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Cover Page Footnote

Many thanks to the participants at both the University of Dayton School of Law Faculty Colloquium and the University of Dayton Law and Education Symposium on *Lemon,* and in particular, thanks to Professor Carlos Bernal and Professor Jeff Schmitt for their helpful comments on this paper.

THE ESTABLISHMENT CLAUSE: AN EMPTY VESSEL FILLED WITH *LEMON*[S]?

Christopher J. Roederer[*]

> Congress shall make no law *respecting an establishment of religion*, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[1]

[*] Author's note. Many thanks to the participants at both the University of Dayton School of Law Faculty Colloquium and the University of Dayton Law and Education Symposium on Lemon, and in particular, thanks to Professor Carlos Bernal and Professor Jeff Schmitt for their helpful comments on this paper.

[1] U.S. CONST. amend. I. (emphasis added).

I. INTRODUCTION

This Article arises out of the University of Dayton Law and Education Symposium: *Lemon at 50: Has the Supreme Court Soured on Its Bitter Fruits?*[2] For the symposium, I was asked to address *Lemon: The Past*. In doing so, I took it as my charge to evaluate whether the *Lemon* Test was justified by what came before it. In doing so, I looked to see what justified the decision in that case. Was the rule justified by precedent, the original mischief the Establishment Clause was meant to address, the Founder's views, the Framer's original intent, or the original public meaning of the text? [3] Or does a search into the history lead us to the proverbial empty vessel?[4] Is that what the Framer's intended to give us all along?

The Establishment Clause is not merely open textured but is, in fact, opaque.[5] This is because, on top of the fact that there were multiple views of what an establishment of religion was, as the Court noted in *Lemon v. Kurtzman*, the framers did not merely forbid Congress from the establishment of religion but from making laws *respecting*

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[2] University of Dayton School of Law, *Lemon at 50: Has the Supreme Court Soured on Its Bitter Fruits?* (Sept. 24, 2021), https://udayton.edu/law/events/education-conference.php.

[3] I take these to be the range of backward-looking approaches for justifying a particular legal test that is constructed to give effect to a broad constitutional duty and its corresponding right. Most of these are one or another form of originalism. While looking to precedent is backward looking, it may or may not be consistent with an originalist understanding of the Clause. While precedent, like history and tradition, are not necessarily sufficient reasons for justifying a standard or test at the Supreme Court level, tests that are well grounded in precedent, like those grounded in an unbroken history and tradition do provide some level of consistency, stability, and predictability to the law. Although I am putting on an "originalist" hat, or rather, a range of "originalist" hats, I am not arguing that originalism is a necessary or sufficient justification for a given constitutional test or standard. Where originalist understandings deeply undermine, or conflict with, democratic equality and the rule of law, they should give way to these more fundamental principles underlying our contemporary constitutional democracy.

[4] *See, e.g.*, Josh Blackman & Ilya Shapiro, *Is Justice Scalia Abandoning Originalism*?, CATO INSTITUTE (Mar. 9, 2010), https://www.cato.org/commentary/justice-scalia-abandoning-originalism ("Justice Antonin Scalia holds himself out as the patron saint of originalism, the idea that judges should interpret the Constitution according to its original public meaning. To do otherwise, he adds, is to succumb to government by black-robed philosopher-kings who fill the empty vessel of a 'living Constitution' with their own policy preferences."); *see also* American Constitution Society, *Justices Breyer and Scalia Converse on the Constitution* at 34:40, YOUTUBE (Nov 22, 2013), https://youtu.be/9uk110w08_s (Justice Scalia uses the metaphor of the empty bottle).

[5] *Establishment Clause*, CORNELL L., https://www.law.cornell.edu/wex/establishment_clause (last visited June 12, 2022). H.L.A. Hart tells us that the English language and the rules we create are naturally open-textured. H.L.A. HART, THE CONCEPT OF LAW 128 (2d ed. 1994); Hart distinguishes those things that fall within the core of a given rule (the settled meaning), which might be decided by looking at ordinary meaning, logic, and those things that fall into the penumbra which require additional premises, e.g., the purpose of the rule. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARVARD L. REV. 593, 607 (1958). The Clause is opaque because it is not clear what the core meaning of the Clause is. The Clause is vague at best. *See infra* Section V. Because of this vagueness, the text is not capable of direct application, but like the free speech provisions, must be mediated by doctrine that is constructed. *See, e.g.*, Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 468–472 (2013). As Solum further notes, while interpretation may be a factual matter, construction is normative, and there is a vast array of normative approaches to constructing doctrine under these circumstances. *Id.* at 472.

such establishments.[6] There is no evidence in the historical record to suggest that the term *respecting* had a meaning at the time of the Founding that was different from today. Then, as today, it means "relating to, having a reference to."[7] It is not that the meaning of *respecting* is completely unclear, for it clearly enlarges the scope of the phrase it modifies. What is unclear, and what the "plain meaning" leaves open, is how far it enlarges the scope of the prohibition. There is a multitude of steps that the government may take in the direction of, or that are related to, establishing a religion that falls short of establishing an official government religion like the Church of England.[8] But, further, as we see, the term "establishment of religion" itself was used in a variety of ways, by various actors, at the time of the Founding that ranged from requiring almost complete separation to accommodating and even financing religion.[9] Thus, these few words of text provide us little guidance as to the Clause's scope. What steps are enough, and what steps are too *de minimis* to trigger Establishment Clause concerns? What things are

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[6] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). This proposition finds support in *McGowan*, where Chief Justice Warren for the court stated:

But, the First Amendment, in its final form, did not simply bar a congressional enactment *establishing a church*; it forbade all laws *respecting an establishment of religion*. Thus, this Court has given the Amendment a "broad interpretation . . . in the light of its history and the evils it was designed forever to suppress. . . ."

366 U. S. 420, 441–42 (1961) (quoting Everson v. Bd. of Educ., 330 U.S. 1, 14–15 (1947). This might still be read to at least limit the Clause to legislation. For better or worse this would require limiting the rest of the First Amendment in the same way, and this has never been the case. Governmental conduct, in addition to laws, can violate the First Amendment.

[7] *Respect*, JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1795); *see also Respecting*, SAMUEL JOHNSON, FOLIO EDITION OF A DICTIONARY OF THE ENGLISH LANGUAGE (1755), https://johnsonsdictionaryonline.com/views/search.php?term=respecting ("Relation; regard. In *respect* of the suitors which attend you, do them what right in justice, and with as much speed as you may. *Bacon*."); *see also Respecting*, WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), http://www.webstersdictionary1828.com/Dictionary/respecting ("RESPECT'ING, *participle present tense* Regarding; having regard to; relating to."). According to the Court in *Lemon*, the Founders forbade inchoate steps in the direction of the establishment of religion. *Lemon*, 403 U.S. at 612. The New Shorter Oxford English Dictionary defines "respecting" as "[w]ith reference to, with regard to, concerning." *Respecting*, THE NEW SHORTER OXFORD ENGLISH DICTIONARY 2565 (Lesley Brown Eds. 1993).

[8] Carl H. Esbeck, *The Establishment Clause: Its Original Public Meaning and What We Can Learn From the Plain Text*, 22 FED. SOC. REV. 26, 34–35 (2021). The word "respect" comes from the Latin to look back "re- + specere." THE NEW SHORTER OXFORD ENGLISH DICTIONARY, *supra* note 7.

