notes 182-194 and accompanying text. The effect is to give vitality to the described events. The battle metaphor, with its connotations of life and death struggles, and heroic feats, explicitly informs the reader that the issue before the Court is of great importance.

419. LAKOFF & TURNER, *supra* note 408, at 63 (maintaining that "[t]o the extent that we use a conceptual schema or a conceptual metaphor [just as the "wall of separation" metaphor is used in Religion Clause Jurisprudence], we accept its validity").

420. *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting).

421. *Id.* at 107.

422. *Id.* at 107, 108.

423. *Id.* at 107 (quoting *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (1926)).

will "be frankly and explicitly abandoned."⁴²⁴ Turning metaphor on itself, he later argues that "[o]ur perception has been clouded not by the Constitution but by the mists of an unnecessary metaphor. The true meaning of the Establishment Clause can only be seen in its history."⁴²⁵

Rehnquist does not, of course, acknowledge the pervasive role of metaphor in the histories written in judicial opinions. In judicial opinions, factual history has often been supplemented by metaphoric history. Constitutional meaning is not merely found in events and actors, but also in implied connections and affinities. Particular troublesome facts do not always interfere with such histories.⁴²⁶

Metaphor, while infinitely malleable, might appear to be an improper tool for jurisprudence; however, to the extent that metaphor can offer verisimilitude, it can assist us in our understanding of the past. For, it is difficult to imagine a meaningful judicial history that is limited to the bare facts in the historical record. And the nature of the judicial decision is to give meaning to new events by analogy to earlier ones, and thus it is important to understand the metaphoric aspects of such analogies. Moreover, the historical record is frequently conflicted, ambiguous, and incomplete, and we must fill in the historical record with our own understanding of how these events fit together. Finally, when judges attempt to avoid metaphoric history at all costs, as Rehnquist apparently attempts to do in his dissent, their narrative can end up as fragmented and incoherent because the historical record is insufficient to make a powerful case for one theory over another.

4. *Romance and Satire*.—Hayden White, in his study of style in historical narratives,⁴²⁷ provides a description of the Romance and the Satire, two literary styles that are particularly relevant in the context of the judicial opinion. Majority opinions tend to be like the former; dissents like the latter. White maintains that "[r]omance is fundamentally a drama of self-identification symbolized by the hero's transcendence of the world of experience, his victory over it, and his final liberation from it"⁴²⁸ It "is a drama of the triumph of good over evil, of virtue over vice, of light over darkness, and of the ultimate transcendence of man over the world in which he was imprisoned by

424. *Id.*

425. *Id.* at 112-13.

426. *See supra* note 377 and accompanying text.

427. WHITE, *supra* note 17.

428. *Id.* at 8.

the Fall."⁴²⁹ Satire presents an ironic perspective on the human condition that is frequently expressed through explicit paradox and absurdity. "The archetypal theme of Satire is the precise opposite of this Romantic drama of redemption; it is . . . a drama dominated by the apprehension that man is ultimately a captive of the world rather than its master . . ."⁴³⁰ The mythic nature of all of the opinions—except that of Rehnquist—are all variants of White's Romance. For the reader of the opinions studied in this Article, the impact of style is to undercut the reliability of each individual narrative.

The opinions—except, again, that of Rehnquist—are Romances in a second sense as well. These opinions cast the author in the role of a Romantic hero. In these Romantic opinions, and most obviously in that of Rutledge, the authors can reflect "the great light of the political world,"⁴³¹—Thomas Jefferson, and that of his able lieutenant, James Madison. By identifying with them, the Justices seek to transcend the forces of intolerance that they oppose. For example, Rutledge ends his dissent by comparing his role to that of Madison: "Now as in Madison's day it is one of principle, to keep separate the separate spheres as the First Amendment drew them . . ."⁴³² By fighting for religious liberty, Rutledge can take on the mantle of the giants who preceded him. In this manner, Rutledge's own underlying philosophy is imbued with potent indigenous symbolism and can claim descent from the deepest roots of the American political tradition.

Rehnquist's task was different than that of the other Justices. He was attempting to attack the Romantic tales that Waite, Black, and Rutledge had constructed. Satire is, after all, the appropriate mode with which to plot the downfall of Romance.⁴³³

Rehnquist frequently expresses satire through explicit paradox and absurd expression; in fact, satire emanates from his opinion. By burying Jefferson and Madison under detail upon detail, he drowns out their voices and puts out their light. No longer prophets, as in Waite's narrative, they are now bureaucrats and hacks. Rehnquist is even explicitly satiric in his attacks on the use of the "wall" metaphor.⁴³⁴

Rehnquist's dissent attempts to extract the meaning that had been infused into the First Amendment by his Romantic predecessors

429. *Id.* at 9.

430. *Id.*

431. PETERSON, *supra* note 13, at 53.

432. *Everson v. Bd. of Educ.*, 330 U.S. 1, 63 (1947) (Rutledge, J., dissenting).

433. *See* WHITE, *supra* note 17, at 9-10.

434. *See* *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

and it certainly succeeds to some degree. Satire is, however, more effective at knocking down than building up, and Rehnquist is left without a powerful story to replace the earlier ones. And, while Rehnquist demands coherent narratives from the other Justices, he does not present one himself.⁴³⁵ This paradoxical approach creates a tension within his opinion that undermines his attempt to give meaning to the Religion Clause. Even his reliance on Story and Cooley⁴³⁶ seems absurd, given his demand that the other Justices should limit their narratives to the events that comprise the enactment of the First Amendment.⁴³⁷ The few details he provides merely add to this problem. Rehnquist cites to sources that clearly do not support his propositions;⁴³⁸ he relies, without comment, on Story's reactionary and xenophobic reading of the First Amendment;⁴³⁹ and he uncharacteristically omits mention of the date of publication of Cooley's book (which was 1868, close to a century after the Revolutionary era).⁴⁴⁰ Unfortunately, Rehnquist has fallen prey to the weaknesses of his chosen genre and so his opinion does not offer a compelling alternative to the Romances that it savages.

In sum, Rehnquist's history is insufficient to replace what he has cut down. Moreover, Rehnquist's opinion, with its blatant contradictions and inconsistencies, comes across as poorly drafted. While a first reading had persuasive power, a careful reading is a disappointing experience.