[9] Daniel L. Dreisbach, *Defining and Testing the Prohibition on Religious Establishments in the Early Republic*, *in* NO ESTABLISHMENT OF RELIGION: AMERICA'S ORIGINAL CONTRIBUTION TO RELIGIOUS LIBERTY 252, 253 (T. Jeremey Gunn & John Witte, Jr. eds., 2012). One might think the meaning of the text is plain in forbidding laws that would establish an official religion, as in England's established church. While this much is plain, most everyone concedes that the term "establishment of religion" was understood to be broader than this. *Establishment Clause*, *supra* note 5. Numerous types of laws might be passed to support one religion without ever actually establishing an official religion. As Dreisbach notes, "The definition of *establishment* varied from region to region and denomination to denomination." Dreisbach, *supra*, at 253. Drakeman notes that the term was also used in America to describe the practices of imposing taxes to fund churches by both those who opposed such taxes (such as Evangelicals, Baptists and Founders like James Madison) and those who supported such institutions in Massachusetts and in Connecticut. DONALD L. DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT 217–24 (2010) (citing Avery v. Tyringham, 3 Mass. 160 (1807) (an opinion by Sedgwick, J.); Barnes v. Inhabitants of the First Parish, 6 Mass. 401 (1810) (an opinion by Parsons, J.)). As he notes later in the book, while he might agree with Michael McConnell that everyone at the time of the founding knew what the expression meant, he does not agree that they all thought it meant the same thing. *Id.* at 228.

sufficiently "related to" an establishment of religion to come within its terms? This raises the question, to paraphrase the words of Justice Scalia, is the Establishment Clause just an empty vessel to be filled up with whatever meaning each generation gives to it or is there some fixed original meaning that each generation is bound to respect until the Constitution is amended?[10]

As the title suggests, and as this Article will demonstrate, the language the Framers landed on provides us little more than an empty vessel. Historians, legal academics, and judges have sometimes filled that vessel using originalist arguments, but there does not appear to be any consensus on what that content should be.[11] One can find historical support for a wide range of views on the Clause, running from the strict wall of separation view to the accommodationist view.[12] Our Founding Fathers had a range of views on religion and the relationship between church and state, as did those who drafted and voted for the Clause.[13] Unfortunately, the legislative history and debates do not meaningfully limit or define the scope or meaning of the Clause.[14] They do not point to a single purpose or set of mischiefs the Clause was meant to protect against, much less a common understanding of its scope and meaning.[15] A search for the commonly

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[10] *See* American Constitution Society, *supra* note 4, at 34:40. Note that Justice Felix Franfurter referenced the empty vessel metaphor in the context of statutory interpretation back in 1947. As he stated, statutes are not "empty vessels into which he [the judge] can pour anything he wants—his caprices, fixed notions, even statesmanlike beliefs in a particular policy." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947).

[11] *See generally id.*

[12] *First Amendment: Establishment Clause*, CONST. L. REP., https://constitutionallawreporter.com/amendment-01/establishment-clause/ (last visited June 12, 2022).

[13] *See, e.g.*, Carl T. Bogus, *Is this a Christian Nation?: An Introduction*, 26 ROGER WILLIAMS U.L. REV. 237, 243–57 (2021).

[14] *See* Hana M. Ryman & J. Mark Alcorn, *Establishment Clause (Separation of Church and State)*, MIDDLE TENN. STATE UNIV.: FREE SPEECH CTR., https://www.mtsu.edu/first-amendment/article/885/establishment-clause-separation-of-church-and-state (last visited June 12, 2022).

[15] Van Orden v. Perry, 545 U.S. 677, 698 (2005) (Breyer, J., concurring). Justice Breyer argues that the chief purpose of the Clause was to avoid religious divisiveness, in particular "that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike." *Id*. (citing Zelman v. Simmons-Harris, 536 U.S. 639,717–29 (2002) (Breyer, J., dissenting). For the argument that this is not the mischief the Clause was meant to correct, see generally Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667 (2006). Others, like Justice Thomas, argue that the purpose was to limit the ability of the Federal Government from establishing religion and from interfering with state establishments. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49 (2004) (Thomas, J., concurring) ("The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments."); *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 32–34 (1998). Noah Feldman argues that the purpose of the Establishment Clause was to protect liberty of conscience. As he states, "Violent religious persecution did not loom large in the minds of the Framers, who intended the Establishment Clause to protect the liberty of conscience of religious dissenters against paying taxes to support religious beliefs with which they disagreed." Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CALIF. L. REV. 673, 675 (2002) (citing Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346 (2002)). Andrew Koppelman argues that Justice Brennan, who was not a proclaimed originalist, asked the correct originalist question when he held that the "Court should ask whether challenged practices 'threaten those consequences which the Framers deeply feared; whether, in short, they tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent.'" Andrew M. Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U.L. REV. 727, 740

accepted public meaning of the Clause, even through meta-data searches of thousands of documents from the period, turns up scant evidence of the Clause's meaning.[16] The Framer's chosen language, "respecting an establishment of religion," does not turn up anywhere in the Corpus of Early Modern English, from 1475–1790, nor the Corpus of Founding Era American English from 1760–1789.[17] In other words, there is no evidence that the expression was ever used prior to the final version of the Amendment sent out for ratification. There is no record anywhere of anyone debating or even defending that exact language before it was voted up. What is the original public meaning of an expression that does not appear to have ever been used, much less discussed or debated?[18]

To determine if the *Lemon* test is justified by its past, this Article begins by looking at how the Court in *Lemon* chose to justify its interpretation of the Clause. As we will see, the Court largely grounded its decision in precedent.[19] In this regard, the Court's opinion finds ample support in the cases it cites.[20] *Lemon* was not a groundbreaking case that went where no court had gone before. Rather, the Court in *Lemon* largely synthesized a three-pronged rule from earlier cases.[21] *Lemon* finds its justification in over twenty years of precedent, starting with *Everson v. Board of Education* in 1947.[22] Of course, this begs the question as to whether the Court's decision in *Everson* was well-founded. Unlike the Court in *Lemon*, the Court in *Everson* did justify its opinion based on the views of the Founders, and it used the views of prominent historians to buttress its position.[23] Thus, this Article will spend some time addressing this case and the criticisms of the case, and

(2009) (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 236 (1963) (Brennan, J., concurring).

[16] *See generally*, *Law and Corpus Linguistics*, BYU LAW, http://lawcorpus.byu.edu (last visited June 12, 2022).

[17] This database contains over 40,000 texts and 1.1 billion words. The database spans 1475 to 1800. There are only 13 entries that contain this exact language, and they all postdate the Amendment. *Id.* The Corpus of Founding Era American English, which covers 1760–1799, has 20 entries with this exact language. Here, the first entry begins in 1789 with the Amendment as it is voted up by the First Congress. *Id.*

[18] Note, there is no recorded debate or discussion regarding this final language as it came out of Congress and was proposed to the states for ratification.

[19] Lemon v. Kurtzman, 403 U.S. 602, 611–14 (1971).

[20] *Id.* at 611–17.

[21] *Id.* at 612.

[22] Everson v. Bd. of Educ., 330 U.S. 1 (1947).

[23] *Id.* at 11–14. This is true of both the majority (relying on the views of Charles Beard) and the dissent (relying on the view of Irving Brant). DRAKEMAN, *supra* note 9, at 143, 145–46.

> [O]ne of originalism's most durable and visible manifestations—namely, the use of Madison, Jefferson, and colonial Virginia to interpret the establishment clause—has venerable roots not merely in the advocacy of self-interested litigants offering up bits of history to bolster their claims but in distinguished historians who were not shy about presenting clear historical answers to complex constitutional questions. Highly regarded historians actively promoted originalism as an interpretive methodology for the establishment clause, and they supplied a favored version of the history itself, in this case, an oversimplified Virginia-centric First Amendment creation myth.

Id. at 146.

the history that the Justices invoke in support of their opinions. This takes us from the somewhat limited view of a few influential Founding Fathers to that of the framers of the Amendment. As noted, this does not turn out to be a very fruitful exercise if we are seeking a common or single understanding of the Clause. It barely fills out the contours of the bottle, much less its full content. As we will see, if the scope is broadened further to the use of meta-data, the results are no more determinative. Thus, we still have an empty vessel. Contrary to the views of some, history neither provides us with a solid basis for critiquing the *Lemon* Test nor does it provide us a recipe for filling the vessel and providing an alternative test. For that, we must look elsewhere.

II. THE *LEMON* COURT AND ITS JUSTIFICATION FOR THE *LEMON* TEST: PRECEDENT

The Court in *Lemon* did not claim to derive the meaning of the Clause from its plain meaning, nor did it reference the views of the Founding Fathers, or even the framers of the Clause.[24] Rather, the Court largely relied on precedent to identify the mischief the Clause was meant to address and the standards it would set.[25] The Court went so far as to acknowledge that "[c]andor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."[26] Drawing on its decision the previous year in *Walz v. Tax Commission*, the Court claimed to derive the *Lemon* Test from the three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity."[27] The Court further claimed to derive its Test from the "cumulative criteria developed by the Court over many years."[28] The three-part Test is as follows: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be

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[24] *See generally Lemon*, 403 U.S. 602. The concurrence of Douglas, joined by Justice Black, did discuss the views of Jefferson and Madison. *See id.* at 630, 633–34 (Douglas & Black, JJ., concurring).

[25] *Id.* at 612.

[26] *Id.*

[27] *Id.* (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 668 (1970)). Note that the *Lemon* Court does not explain or attempt to justify this choice of evils beyond citing *Walz*. *Walz* provided a description of the evils in the following terms:

> In England, and in some Colonies at the time of the separation in 1776, the Church of England was sponsored and supported by the Crown as a state, or established, church; in other countries "establishment" meant sponsorship by the sovereign of the Lutheran or Catholic Church. The exclusivity of established churches in the 17th and 18th centuries, of course, was often carried to prohibition of other forms of worship.

Walz, 397 U.S. at 668 (citing Engel v. Vitale, 370 U.S. 421, 428 n.10 (1962); C. ANTIEAU, ET AL., FREEDOM FROM FEDERAL ESTABLISHMENT (1964); *Everson*, 330 U.S. at 9–11; L. PFEFFER, CHURCH, STATE AND FREEDOM 71 ET SEQ. (1967)).

[28] *Lemon*, 403 U.S. at 612.

one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[29]

Although *Lemon* has been applied well beyond its original context, it is worth remembering that the cases leading up to *Lemon*, as well as the cases cited in *Lemon*, were nearly all cases involving schools.[30] Although the Court cites *Board of Education v. Allen*, which upheld a textbook loan program to parochial schools in 1968, for the first two prongs of the Test, that formulation can be found five years earlier in *School District of Abington Township v. Schempp*, a case striking down a school prayer law.[31] *Schempp* reached back to the 1961 case of *McGowan v. Maryland* and the 1947 case of *Everson v. Board of Education* to support its formulation of the rule.[32] *McGowen*, in fact, relies on *Everson* for its rule.[33] The third prong finds support in *Walz v. Tax Commission*, where the Court upheld a tax exemption for religious organizations, in part because it did not involve excessive entanglement by the government in religious matters.[34] *Lemon* is really just a case that synthesizes these previous rules into a three-pronged test. Thus, *Lemon* is solidly rooted in precedent. Following precedent furthers democratic rule of law principles of treating similar cases alike and provides stability and predictability. Precedent should not be lightly

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[29] *Id.* at 612–13 (first citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968) for the first and second prongs; then quoting *Walz*, 397 U.S. at 674 for the third prong).

[30] John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 294 (2001). It is worth noting that while there were issues surrounding government funding of religion, the Framers did not live in a world of government funded education. *See, e.g.*, *id.*

[31] 374 U.S. 203, 222 (1963). The *Schempp* Test was stated as follows:

> [W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

Id. (citing *Everson*, 330 U.S. 1; McGowan v. Maryland, 366 U.S. 420, 442 (1961)).

[32] *Id.* at 219. *McGowan* upheld Sunday closing laws based on their secular purpose and effect. *McGowan*, 366 U.S. at 422–44. And *Everson* upheld the transportation expenses reimbursement program for children attending both public schools and parochial schools based on its secular purpose and effect. *Everson*, 330 U.S. at 17–18.

[33] *McGowan*, 366 U.S. at 442–44.

[34] *Walz*, 397 U.S. at 676. Although the third prong of *Lemon* finds its origin in the case, Chief Justice Burger writing for the Court, justified the decision using all three prongs of the subsequent *Lemon* Test. *Id.* at 669, 672–73, 676–77. As he stated, "Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." *Id.* at 669. He then went on to state: "The legislative purpose of the property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility." *Id.* at 672. The Court finds the state's secular purpose to be the "stabilizing influences in community life" that these groups provide. *Id.* at 673. Note that the Court also justified the lack of entanglement on the widespread and long-standing practice of tax exemptions for religious organizations across all fifty states and enactments of Congress dating back to 1802. *Id.* at 676–77. As the Court noted, "It appears that at least up to 1885 this Court, reflecting more than a century of our history and uninterrupted practice, accepted without discussion the proposition that federal or state grants of tax exemption to churches were not a violation of the Religion Clauses of the *First Amendment*." *Id.* at 680. Note further, that Justice Brennan also claims to take a view that is faithful to the Founding Fathers. *Id.* at 680–700 (Brennan, J., concurring). Note also Justice Douglas's dissent. *Id.* at 719–35 (Douglas, J., dissenting).

overruled unless the precedent is erroneous and is either unworkable or results in undermining other fundamental democratic principles. As Randy Barnett, one of the most influential new originalists argues,

> there is much room for the doctrine of precedent in originalism. It is not incompatible with original public meaning originalism to adhere to precedent in cases involving (a) nonconstitutional issues, (b) matters of constitutional construction, (c) detrimental reliance by identifiable individuals, (d) epistemic concerns about the correctness of originalist claims, and perhaps also (e) where the text was originally ambiguous.[35]

As the remainder of this Article will demonstrate, not only is the text originally ambiguous, but there are serious epistemic concerns regarding the correctness of originalist claims when it comes to the Establishment Clause. Thus, under Barnett's framework, relying on precedent in this case is not inconsistent with originalism.

This still begs the question as to whether these prongs have a deeper pedigree. Are they rooted in our history and traditions? Are they consistent with the text of the Constitution, the mischief the Framers were attempting to address, their original intent, or at least the spirit and purport of the Clause?