Notwithstanding the flaws in Rehnquist's opinion in *Jaffree*, Souter apparently believes that he must respond to Rehnquist's onslaught in *Weisman*. While attempting to answer Rehnquist on his own terms, Souter sidesteps the factual issues and slips into the Romantic mode. He accepts that Jefferson may have had a limited role in regard to the enactment of the First Amendment but allows him (and Madison) a dominant role as a spiritual guide to the meaning of the First Amendment.⁴⁴¹

Rehnquist leaves the reader suspicious of the opinions that came before his and suspicious of the historical narrative. Souter is unable

435. See *supra* text accompanying note 266.

436. *Jaffree*, 472 U.S. at 104-06 (Rehnquist, J., dissenting).

437. *Id.* at 92.

438. See *supra* notes 290-293 and accompanying text.

439. *Jaffree*, 472 U.S. at 104-06 (Rehnquist, J., dissenting).

440. *Id.* at 105-06.

441. See *Lee v. Weisman*, 505 U.S. 577, 615 (1992) (Souter, J., concurring); see also *supra* text accompanying notes 342-344 (describing Souter's use of Jefferson and Madison as leading figures in Religion Clause history).

to fully rehabilitate it, and the historical narrative loses some of its force as a means to explain the text of the Religion Clause.

5. *The Origin Myth*.—Professor Mercia Eliade identified myth as the most important form of collective thinking, as a fund of ideas, symbols, and images from which a society can draw meaning.⁴⁴² The origin myth, the one from which all that is essential is to have sprung, itself relies on the narrative tools of retelling, framing, metaphor, and style. In non-industrialized societies

the myth is thought to express the *absolute truth*, because it narrates a *sacred history*; that is, a transhuman revelation which took place at the dawn of the Great Time, in the holy time of the beginnings (*in illo tempore*). Being *real* and *sacred*, the myth becomes exemplary, and consequently *repeatable*, for it serves as a model, and by the same token as a justification, for all human actions. In other words, a myth is a *true history* of what came to pass at the beginning of Time, and one which provides the pattern for human behaviour.⁴⁴³

In such societies, mythology informed not only the thinking, but also the action of its members: "In *imitating* the exemplary acts of a god or of a mythic hero, or simply by recounting their adventures, the man of an archaic society detaches himself from profane time and magically re-enters the Great Time, the sacred time."⁴⁴⁴ While myth may not be as potent in industrialized society, it certainly is present.⁴⁴⁵ What it adds to constitutional jurisprudence is a means by which one understanding of constitutional text can be compellingly prioritized over all others.⁴⁴⁶

Professor Hayden White notes that mythology is similar to some of the stories told by historians. As he explains, "[s]tories of the foundings of cities or states . . . whether presented under the aspect either of social science or of history, partake of the mythical inasmuch as they 'cosmologize' or 'naturalize' what are in reality *nothing but* human constructions which might well be other than what they happen to be."⁴⁴⁷ Myth, then, may be a source of meaning, and archetypes and story patterns may be identifiable in historical narratives.

442. See MERCIA ELIADE, MYTHS, DREAMS, AND REALITIES 23 (Philip Mairet trans., 1960).

443. *Id.*

444. *Id.*

445. See *id.* at 24-26.

446. See *id.* at 24 (noting that myth becomes "integrat[ed] . . . into the general history of thought . . . as the most important form of collective thinking").

447. HAYDEN WHITE, TROPICS OF DISCOURSE 103 (1978).

Commonly believed myths may also provide clues to the meaning that a historian is trying to weave into the historical record.

Widely believed myths may permeate the fabric of a culture, which accrues meaning over time. We call the results of that accrual "tradition" and "custom." Professor Bruner states that institutions "'invent' traditions out of previously ordinary happenings and then endow them with privileged status."⁴⁴⁸ These invented traditions can be very relevant to an understanding of a democratic nation-state, such as the United States, which is a relatively new type of human organization, the legitimacy of which may be challenged (as leaders of various religious, ethnic, sectional, and pan-national ideologies have done from time to time).⁴⁴⁹

Professor Clifford Geertz, in studying the symbolic systems of power structures, notes:

At the political center of any complexly organized society . . . there is both a governing elite and a set of symbolic forms expressing the fact that it is in truth governing. . . . [The members of the elite] justify their existence and order their actions in terms of a collection of stories, ceremonies, insignia, formalities, and appurtenances that they have either inherited or, in more revolutionary situations, invented. It is these—crowns and coronations, limousines and conferences—that mark the center as center and give what goes on there its aura of being not merely important but in some odd fashion connected with the way the world is built. The gravity of high politics and the solemnity of high worship spring from liker impulses than might first appear.⁴⁵⁰

Being identified with the "order of things" is to have a natural authority.⁴⁵¹ It is for this reason that the control of symbols takes on so much importance in any cultural battle. It is the process of the wrestling back and forth of symbols by which opponents, such as the Justices discussed in this Article, wage their textual battles.⁴⁵²

448. Bruner, *supra* note 358, at 18.

449. See Eric Hobsbawm, *Introduction to THE INVENTION OF TRADITION* 12-14 (Eric Hobsbawm & Terrence Ranger eds., 1984); cf. HENRY STEELE COMMAGER, *THE SEARCH FOR A USABLE PAST* 13 (1967) ("Nothing in the history of American nationalism is more impressive than the speed and the lavishness with which Americans provided themselves with a usable past: history, legends, symbols, paintings, sculpture, monuments, shrines, holy days, ballads, patriotic songs, heroes, and—with some difficulty—villains.").

450. CLIFFORD GEERTZ, *LOCAL KNOWLEDGE* 124 (1983).

451. See *id.*

452. See KENNETH BURKE, *ATTITUDES TOWARD HISTORY* 328 (3d ed. 1984) (noting that "[t]he stealing back and forth of symbols is the approved method whereby the Outs avoid 'being driven into a corner'").

Constitutional jurisprudence typically privileges the historical moment of adoption of constitutional texts over what comes before or after such moment.⁴⁵³ In the opinions analyzed above, the origin myth has taken different forms to suit different purposes. Redefining the point of origin has been one of the ways by which the meaning of the Religion Clause has been contested. Yet, as the disagreements between the Justices analyzed above suggest, it is doubtful whether the meaning of the First Amendment can be definitively tied to one particular point in time.