III. *EVERSON* AND THE CENTRALITY OF MADISON, JEFFERSON, AND THE VIRGINIA TAX CONTROVERSY

As noted above, the cases cited in *Lemon* largely relied on the Court's reasoning in *Everson v. Board of Education*.[36] Thus, as we trace back the decision's pedigree, it's worth revisiting that case to see if the Court's opinion comports with the text, mischief, original intent, and/or spirit and purport of the Clause. While *Everson* was a five to four decision ultimately upholding the law that reimbursed school transportation expenses, no one on the Court dissented from the decision to incorporate the Establishment Clause; no one dissented from the majority's view of the mischief the Clause was meant to address, nor the roles of Madison and Jefferson in the formation of the Clause, and the relevance of their views on Virginia's plan to tax its citizens to support the church.[37] Moreover, no

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[35] Randy Barnett, *Trumping Precedent with Original Meaning: Not As Radical As It Sounds*, 22 CONST. COMMENT 257, 269 (2005).

[36] *See, e.g.*, *McGowan*, 366 U.S. at 461, 467; Zorach v. Clauson, 343 U.S. 306, 312 (1952); Torcaso v. Watkins, 367 U.S. 488, 493 (1961).

[37] Everson v. Bd. of Educ., 330 U.S. 1, 18–74 (1947) (Jackson & Rutledge, JJ., dissenting). Justice Rutledge, in his dissent, further noted that

> [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

one on the Court argued that the Court's standard went too far or worked too strictly on a separation of church and state.[38] If anything, the dissent argued that the majority did not go far enough to maintain the wall of separation in its standards, particularly in applying its standards to the facts.[39] Those standards were as follows:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson,

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> brevity." Madison could not have confused "church" and "religion," or "an established church' and 'an establishment of religion."

Id. at 31 (Rutledge, J., dissenting) (citing IX WRITINGS OF JAMES MADISON 288 (Hunt ed., 1910); SAUL PADOVER, JEFFERSON 74 (1942)). Madison's characterization related to Jefferson's entire revision of the Virginia Code, of which the Bill for Establishing Religious Freedom was a part. *See id.* at 35 n.15 (note that Justice Rutledge, like the other dissents, dissented primarily on the facts and not the law). Justice Rutledge's dissenting opinion "merely restated Justice Black's account . . . with different emphasis." AMERICA IN THEORY 18 (Leslie Berlowitz et al. eds., 1988).

[38] *See generally Everson*, 330 U.S. 1.

[39] Justice Jackson largely dissented on the facts. *See id.* at 19–20, 25 (Jackson, J., dissenting). In addition to arguing that the Court did not "apply the principles it avows," he argued that merely because the state claimed the law had a public purpose did not make it so. *Id.* at 25–26. He endorsed Justice Rutledge's dissent when he said, "the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense." *Id.* at 26. Justice Rutledge argued that

> [t]he Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion. In proof the Amendment's wording and history unite with this Court's consistent utterances whenever attention has been fixed directly upon the question.

Id. at 31–32 (Rutledge, J., dissenting).

> the clause against establishment of religion by law was intended to erect "a wall of separation between church and State ."[40]

The majority draws attention to the religious persecution in Europe by and against Catholics and the various Protestant sects, as well as the persecution of Jews by the former, and the continuation of those practices through religious establishments in America.[41] Those in the minority in any given locality were treated horribly, according to the Court. They were persecuted, jailed for their beliefs, and forced to attend services, not to mention to pay tithes and taxes that went to government-sponsored churches and pay for ministers' salaries.[42] The Court reports that "[t]hese practices became so commonplace as to shock the freedom-loving colonials into afeeling of abhorrence."[43]

While the historical facts regarding persecution, both in Europe and in the Colonies, are well documented in the historical record, the conclusion that this "shock[ed] the freedom-loving colonials" is not so well supported.[44]

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[40] *Everson*, 330 U.S. at 15–16 (quoting Reynolds v. United States, 98 U. S. 145, 164 (1878)). Note that the amicus briefs of both the National Councils of Catholic Men and Women and the American Civil Liberty Union ("ACLU") adopted Jefferson's wall of separation metaphor. DRAKEMAN, *supra* note 9, at 95–98. The Catholic brief argued that non-preferential aid to religious organizations did not violate the historical understanding of the Establishment Clause. *Id.* at 95. On the one hand, the Catholic brief argued that the wall was there to stop government from compelling believers and non-believers in matters of belief as well as to stop the Church from compelling conformity to its beliefs as a "condition of full citizenship . . . ." *Id.* at 96 (quoting LANDMARK BRIEFS AND ARGUMENT OF THE SUPREME COURT OF THE UNITED STATES 960 (Philip B. Kurland & Gerhard Casper eds. 1975) [hereinafter LANDMARK BRIEFS]). The ACLU, on the other hand, argued for a "complete separation of church and state." *Id.* at 94 (quoting LANDMARK BRIEFS, *supra*, at 852).

[41] *Id.* at 9–10 (citing BAMBINGTON MACAULAY, 1 HISTORY OF ENGLAND, chs. 2, 4 (1849); 5 THE CAMBRIDGE MODERN HISTORY, chs. V, IX, XI (1908); 1 CHARLES A. BEARD & MARY RITTER BEARD, RISE OF AMERICAN CIVILIZATION, 60 (1933); STANFORD H. COBB, RISE OF RELIGIOUS LIBERTY IN AMERICA chs. II (1902); WILLIAM W. SWEET, THE STORY OF RELIGION IN AMERICA chs. II (1939); WILLIAM W. SWEET, RELIGION IN COLONIAL AMERICA 320–22 (1942)).

[42] *Id.* at 10.

[43] *Id.* at 11. The Court referenced the following letter from Madison to a friend in 1774 in support of this view:

> That diabolical, hell-conceived principle of persecution rages among some . . . . This vexes me the worst of anything whatever. There are at this time in the adjacent country not less than five or six well-meaning men in close jail for publishing their religious sentiments, which in the main are very orthodox. I have neither patience to hear, talk, or think of anything relative to this matter; for I have squabbled and scolded, abused and ridiculed, so long about it to little purpose, that I am without common patience. So I must beg you to pity me, and pray for liberty of conscience to all.

See id. at 11 n.9 (quoting 1 WRITINGS OF JAMES MADISON 18, 21 (1900)).

[44] *See* DRAKEMAN, *supra* note 9, at 110–13. As he states,

> In painting this broad landscape depicting widespread persecution and governmental support of the churches, Justice Black thus drew from a wide range of distinguished historians, and his footnotes evidence an impressively documented study of the well-known and certainly in this context noncontroversial aspects of the history of religious freedom (or lack thereof) in seventeenth- and eighteenth-century Europe and America. But at this point in the historical narrative, Black needs to link this general background with the First Amendment, and the learned historians on whom he has been relying are unable to help.

The Court proceeded to note that while no one group or locality should be given credit for having "aroused the sentiment that culminated in [the] adoption of the Bill of Rights' provisions embracing religious liberty," Virginia provided a great stimulus to the idea.[45] The Court then turned its attention to the controversy in Virginia over the plan to tax its citizens to support religious institutions.[46] The particular focus was on the efforts of Madison and Jefferson to quash those efforts and to establish religious liberty in the state. In addition to appending Madison's *Memorial and Remonstrance* and quoting at length from Jefferson's *Virginia Bill for Religious Liberty*, the Court spent several pages elucidating the views of Madison and Jefferson on the subject.[47] The preamble to the Virginia Bill reads in part: "[T]hat to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern . . . ."[48]

The Court then argued that the First Amendment's religion clauses had the same objective and were intended to provide the same protections as the Virginia statute.[49] But it was not this Court alone that adopted the view. The majority opinion traced back the pedigree of this idea all the way back to the late 19th century in *Reynolds v. United States*, *Watson v. Jones*, and *Davis v. Beason*.[50]

Id. at 111.

[45] *Everson*, 330 U.S. at 11.

[46] *Id.* Patrick Henry's 1784 proposal was to levy a property tax on all citizens to support ministers of recognized Christian sects. HOWARD GILLMAN & ERWIN CHEMERINSKY, THE RELIGION CLAUSES: THE CASE FOR THE SEPARATING OF CHURCH AND STATE 31 (2020) (citing THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA 108–09 (1977)). This was somewhat non-preferential, but a more clearly non-preferential amendment of the proposal was passed removing "Christian" from it, so that it would or could included people of non-Christian faiths, that amendment was reversed, the justification being that the tax was designed to keep Christian ministers, and in particular Episcopalian clergy solvent. *See id.*; *see also* A Bill Establishing a Provision for Teachers of the Christian Religion, Washington Mss. (*Papers of George Washington*, Vol. 231), Library of Congress, *reprinted in Everson*, 330 U.S. at app. II at 72–74 (Rutledge, J., dissenting).

[47] *See* Letter from John Madison, to the Honorable General Assembly of the Commonwealth of Virgina (1785) (on file with the Library of Congress), *reprinted in Everson*, 330 U.S. at app. I at 63–72 (Rutledge, J., dissenting); *see also Everson*, 330 U.S. at 12–13.

[48] *Everson*, 330 U.S. at 13 (quoting DOCUMENTS OF AMERICAN HISTORY 125 (Henry Steele Commager ed., 1944)).

[49] *Id.*

[50] *Id.*; Reynolds v. United States, 98 U.S. 145, 164 (1878); Watson v. Jones, 80 U.S. 679, 720 (1871); Davis v. Beason, 133 U.S. 333, 342 (1890). After quoting Jefferson's use of the wall of separation metaphor, the Court stated:

> Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

Reynolds, 98 U.S. at 164. While the Jeffersonian wall of separation metaphor can be found in *Reynolds* as defining the scope of the Clause, upon an admittedly cursory view of the *Watson* and *Davis* cases, it is

IV. THE CRITIQUE

Everson's rendition of history and the centrality of Madison, Jefferson, and Virginia has come under considerable attack over the years.[51] Further, a number of scho ars have criticized the judges in the *Everson* case, arguing that the *Everson* majority and dissenting opinions were based on anti-Catholic sentiments.[52] Finally, the case's rather under-justified

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not clear that they add any support to the Court's assertion. *Id.*; *Watson*, 80 U.S. at 720; *Davis*, 133 U.S. at 342.

[51] *See, e.g.*, John Phillip Reid, *Law and History*, 27 LOY. L.A. L. REV. 193, 220–21 (1993) ("There are no other decisions dealing with American constitutional law that owe more to violations of the canons of historical interpretation than those dealing with the establishment and free exercise of religion. A 'wall of separation' has been erected to create the doctrine of 'Separation of Church and State,' ostensibly based on a letter Thomas Jefferson wrote to Baptist ministers in Connecticut. Historians have been amazed at how this evidence meets no canon of relevancy. Jefferson . . . had no official connection with the amendment of the Constitution that the Court was interpreting." (footnotes omitted)); *see also* Jeffries & Ryan, *supra* note 30, at 296–97 ("When the *Everson* Court reached back to Virginia for the pedigree of modern separationism, the justices were not obeying a command from the Framers. They were making a choice. The past they imagined in *Everson* seemed obvious, natural, and clear to them because it fit so readily what they expected the Constitution to say."); Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS. J. 73, 136 (2005) (arguing that "[t]he Establishment Clause was not crafted to reflect the notions of Jefferson or Madison or any other small collection of individuals—not even the individuals who happened to sit in the First Congress."); DISESTABLISHMENT AND RELIGIOUS DISSENT: CHURCH-STATE RELATIONS IN THE NEW AMERICAN STATES, 1776–1833, at 10–11, 16–17 (Carl H. Esbeck & Jonathan J. Den Hartog eds., 2019) (criticizing the focus on Virginia's disestablishment and noting "it cannot be said that the disestablishment story in any one state was more important than that of others," as well as criticizing the view that Jefferson had a broad influence on the disestablishment process); James J. Knicely, "*First Principles" and the Misplacement of the "Wall of Separation": Too Late in the Day for a Cure?*, 52 DRAKE L. REV. 171, 172–73 (2004).

> Everson's solemn invocation of Jefferson and Madison, and its commanding pronouncements from the Virginia disestablishment battle—portrayed as the view subscribed to by most early Americans—established a powerful doctrinal engine for a completely new regime of law in all of the states. The slow but progressive revelation of its incomplete and distorted rendition of that history has produced, however, not only a doctrine in need of justification, but a body of law with underpinnings that cannot long withstand the absence of a legitimate rationale for decision.

Id. at 205 (footnotes omitted); *see also* DRAKEMAN, *supra* note 9, at 74–147.

[52] Jeffries & Ryan, *supra* note 30, at 291 ("[W]e believe, as Justice Thomas charged, that the constitutional prohibition against aid to religious schools is in some measure the sanitized residue of nativism and anti-Catholic animosity."); DRAKEMAN, *supra* note 9, at 103–05; PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 461–63 (2002). For the counter argument, see Robert D. Goldstein, *The Structural Wall of Separation and the Erroneous Claim of Anti-Catholic Discrimination*, 13 CARDOZO PUB. L. POL'Y & ETHICS J. 173, 215–26 (2014) (criticizing Justice Thomas's views, and the views of Philip Hamburger). Contrary to Thomas and Hamburger, Goldstein argues that the motivation behind the infamous Blaine Amendment was not hostility to the Catholic faith, but to papal authority, which was viewed as illiberal and anti-democratic. *Id.* As he notes,

> > When liberal governments in Europe expelled Jesuits from Italy, Spain, Germany and France between 1848 and 1880, a number of them immigrated to the U.S. and carried forward their work here. These and other "orders emphasized loyalty to the pope above national allegiance and had frequently allied themselves with monarchies and conservative governments."

Id. at 216 n.142 (citations omitted). As he further argues,

> > During this period, Americans expressed concern about the growing power of the Pope. Opposing the ultramontane centralization of the Church, some American Catholics employed anti-clerical and anti-papist rhetoric themselves. French Catholics in Louisiana, for example, claimed in one instance that Irish Catholic loyalty to the tyranny of the Pope is inconsistent with being "true Americans . . . ."