Justice Waite in *Reynolds* merely felt it necessary to look to “the times in the midst of which” the First Amendment was adopted.⁴⁵⁴ One benefit of this indeterminate reference is that it makes it narratively more convenient to look to Jefferson for an understanding of the Religion Clause. Similarly, Rutledge exhorts, “it behooves us in the dimming distance of time not to lose sight of what [Madison] and his coworkers had in mind when, by a single sweeping stroke of the pen, they forbade an establishment of religion and secured its free exercise”⁴⁵⁵ For Black, the meaning of the First Amendment is to be dated not to its enactment, but to the battle between the heroic Jefferson and Madison and the amorphous forces of intolerance.⁴⁵⁶ Black maintains that the meaning of the First Amendment resulted from this battle. For such Romantics, to understand the meaning of the First Amendment, one must necessarily understand what preceded it—the origin has its own history.

For the Satiric Rehnquist, the meaning of the First Amendment is not to be gleaned from the broad events that preceded its adoption. Rather, he looks primarily to the discrete events that immediately precede its enactment by Congress and then to the views of those who have come after its enactment.⁴⁵⁷ This allows him to bypass any discussion of colonial Virginia’s struggles regarding religion, which his predecessors have infused with so much meaning.

Souter looks at all of these events—preadoption, adoption, and post-adoption—but is most clearly relying on the Court’s own precedent.⁴⁵⁸ Souter’s focus is on how the origin of the Establishment

453. See Robert W. Gordon, *The Struggle Over the Past*, 44 CLEV. ST. L. REV. 123, 125 (1996) (stating that legal arguments using history often call “for adherence to the original understanding of a text or the original intentions of a founding legislator”).

454. *Reynolds v. United States*, 98 U.S. 145, 162 (1878).

455. *Everson v. Bd. of Educ.*, 330 U.S. 1, 37-38 (1947) (Rutledge, J., dissenting).

456. *Id.* at 9-12 (describing colonial government action against people with dissenting religious beliefs and the reaction which led to Madison’s *Memorial and Remonstrance*).

457. *Wallace v. Jaffree*, 472 U.S. 38, 93-98, 100-04 (1985) (Rehnquist, J., dissenting).

458. *Lee v. Weisman*, 505 U.S. 577, 609-10 (1992) (Souter, J., concurring).

Clause has come to be understood by the institution responsible for expounding it. Thus, while his analysis differs from that of his predecessors, he also steps in line with the Court's mainstream views on the subject.

There is no question, however, that all of the Justices are attempting to define the origin of the Religion Clause. And Justices look to before the enactment, to the enactment itself, or to events that come after the enactment in order to understand the meaning of the First Amendment. Each is a common interpretive strategy, with its own strengths and weaknesses. In the context of the enactment of the First Amendment, it does not appear that one strategy has convincingly claimed a position superior to the rest. Nonetheless, all of the Justices implicitly acknowledge that the origin itself has a unique importance. In fact, the need for an origin myth seems universal within the judicial histories of the Religion Clause. But such an origin myth, whether Waite's or Rehnquist's, can never be free of the narrative tools with which it was constructed.

IV. CONCLUSIONS

This Article has sought to demonstrate the intrinsically narrative nature of key Religion Clause opinions as expressed in the histories they contain. It has also argued that those historical narratives as well as the historical record itself have not been sufficient to ground Religion Clause jurisprudence. The Supreme Court must complement history with theory if they are to create a meaningful Religion Clause jurisprudence.⁴⁵⁹

A. *Law and Narrative*

The judicial opinion is often explicitly narrative in form.⁴⁶⁰ Yet the study of judicial narrative is a relatively new—and sometimes criticized—field. To some extent, there is a practical explanation for this. Many lawyers believe that in order for the legal system to be legitimate, it must be based upon a foundation more stable than the typical literary narrative. Judge Richard Posner is such a lawyer. Posner argues that legal texts do indeed differ from other texts in ways that make them truly authoritative. For example, he argues that legal texts are less likely to be ambiguous than literary texts,⁴⁶¹ and that the hold-

459. See TRIBE, *supra* note 15, § 14-3, at 1158.

460. See RICHARD A. POSNER, *LAW AND LITERATURE* 347 (rev. ed. 1998) (discussing "the story element" of judicial opinions).

461. See *id.* at 237.

ings of the Supreme Court limit the scope of interpretation in a way that a literary critic cannot.⁴⁶²

While Posner acknowledges that literary theory may lead to some form of insight into legal texts, he argues that "the interpretation of different kinds of text, specifically the literary and the legal, have few interesting commonalities."⁴⁶³ He fails, nonetheless, to demonstrate that opinions are *not* narratives, and that they can exist in the absence of narratives.

The late Professor Robert Cover, in contrast, finds that narrative is central to legal systems.⁴⁶⁴ He writes:

[L]egal tradition is . . . part and parcel of a complex normative world. The tradition includes not only a corpus juris, but also a language and a mythos—narratives in which the corpus juris is located by those whose wills act upon it. These myths establish the paradigms for behavior. They build relations between the normative and the material universe, between the constraints of reality and the demands of an ethic. These myths establish a repertoire of moves—a lexicon of normative action—that may be combined into meaningful patterns culled from the meaningful patterns of the past.⁴⁶⁵

The opinions discussed in this Article clearly display the battle amongst the Justices to determine the appropriate "lexicon of normative action" for Religion Clause jurisprudence. The combatants use history however they can to win their fight.

In her study of *Roe v. Wade*, Professor Peggy Davis has found that

[t]he Court has made two very different uses of history and tradition in constitutional adjudication. Some Justices have looked to historical and traditional *practices* to determine the scope of constitutional protections of individual rights. . . .

On other occasions, Justices have looked to history and tradition, not to enshrine practices familiar to the constitutional framers, but to illuminate the *principles* that the framers held and sought to embody in the constitutional text.⁴⁶⁶

462. See *id.* at 240.

463. *Id.* at 253.