Id. at 216; *see also* Patrick W. Carey, *American Catholics and the First Amendment: 1776–1840*, 113 PA. MAG. HIST. & BIOGRAPHY 323, 342 (1989) (describing Pope Gregory XVl's 1832 encyclical *Mirari Vos* which opposed "in principle and practice religious liberty, freedom of the press, and separation of church and state."). Alito's concurrence in *Espinoza* recounts the anti-Catholic sentiment that led to the law

incorporation of the Establishment Clause to the states in that case has also come under attack.[53]

i. Incorporation

Addressing this last point first, if the Establishment Clause never should have been incorporated, then a large number of state and local cases should never have been decided.[54] Of course, there would still be a need to understand the scope of the Clause *vis-à-vis* the federal government. So, was there an original understanding that the Clause was designed to protect state establishments from the federal government? As we will see in Section V below, there is no clear evidence that anyone in the House of Representatives, much less a majority of the members of the House took this view when they debated the Clause.[55] We do not know what was discussed in the Senate or the conference committee, and the records of the state conventions are generally thought to be even less useful than the House debates.[56] There doesn't appear to be any actual solid evidence for the view beyond the argument that the term "respecting" can be read to mean that the federal laws

in that case. His opinion reads a bit like a "me too" for Catholics. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2267–74 (2020) (Alito, J., concurring).

[53] *See, e.g.*, Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 481 (1991) ("it is striking in retrospect to observe how little intellectual curiosity the members of the Court demonstrated in the challenge presented by the task of adapting, for application to the states, language that had long served to protect the states against the federal government."); James M. O'Neil, *Nonpreferential Aid to Religion is not an Establishment of Religion*, 2 BUFF. L. REV. 242, 244–45 (1952). Drakeman tells us that that Edward Corwin thundered that "'the Court has the right to make history . . . but it has no right to make it up.'" Donald L. Drakeman, Everson v. Board of Education *and the Quest for the Historical Establishment Clause*, 49 AM. J. LEGAL HIST. 119, 120 (2007) (quoting EDWARD S. CORWIN, A CONSTITUTION OF POWERS IN A SECULAR STATE 116 (1951)). For a review of *Everson*, see Daniel L. Dreisbach, Everson *and the Command of History: The Supreme Court, Lessons of History, and Church-State Debate in America*, *in EVERSON* REVISITED: RELIGION, EDUCATION, AND LAW AT THE CROSSROADS (Jo Renee Formicola & Hubert Morken eds, 1997). For a Defense of *Everson*, see David M. Levitan, *Mr. Justice Rutledge*, 34 VA. L. REV. 526, 533 (1948).

[54] For attacks on the incorporation of the Establishment Clause, see for example, Jonathan P. Brose, *In Birmingham They Love the Governor: Why the Fourteenth Amendment Does Not Incorporate the Establishment Clause*, 24 OHIO N.U. L. REV. 1 (1998); Knicely, *supra* note 51, at 173; see also Justice Thomas concurance in *Zelman v. Simmons-Harris*, where he stated, "[I]n the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government." 536 U.S. 639, 678 (2002) (Thomas, J., concurring). In *Elk Grove*, he went further and argued that the Clause was a federalism provision, which resists incorporation. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45–46 (2004) (Thomas, J., concurring). Justice Thomas argues that incorporating the Clause "prohibit[s] precisely what the Establishment Clause was intended to protect—*state* establishments of religion." *Id.* at 52 (citation omitted). He reiterates these points in his concurrence in *Espinoza*, where he states: "As I have explained in previous cases, at the founding, the Clause served only to 'protec[t] States, and by extension their citizens, from the imposition of an established religion by the *Federal* Government.'" *Espinoza*, 140 S. Ct. at 2263 (Thomas, J., concurring). Under this view, the Clause resists incorporation against the States. *See* Town of Greece, N.Y. v. Galloway, 572 U. S. 565, 604 (2014) (Thomas, J., concurring). Even if this is true, it does not follow that the Clause was designed to protect state establishments.

[55] *See infra* Section V.

[56] *See infra* Section V.

that touch on or interfere with state establishments would be laws "respecting an establishment of religion."[57]

Donald Drakeman, in *Church, State, and Original Intent*, ends his twenty page argument against the view that the original public meaning of the Establishment Clause was that it was designed to prohibit the Federal Government from interfering with state establishments with a relatively devastating blow, namely, that candidates for "original public meaning" must be "supported by evidence that *somebody* at the time embraced that particular interpretation."[58] But, there is no such evidence, and in fact, those who might have gained the most from the argument did not make it before, during, or after the ratification.[59]

It is very unlikely that anyone believed that the draft, which stated that "Congress shall make no law," would ever apply to the states.[60] But, of course, that is also likely true of the rest of the rights in the Bill of Rights, including the free speech provisions of the First Amendment.[61] The fact that some states still had established religions also supports the fact that no one thought that the provision applied to the states.[62] But this does not distinguish the Establishment Clause from the Free Speech Clause, since most states did not have provisions protecting free speech.[63] Only Pennsylvania and Vermont had provisions in their charters or bills of rights that protected free speech generally.[64] New York's free speech provision, section 11 of its bill of rights, did not provide a general right to free speech but merely a right that protected

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[57] As we will see below, the "respecting" language was only added at the end by the conference committee and was not part of the drafts that either the House or the Senate sent to the committee. *See infra* note 135 and accompanying text.

[58] DRAKEMAN, *supra* note 9, at 247–48. Drakeman goes so far as to argue that there is more evidence to support the view that the other rights provisions in the First Amendment should be resistant to incorporation from the view of original intent than the Establishment Clause, since an Amendment from Madison that would have guaranteed freedom of conscience, speech and press (among other things) *vis-à-vis* the states was explicitly rejected. *Id.* at 245.

[59] Drakeman notes that there is no record of the New England states, nor any other state, calling for the enhanced protection against federal interference or to shield their ecclesiastical laws from federal interference; there was no record of speeches, sermons, or newspaper articles calling for such protection, and no record of New Englanders identifying their laws as "Establishments" even after the ratification. *Id.* at 241–43. While a number of Framers made the general federalism argument that the Federal Government had no enumerated power to regulate religion, it does not follow that the Establishment Clause was designed to reinforce that view. As Drakeman notes, there is plenty of evidence that people during the Founding Era did not want a federally established religion, there is no evidence that anyone was seeking extra protection for existing state establishments. *Id*.

[60] *Id.* at 241.

[61] *See id.*

[62] *See* DISESTABLISHMENT AND RELIGIOUS DISSENT, *supra* note 51, at 40.

[63] Christopher J. Roederer, *Free Speech on the Law School Campus: Is it the Hammer or the Wrecking Ball that Speaks?*, 15 U. ST. THOMAS L.J. 26, 42 n.64 (2018).

[64] Pennsylvania and Vermont's declarations state: "That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained." *Pennsylvania Constitution of 1776, Declaration of Rights*, U. CHI. PRESS, http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss5.html (last visited June 12, 2022); *Constitution of Vermont - July 8, 1777*, THE AVALON PROJECT, http://avalon.law.yale.edu/18th_century/vt01.asp (last visited June 12, 2022). Notice that the point of the provision appears to be to protect the press, and also note the use of the term "ought" rather than "shall" or "must."

the legislature, as it stated, "That the freedom of speech and debates and proceedings in the senate and assembly shall not be impeached or questioned in any court or place out of the senate or assembly."[65]

Even if the Clause was originally thought to only apply to the Federal Government, and even if it was thought to protect state establishments, it is highly unlikely that the Court would turn back the clock on incorporating the Clause, or turn back the clock on interpreting it the same way at the state and federal level.[66] Any notion that the Court would be able, much less willing, to undo its incorporation doctrine in this area is likely misguided.[67] Whether or not the Clause should have been incorporated, one can still ask what, if anything, the original understanding of the Clause was *vis-à-vis* the Federal Government, and whether the Court got the underlying meaning right.[68] For after all, even if the Clause was partly

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[65] The New York Bill of Rights Statute, S. Res. 1, 1787 Leg., 10th Sess. (N.Y. 1987), (available at https://history.nycourts.gov/nys-bill-rights-1787/).

[66] Note that by the time the Fourteenth Amendment was ratified, there were no longer any state establishments. So, people likely had different views of the Establishment Clause than they did back when the First Amendment was ratified.

[67] With the *Ramos* decision, which now requires unanimous jury verdicts in state criminal cases to align them with the federal standard under the Sixth Amendment, nearly all of the rights in the Bill of Rights have been incorporated and each of the rights is now interpreted exactly the same *vis-à-vis* the states as against the Federal Government. Ramos v. Louisiana, 140 S.Ct. 1390, 1395 (2020).

> This Court has long explained, too, that incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government. So, if the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court.

Id. at 1937 (citing Malloy v. Hogan, 378 U. S. 1, 10–11 (1964)). The case of *McDonald* also poses problems for a retreat. *See generally* McDonald v. City of Chicago, 561 U.S. 742 (2010). Could the Court consistently un-incorporate the Establishment Clause without also un-incorporating the Second Amendment? Could it somehow treat the Clause differently in the state context vs federal context given *McDonald* and *Ramos*? *See also* Timbs v. Indiana, 139 S. Ct. 682, 682, 689 (2019) (quoting *McDonald*, 561 U. S. at 766 n.14) (unanimously incorporating the Excessive Fines Clause of the Eighth Amendment, even in civil in rem cases and stating "when a Bill of Rights protection is incorporated, the protection applies 'identically to both the Federal Government and the States.'"); Adarand Constructors, Inc. v. Peña, 515 U.S. 220, 227 (1995) (holding that all racial classifications, whether imposed by federal, state, or local authorities, must pass strict scrutiny review, and overruling *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990), which held that federal affirmative action programs would be treated more deferentially due to the enforcement provisions of the Fourteenth Amendment). Note also, that while the Framers of the Fourteenth Amendment did not see a problem with segregated schools, and they failed to draft an Equal Protection Clause that explicitly binds the Federal Government. The Court reverse incorporated the Clause in the federal companion case to *Brown v. Board of Education*, 347 U.S. 483 (1954). *See also* Bolling v. Sharpe, 347 U.S. 497, 500 (1954). In other words, when the Court in *Brown* found that segregated schools violated the Clause, the Court also found in *Bolling* that the Fourteenth Amendment Equal Protection Clause applied equally to the Federal Government. *Brown*, 347 U.S. 483; *Bolling*, 347 U.S. 497. I would argue that there are stronger arguments for treating Second Amendment and Equal Protection rights differently at the state and federal level based in the history and prefatory language of the Second Amendment, as well as the Enforcement Clause of the Fourteenth Amendment, than there are for treating the Establishment Clause differently.

[68] Arguments based on enhanced federalism concerns may point to an even broader reading of the Clause. In other words, if the Clause was designed to stop the federal government from meddling in state establishments, then arguably the Clause would need to be read broadly enough to capture even the most non-preferential establishments in states like New Hampshire. *See* DRAKEMAN, *supra* note 9, at 244. New Hampshire kept its establishment until 1817. John R. Vile, *Established Churches in Early America*, MIDDLE TENN. STATE UNIV.: FREE SPEECH CTR., https://www.mtsu.edu/first-amendment/article/801/established-churches-in-early-america (last visited June 12, 2022).

designed to keep the Federal Government from interfering with state establishments, by its terms, it also forbids Congress from passing laws respecting an establishment of religion at the federal level.

ii. Anti-Catholic?

A number of scholars have criticized the judges in the *Everson* case, arguing that the *Everson* majority and dissenting opinions were based on anti-Catholic sentiments.[69] Although the Court's decision in the case benefited the Catholic schools in question, the justices allegedly searched the history to find support for their own separationist views and thus settled on the views of Madison and Jefferson.[70] Ironically, if the justices were somehow motivated by anti-Catholic sentiments (as opposed to being motivated by anti-state-funding-of-churches sentiments), this may have been consistent with dominant views at the time of the Founding.[71] But further, at the time of the Founding, it was not clear that excluding Catholic institutions from otherwise "non-preferential" government funding of the dominant Christian sects would be seen as raising any Establishment Clause problems (except by the Catholics and others who were excluded).[72]

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[69] *See, e.g.*, DRAKEMAN, *supra* note 9, at 121–23.

[70] *See, e.g.*, *id.*

> In reviewing the briefs, judicial conference notes, opinion drafts, the justices' private correspondence and the historical sources on which the justices based their conclusions, we can see how first Justice Rutledge and then Justice Black set off on a premeditated search-and-employ mission to locate historical events that would be, in [Justice] Rutledge's words, "admirable for the . . . purpose" of letting him express his strong feelings about the case without "pointing what [he] had to say in the direction of any specific sect," *viz.*, Roman Catholicism.

Drakeman, *supra* note 53, at 121 (footnotes omitted); *see also* HAMBURGER, *supra* note 52, at 491–92. Drakeman's tone and treatment of the justices are very different by the time he reaches the end of his article, where he notes, "But in *Everson*, it is clear that Justice Rutledge was not doing freelance amateur history at odds with the best published materials he could find. To the contrary, he employed an originalist methodology that was explicitly promoted by the prominent historian whose work he consulted." Drakeman, *supra* note 53, 167. As to Justice Black, he notes:

> [O]ne of Justice Black's key sources, Charles Beard, not only invokes the authority of the framers but he also asserts that they were, in fact, committed to his vision of the separation of church and state. In particular, he cites the "attitudes towards religion taken by leaders among the framers of the Constitution and the plain letter of the original document," concluding that one of the "definite propositions" is that "Congress [cannot] vote money for the support of all churches [nor can it] establish one of them as a national church." This proposition, grounded in a "First Amendment [that] merely confirms the intentions of the framers," becomes Black's "no aid" formulation, which is one of *Everson*'s most enduring interpretive legacies.

Id. (footnotes omitted).

[71] Drakeman notes that Justice Rutlege's biographer did not find that he harbored any anti-Catholic bias, and that Justice Murphy's biographer noted that Justice Rutlege was his closest friend on the Court. DRAKEMAN, *supra* note 9, at 131 (citing JOHN M. FARREN, SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE 267 (2004); SIDNEY FINE, FRANK MURPHY: THE WASHINGTON YEARS 195 (1984)).