464. Robert Cover, *The Supreme Court, 1982 Term—Foreword, Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

465. *Id.* at 9. In *Everson*, Justice Rutledge states that "[t]he facts may be stated . . . to give setting and color to the constitutional problem." *Everson v. Bd. of Educ.*, 330 U.S. 1, 29 (1947) (Rutledge, J., dissenting). Whether he finds "setting and color" to be mere accouterments to an opinion or more integral than that, he does not say.

466. Peggy Cooper Davis, *Neglected Stories and the Lawfulness of Roe v. Wade*, 28 HARV. C.R.-C.L. L. REV. 299, 302-03 (1993) [hereinafter Davis, *Neglected Stories*]; see also Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348,

A similar division is found in the use of history in Religion Clause jurisprudence. Historical events are used by nonpreferentialists to demonstrate that religion has always been entwined in civil affairs⁴⁶⁷ and by strict separationists to demonstrate a momentum of history that leads closer and closer to the goal of an absolute division between the religious and civil spheres.⁴⁶⁸

Justices have not generally acknowledged the mutability of history when they rely on history to make and support legal decisions, perhaps to maintain an aura of authority. Notwithstanding this fact, Professor Davis argues that “[h]istorical facts illuminate constitutional meaning only when they are understood as part of a narrative of why and how the Constitution came to say what it says.”⁴⁶⁹ For Davis, then, traditional judicial tools, like statutory interpretation and common law adjudication, must take cultural practices into account if they are to be useful. Otherwise, statutes and judicial rules are like “medieval annals . . . [or] lists with no narrative structure, no ‘notion of a social center by which . . . to charge them with ethical or moral significance.’”⁴⁷⁰ In sum, according to Davis, “[t]he question of history and tradition raised by a constitutional claim is whether the state action is consistent with the history that produced, and the traditions that support, the relevant constitutional provisions.”⁴⁷¹

Davis does not only characterize judicial opinions as narratives, she makes the stronger claim that the legal *doctrines*—that is, principles—within the opinions are best understood as narratives as well:

Constitutional doctrines are stories, structured upon formal but ambiguous texts, and nourished . . . by history and tradition. Justices who articulate constitutional doctrine take selectively from history and tradition, and therefore reflect perspective. This is only natural. It is not possible to capture history and tradition in all their richness and complexity. It is necessary to summarize. It is necessary to foreground some things, background some things and ignore some things.⁴⁷²

1352 (1994) [hereinafter Davis, *Contested Images of Family Values*] (“[T]raditional practices might be repudiated by the higher traditions that have inspired constitutional design, and . . . even long-established state practices must be measured against a tradition of respect for liberty.”).

467. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 100-04 (1985) (Rehnquist, J., dissenting).

468. See *Everson*, 330 U.S. at 9-13.

469. Davis, *Contested Images of Family Values*, *supra* note 466, at 1352.

470. *Id.* (quoting Hayden White, *The Value of Narrativity in the Representation of Reality*, in *ON NARRATIVE* 1, 11 (W.J.T. Mitchell ed., 1981)).

471. *Id.* at 1351-52.

472. Davis, *Neglected Stories*, *supra* note 466, at 303.

Posner, on the other hand, has dismissed the notion that the study of narratives is integral to the interpretation of legal texts.⁴⁷³ Although he does allow that narratives may be valuable “in situations in which we have difficulty *seeing* important aspects of a problem because it involves people whose experiences are remote from ours,”⁴⁷⁴ he would deny that constitutional doctrines are stories. Furthermore, Posner denies that the study of literature would assist in developing a constitutional jurisprudence, for although literary translation and constitutional interpretation, for instance, could be seen as analogous, “the analogy would be too distant to be illuminating.”⁴⁷⁵

Fundamentally, for Posner,

The problem with argument by metaphor, like argument by analogy which it closely resembles, is that it requires—translation. Literary translation and constitutional interpretation do have things in common, but there are also differences, and the differences may dominate the similarities.⁴⁷⁶

Posner’s rejection, however, appears based more on his discomfort with the ambiguous nature of metaphor than with a principled denial of its significance, given that metaphor pervades judicial opinions. In truth, the judicial opinions studied in this Article are infused with narrative and all of the elements thereof—style and myth in addition to metaphor—and scholars have only just begun to seriously study these aspects of them.⁴⁷⁷ Moreover, as Professors Anthony Amsterdam and Jerome Bruner have posited, narrative “is the *necessary* discourse of the law, and that recognizing this necessity is an important step toward enriching the possibilities of storytelling in the legal process *and* guarding against its perils.”⁴⁷⁸

B. Religion Clause History

Waite, Black, Rutledge, Rehnquist, and Souter—each constructs a historical narrative to support his interpretation of the Religion Clause. These narratives are carefully constructed by the use of fram-

473. See RICHARD A. POSNER, *OVERCOMING LAW* 384 (1995).

474. *Id.*

475. *Id.* at 496.

476. *Id.*

477. See Peggy Cooper Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and “Feminine” Style*, 66 N.Y.U. L. REV. 1635, 1635-36 (1991) (“Many scholars have recognized the need for critical analysis of the interactive and cultural contexts of legal decision-making. But legal scholars have just begun the difficult task of developing tools for systematic, contextual analysis of the discursive and written work that lawyers and judges do.”).

478. ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 113 (2000).

ing, the juxtaposition of historical events, and the strategic use of rhetorical devices. Once these narratives coalesce into a legal tradition, a more accurate picture of Thomas Jefferson and James Madison appears. They are neither the Mosaic lawgivers of Waite's opinion, nor are they the marginal characters of Rehnquist's dissent. These narratives are (for now) understood to be helpful guides to understanding the American constitutional tradition. But it is only through this ongoing telling and retelling of stories in judicial opinions that a more accurate rendition of Jefferson and Madison has emerged.

This rhetorical battle amongst the Justices is one of high stakes. It is about who can identify the intent of the Framers, who can claim the mantle of the American tradition, and who will control the future of the law. Various strategies are employed in this battle. Rehnquist relies on supplementing the historical record with post-enactment events.⁴⁷⁹ Waite, Black, and Rutledge rely on the potent icon of Jefferson.⁴⁸⁰ This iconography allows them to impose a teleology upon the historical record: if Jefferson represents what is best in America, then the historical record is only relevant to the extent it reveals the triumph of Jeffersonian liberty and the defeat of the forces of intolerance and bigotry. This technique, while unacceptable in academic history, is characteristic of judicial history.⁴⁸¹ Because of their widespread use, icons are implicitly accepted even by those, like Souter, who privilege precedents (and necessarily the histories and icons they contain) over the explicit use of iconography or the naked historical record.⁴⁸²

479. See *Wallace v. Jaffree*, 472 U.S. 38, 100-04 (1985) (Rehnquist, J., dissenting).

480. *Everson v. Bd. of Educ.*, 330 U.S. 1, 11-13 (1947); *id.* at 34-37 (Rutledge, J., dissenting); *Reynolds v. United States*, 98 U.S. 145, 163-64 (1878).

481. In his concurrence in a Religion Clause case, Justice Brennan, for one, seems to acknowledge that judicial history does have a different role from other types of history: "[O]ur use of the history of [Jefferson's and Madison's] time must limit itself to broad purposes, not specific practices." *Abington School District v. Schempp*, 374 U.S. 203, 241 (1963) (Brennan, J., concurring). While this does not identify the scope of judicial history, it does provide a sign that Brennan sees its goals to be different from those of other types of history and that any commentator should consider that fact before criticizing judicial history for failing to live up to some scholarly standard.

482. Cf. William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227, 227-28 (1988). Professor Wiecek writes:

The United States Supreme Court is the only institution in human experience that has the power to *declare* history: that is, to articulate some understanding of the past and then compel the rest of society to conform its behavior to that understanding. No Ministry of State Security, no Thought Police, has ever succeeded in establishing such authority. This power exists irrespective of the degree to which that judicial perception of the past conforms to reality. Even where the Court's

Justice Rutledge reveals his teleological perspective in his *Everson* dissent:

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. It is at once the refined product and the terse summation of that history. The history includes not only Madison's authorship and the proceedings before the First Congress, but also the long and intensive struggle for religious freedom in America, more especially in Virginia, of which the Amendment was the direct culmination. In the documents of the times, particularly of Madison, who was leader in the Virginia struggle before he became the Amendment's sponsor, but also in the writings of Jefferson and others and in the issues which engendered them is to be found irrefutable confirmation of the Amendment's sweeping content.⁴⁸³

Here, Rutledge reveals the importance that he attaches to history in Religion Clause jurisprudence. For he finds that the First Amendment itself is "the terse summation of that history."⁴⁸⁴ He considers the history of the Religion Clause to include: (1) Madison's authorship; (2) the proceedings before the First Congress; and (3) the "long and intensive struggle for religious freedom in America."⁴⁸⁵ The First Amendment's "sweeping content," for Rutledge, is irrefutably confirmed in "the documents of the times, particularly of Madison," the writings of Jefferson, the writings of "others" and the "issues which engendered them."⁴⁸⁶ Once again, Rutledge emphasizes that *his* history is a history of ideas, not merely a chronicle of events.

There is something tautological about Rutledge's reasoning: he looks to a broad scope of events to determine that the text of the First Amendment has "sweeping content." And such "sweeping content" is confirmed by the history he recites. This apparent tautology can only be understood if we accept that Rutledge begins his project with an overarching understanding of the constitutional jurisprudence that pushes constitutional text and American history in the same direction. All Justices have some sort of constitutional philosophy that necessar-

history is at odds with the actual past, that judicial history, as absorbed into a decision, and then a doctrine, becomes the progenitor of a rule of law.

Id.

483. *Everson*, 330 U.S. at 33-34 (Rutledge, J., dissenting) (footnotes omitted).

484. *Id.* at 33.

485. *Id.*

486. *Id.* at 34.

ily informs their judicial histories.⁴⁸⁷ Those who demean the “law office historians” on the Court are in fact naïve when they compare the task of a Justice to that of a scholar.⁴⁸⁸

We now move from describing Religion Clause judicial history to evaluating it. We need not privilege history over theory, only acknowledge its role in constitutional doctrine. As Professor Davis has noted, the best way to evaluate history and traditions raised by a constitutional claim is to ask “whether the state action is consistent with the history that produced, and the traditions that support, the relevant constitutional provisions.”⁴⁸⁹ The historical record does not, however, speak with one voice. We must look to history *and* to theory to reach a meaningful understanding of the Religion Clause.

How are we to evaluate the five opinions then? True/false? Truer/less true? Good/bad? These dichotomies do not seem to apply. Are they consistent with the bare historical record? All the opinions seem to be consistent with the historical record, give or take a few facts. Are they meaningful? Yes. But which meaning do we accept? Is the story plausible? Is it coherent?

None of the opinions evaluated in this Article are both plausible and coherent. While Waite, Black, and Rutledge have told coherent, very meaningful stories, Rehnquist has highlighted the implausible aspects of their stories—their improper emphases, conflated facts, glaring omissions. Their stories are not all that plausible.⁴⁹⁰ While Rehnquist has told a more plausible story, chock full of facts, his history is incoherent. It is list-like, and it is inconsistent with the narrative rules that Rehnquist himself has set up.⁴⁹¹

Souter, while acknowledging Rehnquist’s criticisms of the earlier histories, ultimately ignores them because of “precedent.”⁴⁹² Souter may do this and stay well within the boundaries of judicial reasoning, but his reliance on precedent does not sufficiently overcome the flaws that Rehnquist has identified in the earlier opinions. None of the stories told so far seems to be head and shoulders above the rest. That compelling story remains to be told. Or there may be room in the historical record for competing and equally compelling stories. Thus, we must proceed to theory to ground Religion Clause jurisprudence.

487. See Posner, *supra* note 357, at 580.

488. See *id.* (asserting that the use of history by Supreme Court Justices “is not a sign of thralldom to history but of the opposite, of bending history to the service of life . . .”).

489. Davis, *Contested Images of Family Values*, *supra* note 466, at 1352.

490. See *Wallace v. Jaffree*, 472 U.S. 38, 92-100 (1985) (Rehnquist, J., dissenting).

491. See *supra* text accompanying notes 244-246 (discussing the “rules” Rehnquist sets out for using history in judicial opinions).

492. See *Lee v. Weisman*, 505 U.S. 577, 610 (1992) (Souter, J., concurring).

C. Histories and Holdings

Justice Jackson, in his *Everson* dissent, notes that “the undertones of [Black’s] opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters.”⁴⁹³ Jackson captures a central paradox of Religion Clause jurisprudence quite well. In fact, after reading Black’s opinion and that of Justices Waite, one is left wondering why they told such stirring stories of liberty overcoming intolerance only to then hold that that liberty was not threatened by the situations presented in *Reynolds* and *Everson*. Of course, Waite and Black may have felt that the particular histories they told were necessary to the holdings in those cases, but that is not an entirely convincing explanation. Surely, the holdings could have stood even if Waite and Black told less heroic stories.

One potential explanation for the tension between the holdings and the stories is that if constitutional doctrines are perceived as narratives, the sweeping stories told in these opinions are not necessarily inconsistent with their limited holdings. By telling these stories, Waite and Black may have had a number of motives. They may have thought that a holding which was more consistent with their pro-religious liberty narrative would not be acceptable to their colleagues; therefore, they attempted to outline the general doctrine at the expense of the particular holding.⁴⁹⁴ Waite might have considered his history to be an intimation of genuine strict separation to be fleshed out by later Justices at some future time.⁴⁹⁵

Waite and Black may have conceived of their stories as limits on their holdings: they are vibrant codas to the dry rules of the holdings, telling readers not to get carried away and attempt to demolish the “wall separating church and state” even if it was not built for these particular occasions. In upholding a statute authorizing the transportation of parochial school children at public expense, Black writes “we must not strike that state statute down if it is within the State’s constitutional power even though it approaches the verge of that power.”⁴⁹⁶

493. *Everson v. Bd. of Educ.*, 330 U.S. 1, 19 (1947) (Jackson, J., dissenting).

494. Given the intense animosity towards Mormons in the 1870s, Waite and the other members of the *Reynolds* majority might have thought that a ruling in *Reynolds* that favored Mormons would be unacceptable to the public and drafted a narrative to avoid a confrontation with the public and other branches of government.

495. *Cf. United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938) (laying basis in dicta for dramatic expansion of review in equal protection cases).

496. *Everson*, 330 U.S. at 16.

Black is thereby using history to provide some friction on the slippery slope of constitutional adjudication to set a limit on *Everson's* holding.

Finally, the apparent disconnect between holding and history may be resolved by viewing these opinions in the context of the various American strands of thinking on religious liberty—those of Jefferson, Madison, and Williams. Although Waite and Black fail to distinguish explicitly between these various strands, the different approaches they take in their opinions are consistent with different strands. Waite, like Jefferson, was less interested in protecting religion than protecting secular government from religion's influences.⁴⁹⁷ His holding and history, taken together, are consistent with that position. In fact, the two together allow Waite to best express his understanding of the Religion Clause. The holding alone might have implied that religion is to get no protection from the state, while his history might imply that religion is to get more protection from the State than Waite in fact believed it should. Black's conclusion, on the other hand, can be interpreted as Madisonian, for he carefully considers the risks to both the religious and civil spheres and tries to draw the line between them, so as to protect both.⁴⁹⁸

Rutledge, in contrast, whose rhetoric matches his desired holding, has "chosen to place [his] dissent upon the broad ground [he] think[s] decisive, though strictly speaking the case might be decided on narrower issues."⁴⁹⁹ His dissent is intended to provide tools to brace the "wall" in the future in order to protect the civil sphere from the influence of the religious.⁵⁰⁰ As a result, he falls more in line with the Jeffersonian Waite even though Waite upholds the state action and Rutledge would find it unconstitutional.

Thus, the high rhetoric and the holdings of Waite and Black can be reconciled. Their strong commitment to "strict separation" must be viewed through the lens of theory: is it Jeffersonian or is it Madisonian? In this case, theory is necessary to align history with holding.

D. Theory and History

While all of the opinions discussed in this Article imply that history is a better guide to the meaning of the Religion Clause than the-

497. See *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878) ("To permit [a man to violate a law because of his religious belief] would be to make the professed doctrines of religious belief superior to the law of the land . . . Government could exist only in name under such circumstances.").

498. See *Everson*, 330 U.S. at 18.

499. *Id.* at 61 (Rutledge, J., dissenting).

500. See *id.* at 63.

ory, they are wrong. For even though the content of the historical record is not particularly controversial, the meaning of it is.⁵⁰¹ We are left, as a result, with a Religion Clause jurisprudence that is often described as unprincipled, incoherent, and unworkable.⁵⁰²

The authors of these opinions are sophisticated and it is unlikely that any of them would explicitly say that history is a sufficient foundation in itself for interpreting the Religion Clause. Nonetheless, they all demonstrate a willingness to act as if that were the case. Rehnquist's attack on the "wall of separation" for instance, implies that if he proved that it, and Jefferson, were not relevant to the enactment of the Religion Clause, then the theory of strict separation would fall as a result.⁵⁰³ That is, Rehnquist acts as if his attack on *Everson's* history is sufficient in itself to destroy *Everson's* holding. Black's numerous confections imply that his narrative reveals the true meaning of the Clause. Justice Black says that "[n]o one locality and no one group" can be given credit for adopting the Religion Clause, but then immediately gives all credit to Virginia and its inhabitants, thereby circumventing the need to delve into conflicting currents in American history.⁵⁰⁴ And Souter, although he gives a nod to history, and pays some heed to theory, relies too heavily on precedent—to the detriment of meaning—to present a cogent theory of religious liberty.⁵⁰⁵

Instead of arguing the historical record, future Justices should acknowledge its ambiguity and come to terms with the competing American theories of religious liberty that have coexisted for well over 200 years. One must first evaluate the preferentialism of a Story and the nonpreferentialism of a Rehnquist. One must then carefully evaluate the three strands of strict separationist thinking: those who want to protect religion from civil society, like Williams; those who want to protect religion from civil society and vice versa, like Madison; and those who want to protect civil society from religion, a concern that is emphasized by Jefferson.⁵⁰⁶

Until these competing theories are evaluated and considered in the context of each other, Religion Clause jurisprudence will be replete with sophistic argument and sophomoric history and will fail to

501. See CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 20 n.37 (1969) (discussing the distinction between facts and thoughts).

502. See, e.g., John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 374 (1996).

503. See *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

504. *Everson*, 330 U.S. at 11.

505. See generally *Lee v. Weisman*, 505 U.S. 577, 609 (1992) (Souter, J., concurring).

506. See *TRIBE*, *supra* note 15, § 14-3, at 1158-60.

provide meaningful guidance.⁵⁰⁷ Once the importance of theory is acknowledged in this context, intelligent discussion can resume. History still has a role to play. The attempt to provide a history that feels right to the audience—one that has verisimilitude—will always strengthen a Religion Clause jurisprudence grounded in theory.

E. Postscript: Iconography in Society

The judicial battle over the iconography of the founding generation reflects an ideological battle that rages throughout American society, in its popular culture, and in its academic debates.⁵⁰⁸ The battle is over the control of ancient icons, important texts, and fundamental civil discourses. It is as significant today as it was 100 years ago, or 100 years before that.

The debate over the meaning of the Religion Clause amongst the Justices mirrors the one that exists throughout the whole polis. In the press and the academy, there are both historical and political agendas at work, as authors attempt to redefine the “American” understanding of religious liberty.⁵⁰⁹ Attacks by religious leaders on the applicability of Jefferson’s wall metaphor may lead to new attacks on contemporary Religion Clause jurisprudence.⁵¹⁰

This battle over America’s icons is more subtle in academia where historians who claim to provide “just the facts” end up, unavoidably,

507. Many academics have taken up the challenge to take theory seriously in Religion Clause jurisprudence. See Daniel O. Conckle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1 (2000) (exploring the increased importance of formal neutrality in Religion Clause jurisprudence); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 3 (2000) (arguing that “singling out religion” for special protection is consistent with the purposes of the Religion Clause, which is to “ensure that religion, as nearly as possible, is free from government control or influence”); Gidon Sapir, *Religion and State—A Fresh Theoretical Start*, 75 NOTRE DAME L. REV. 579 (1999) (proposing a model for the relationship between religion and the state that addresses both the importance of religion in human life and a commitment to human freedom); Witte, *supra* note 502 (applying the ideas of Francis Bacon to discover the first principles of the American constitutional experiment as they relate to religion).

508. See Thomas, *supra* note 12 (observing the current popularity of the founders in popular culture).

509. See, e.g., M. Stanton Evans, *What Wall?*, NAT’L REV., Jan. 23, 1995, at 56 (attacking the Jeffersonian definition of religious freedom); Merrill D. Peterson, *Jefferson and Religious Freedom*, ATLANTIC MONTHLY, Dec. 1994, at 112 (promoting a Jeffersonian definition of religious freedom).

510. See Goodstein, *supra* note 14 (noting that some conservatives argue that rediscovered passages from Jefferson’s Letter to the Danbury Baptists can be used to “knock down the barrier between religion and government”).

taking sides.⁵¹¹ Some academics criticize the historical narratives in First Amendment opinions for being purely ideological. Justice Black, in particular, is accused of "law-office history," selecting "data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered."⁵¹² Many of these same academics, however, have also written narratives replete with all of the rhetorical devices that are employed in the opinions analyzed here. And their writing tends to divide along the same ideological lines as these opinions.⁵¹³

Legal scholars are no exception. While they decry the fact that Jefferson's "image has been cast and recast to serve political objectives or conform to modern ideals" and believe that they can identify "the true historical Jefferson," the ambiguous historical record makes them highlight particular facts to make their case as much as any Supreme Court Justice.⁵¹⁴ Notwithstanding this, many of these revisionists add to a balanced historical understanding of the origins of the First Amendment, even if they frequently demonstrate a naiveté about history and its limitations.⁵¹⁵ And even the more sophisticated and

511. One historian claims that he desires merely to provide a "balanced chronicle of the events surrounding Patrick Henry's effort . . . to achieve tax support for . . . teachers of the Christian religion" from which the Supreme Court may draw. Marvin K. Singleton, *Colonial Virginia as First Amendment Matrix*, in JAMES MADISON ON RELIGIOUS LIBERTY 157 (Robert S. Alley ed., 1985). For a bibliography of historical writings taking the separationist and nonpreferentialist positions, see John Sexton, *Of Walls, Gardens, Wildernesses, and Original Intent: Religion and the First Amendment*, in AMERICA IN THEORY 84, 103 n.12, 104 n.16 (Leslie Berlowitz et al. eds., 1988).

512. Dwight L. Teeter & Maryann Yodelis Smith, *Justice Black's "Absolutism": Notes on His Use of History to Support Free Expression*, in JUSTICE HUGO BLACK AND THE FIRST AMENDMENT 29, 31 (Everette E. Dennis et al. eds., 1978) (quoting Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 n.13); see also Robert L. Cord, *The Church-State Separation: Restoring the "No-Preference" Doctrine of the First Amendment*, 9 HARV. J.L. & PUB. POL'Y 129, 131 (1986) ("It is . . . most timely to re-examine the Supreme Court's Establishment Clause history inasmuch as that history—and consequently what the Court says the Clause forbids—is now very much in dispute."); Edwin S. Corwin, *The Supreme Court as a National School Board*, 1949 LAW & CONTEMP. PROBS. 3, 20 ("Undoubtedly the Court has the right to make history, as it has often done in the past; but it has no right to remake it."); Paul L. Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64, 64-65 (1963) (criticizing Black's use of history). See generally Flaherty, *supra* note 354 (exploring the historiography of early American constitutionalism).

513. See, e.g., CLAUDE G. BOWERS, *THE YOUNG JEFFERSON, 1743-1789* (1945) (portraying Jefferson as an American prophet); MCCLELLAN, *supra* note 49, at 119 (arguing that Story had the historically correct interpretation of the First Amendment).

514. 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, 210 (1990).

515. Cf. Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY. L. REV. 837, 878 (1995) ("There is always an inherent danger in building an understanding of ideas through the

respected historians (typically strict separationists) fall prey to the belief that the meaning that they have discovered in the historical record is *clearly* superior to the meanings found by their adversaries.⁵¹⁶ Few appear willing to acknowledge that the historical record has many shades and remain content with advancing a theoretical basis for their particular reading. The Court, with its emphasis on history, has encouraged this state of affairs.⁵¹⁷ It is time that we "both cultivate a sense of the complexity and ambiguity of the historical record . . . and honor the essential character of history as a chronicle of change and development"⁵¹⁸ Only then, can we move beyond the tit-for-tat of current scholarship and jurisprudence into a genuine interchange between the various American perspectives on the meaning of religious liberty.

But a reliance on theory will not diminish the importance of symbols. The icon of Jefferson has remained potent for nearly 200 years in a way that many ideas and texts have not.⁵¹⁹ As with all symbols, Jefferson acts as a shorthand mnemonic for democracy, equality, and liberty.⁵²⁰

Barry Schwartz, writing of George Washington, suggests that "[t]he commemoration of Washington is the retention of an image, and its function is not to influence directly the disposition of power but to make the issue of power itself visible and understandable."⁵²¹ The same could be said of Jefferson. He, like Washington, "focuses

piecing together of small portions of the thought of many individuals; not every word uttered [was] intended to be that person's ultimate statement on the subject, let alone the ultimate statement of the age."); Adams & Emmerich, *supra* note 57, at 1594 ("Any attempt to reduce the Founders' views to one position or to read the beliefs of certain Founders, no matter how prominent, into the first amendment is likely to produce indefensible and culturally unacceptable results.").

516. See, e.g., Alley, *supra* note 247, at 308 (criticizing the "new mythology" surrounding the origins of the First Amendment); cf. LEVY, *supra* note 22, at xix ("[T]he nonpreferentialist position is historically groundless and without constitutional merit.").

517. See, e.g., Abington Sch. Dist. v. Schempp, 374 U.S. 203, 257 (1963) (Brennan, J., concurring) (stating that "it is certainly too late in the day" to review the historical foundation upon which current doctrine rests).

518. Sexton, *supra* note 511, at 85 (emphasis omitted).

519. See PETERSON, *supra* note 13, at 8-13 (discussing the postmortem popularity of Thomas Jefferson).

520. See *id.* at 457 ("[Jefferson] may . . . go on vindicating his power in the national life as the heroic voice of imperishable freedoms. It is this Jefferson who stands at the radiant center of his own history, and who makes for the present a symbol that unites the nation's birth with its inexorable ideal.").

521. BARRY SCHWARTZ, *GEORGE WASHINGTON: THE MAKING OF AN AMERICAN SYMBOL* 205 (1987).

attention on those underlying ideals in American life that might otherwise be less visible and less salient."⁵²²

Notwithstanding Jefferson's symbolic importance, we can never go back to Waite's Jefferson-centric reading of Religion Clause history.⁵²³ The Justices have expanded the history of the First Amendment to include the key role played by Madison, who had an immense and independent influence on the history of religious liberty and the enactment of the Constitution and the Religion Clause of the First Amendment in particular. It is only with time, though, that this has been acknowledged in the Supreme Court's Religion Clause jurisprudence. Unjustly or not, Madison has not had a hold on the popular imagination to the degree that Jefferson has.⁵²⁴

The extraordinary debate over the applicability of Jefferson's "wall" metaphor further highlights Madison's smaller iconographic role. In his *Memorial and Remonstrance Against Religious Assessments*, Madison provides his own suggestive metaphor regarding the separation of church and state: he states that the various branches of government cannot "be suffered to overleap the great Barrier which defends the rights of the people" and exert authority over religion.⁵²⁵ But Madison's phrase, the "great Barrier," has had none of the resonance of Jefferson's "wall." Not one Justice has sought to replace the latter with the former. While the "wall," this historically troubled example of original intent, has a parallel and historically convenient ally in the "Barrier," the "Barrier" barely stirs in history's dustbin.

But for those who must come to terms with the historical record, historians and judges, Madison's importance must be acknowledged. The histories of Waite and Black elicited the correctives provided by Rehnquist and Souter. Rutledge's dissent is rather complex in its assessment of Madison. While Jefferson is apparently the "great author" of religious freedom, the dissent is a paean to Madison and his *Memorial and Remonstrance*.⁵²⁶ Besides appending it in full to his opinion, he quotes and cites it numerous times so that his opinion appears to

522. *Id.*

523. At the same time, this revisionary history is helping to provide a more subtle and textured perspective of Madison's and Jefferson's views on religious liberty. See, e.g., Dreisbach, *supra* note 514, at 195 ("While Madison's 'Memoranda' and Jefferson's 'wall' metaphor are frequently invoked by the judiciary, their 'Bill for Appointing Days of Public Fasting and Thanksgiving' is largely forgotten."). New documents are found, highlighted, and analyzed, and prior misconceptions are wiped away. See *id.*; see also Underkuffler-Freund, *supra* note 515, at 874-79.

524. See McCoy, *supra* note 43, at xv.

525. MADISON, *supra* note 48, at 299.

526. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 29, 34-41 (1947) (Rutledge, J., dissenting).

be no more than a commentary on Madison's text. The progress of Jefferson and Madison in the judicial mind has moved from iconographic to fact-based history. That is, there has been a move from the rhetorical appeal of Jefferson to the historical role of Madison.

Yet, this factual corrective does not necessarily entail an equal change in the iconic status of Madison. Having never captivated the public imagination, he may never be hoisted as high as Jefferson. And so, he may never provide on his own sufficient rhetorical power to shape a "strict separation" Religion Clause jurisprudence. In the dying words of John Adams, "Jefferson still survives."⁵²⁷ Nonetheless, Madison's writings do contain parallel metaphors to fill in any gap that is created if Rehnquist and his allies successfully minimize Jefferson's role in the creation of the First Amendment.⁵²⁸

Symbols do not define discourse but they can exemplify it. As such, it is important to understand what they represent and why they are employed. In Religion Clause discourse, symbolism is used by Justices to costume America in the raiment of religious liberty or religious preference. Clearly, this American morality play is not over. Story shall continue to struggle with Jefferson; Rehnquist with Rutledge. The stage has been set, the parts have been written, only the actors change.

527. PETERSON, *supra* note 13, at 3.

528. In addition to the "great Barrier," Madison repeatedly advocates "a perfect separation" between ecclesiastical and civil matters. Letter from James Madison to Edward Livingston (July 10, 1822), in IX THE WRITINGS OF JAMES MADISON, 1819-1836, at 98, 102 (Gaillard Hunt ed., 1910). See LEVY, *supra* note 22, at 124 (noting that for Madison, "the separation between Religion and Government in the Constitution of the United States" is "[s]trongly guarded").