[72] As Drakeman argues, the "maximum amount of nonpreferential reach during the Founding Era thus embraced only Christians, and in virtually every case that meant Protestant Christians." DRAKEMAN, *supra* note 9, at 256. So-called general assessments were not for the benefit of Catholicism, Judaism, Islam, or the religions practiced by Native American or slaves. *Id.* at 255–56. Catholics were not exempt from

So, arguably, the Court was treating Catholics much better than the founding generation. Nonetheless, some Catholics saw this as a case of winning the battle on busing but losing the war on the Establishment Clause.[73] As it turns out, Catholics would lose the next case of *McCullum v. Board of Education*.[74] It is worth pointing out that Justice Murphy, the only Catholic on the Court at the time, joined the majority in both *Everson* and *McCullum*, which endorsed the idea of a "wall of separation."[75] Even if Justice Black had bad motives, it is a fallacy to conclude that his decision was wrong or not justifiable because of those sinister motivations.[76] One can still be right, even if one's motivations are wrong.

iii. Too Narrow a Focus

Good or bad motives aside, it is fair to conclude that the Court's over-reliance on Jefferson, Madison, and the Virginia tax dispute means that the decision is under-justified from an originalist perspective.[77] Drakeman criticizes the justices for cherry-picking the Virginia tax controversy and for overstating the roles of Madison and particularly Jefferson.[78] His argument was that while Black cited a number of historians, those historians actually pointed to a number of other public figures and Baptists as being more instrumental to the movement.[79] In other words, these historians do not help make the case that "Virginia was the wellspring of a national commitment to religious freedom or that Jefferson and Madison were the leaders of that movement."[80] While Black relied largely on the historian Charles Beard, Rutledge relied on the historian Irving Brant and his multi-volume biography

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paying taxes to support their town's Protestant church under New England's general assessments, which some have argued to the be non-preferential and thus, not "establishments." *Id.* at 250–51.

[73] *See* DRAKEMAN, *supra* note 9, at 106 n.136 (referencing comments by Rev. John Courtney Murray).

[74] *See* Illinois *ex rel.* McCullum v. Bd. of Educ., 333 U.S. 203, 211–12 (1948) (invalidating release time for children to study religion at public school).

[75] *See* Thomas C. Berg & William G. Ross, *Some Religiously Devout Justices: Historical Notes and Comments*, 81 MARQ. L. REV. 383, 394, 396 (1998) ("The latter decision was vehemently criticized by the Catholic hierarchy, which both worried and angered Murphy enough that he discreetly asked friends to write some replies in his defense, and at least once wrote such a letter himself." (footnote omitted)).

[76] This is what is sometimes referred to as the genetic fallacy, for example: "The alleged mistake of arguing that something is to be rejected because of its suspicious origins. More widely, any mistake of inferring something about the nature of some topic from a proposition about its origins." *Genetic Fallacy*, OXFORD REFERENCE, https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095847621 (last visited June 13, 2022); *see also The Oxford Companion to Philosophy—Genetic Fallacy*, OXFORD REFERENCE, https://www.oxfordreference.com/view/10.1093/acref/9780199264797.001.0001/acref-9780199264797-e-993 (last visited June 13, 2022) ("the fallacy of confusing the causal origins of a belief with its justification").

[77] For a recent defense of the influence of Jefferson, see John A. Ragosta, *A Wall Between a Secular Government and a Religious People*, 26 ROGER WILLIAMS U.L. REV 545, 545–50 (2021).

[78] DRAKEMAN, *supra* note 9, at 158–62.

[79] For a treatment of the role of Roger Williams on the issue of disestablishment, see example, Bogus, *supra* note 13, at 276-282. *See generally* Marci A. Hamilton, *The Framers, Faith, and Tyranny*, 26 ROGER WILLIAMS U.L. REV. 495 (2021) (discussing the influence of Calvinists on the Constitution).

[80] Drakeman, *supra* note 53, at 159.

of Madison.[81] While Drakeman is somewhat critical of the justices, in his conclusion, he seems to compliment them, as he states:

> In *Everson*, the law office history of the establishment clause is, in at least one respect, the real thing—that is, history as it was being written by prominent historians in the 1940s, an era in which the separation of church and state was a central tenet in American liberal intellectuals' battles against all forms of authoritarianism, including the Roman Catholic Church.[82]

Historian John A. Ragosta defends the roles of Jefferson and Madison in a 2021 law review article.[83] He argues that "not only did Jefferson and Madison provide the intellectual and political foundation for the adoption of the Virginia Statute for Establishing Religious Freedom, but that statute became central to the development of the First Amendment."[84] He argues that from the end of the eighteenth century onwards no one was consulted more than Jefferson and Madison when people "grappled with the meaning of religious freedom and church-state relations."[85] Thus, he argues, there was nothing surprising or anomalous about the fact that a unanimous Supreme Court in *Reynolds v. United States* "found that Jefferson's and Madison's views . . . 'defined' American religious freedom and the meaning of the First Amendment."[86] As noted above, *Everson*'s unanimous adoption of Jefferson's metaphor was rooted in *Reynolds*.[87] There can be no question that Jefferson and Madison were important and influential Founding Fathers, and they, like a few others, had strong views on the separation of church and state.[88] They are, no doubt, an important part of the historical picture, but they are not the whole picture.[89] In the words of Kent Greenawalt, "the views of Jefferson and Madison failed to represent the broad range of positions that

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[81] *Id.* at 167.

[82] *Id.* at 168.

[83] *See* Ragosta, *supra* note 77, at 547–49. Ragosta notes that much of the critique of the influence of Jefferson began at the invitation of Justice Rehnquist in his dissent in *Wallace*. *Id.*; *see also* Wallace v. Jaffree, 472 U.S. 38, 98–99 (1984) (Rehnquist, J., dissenting).

[84] Ragosta, *supra* note 77, at 547–48.

[85] *Id.* at 548.

[86] *Id.* at 548–49 (footnote omitted). And again, it was the Virginia Statute, Jefferson's letter to the Danbury Baptists, and Madison's Memorial and Remonstrance Against Religious Assessments that were so central. *Id.*

[87] *Id.* at 545, 548–49.

[88] *See generally id.*

[89] As the historian John Reid stated,

> [T]o acknowledge that the doctrine rests on irrelevant history need not make it bad law. Just as decisions holding that "[t]he First Amendment has erected a wall between church and state" have become judicial precedents binding on lower courts, so has Jefferson's quotation been repeated so often it has assumed autonomous status as an example of forensic history. If it is not historically relevant as proof of the original meaning of the First Amendment, it enjoys a somewhat greater forensic legitimacy than some of the "history" currently being marshalled against it.

Reid, *supra* note 51, at 221 (footnotes omitted).

would have been aspects of an original understanding . . . ."[90] Given that seven states at the time of the Founding provided aid to religion and even more restricted office-holding to Christians, it is doubtful that all of those who voted to approve the Clause either in Congress or in the state conventions shared Jefferson and Madison's strict separationist view.[91]

V. CAN MORE CERTAINTY BE FOUND IN THE DEBATES IN CONGRESS?

While many scholars have scoured the historical record, they have not arrived at a consensus but rather numerous conflicting views regarding the meaning of the text and the views of the Founders and Framers of the text.[92] The search for a definitive and coherent view of the Clause in the thoughts, papers, and constitutional debates of our Founding Fathers is most likely a fool's errand or something of a wild goose chase.[93] One most likely needs to cherry-pick to arrive at a coherent view, as our Founders' views on the Clause were likely as varied as their religious beliefs.[94]

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[90] Kent Greenawalt, *Some Reflections on Fundamental Questions about the Original Understanding of the Establishment Clause, in* NO ESTABLISHMENT OF RELIGION: AMERICA'S ORIGINAL CONTRIBUTION TO RELIGIOUS LIBERTY 341, 351–52 (T. Jeremy Gunn & John Witte, Jr. eds., 2012). Note that Drakeman concludes that the historians relied on by Justice Black and Justice Rutledge were "producing highly respected, mainstream history, as history tended to be practiced in the era in which they were writing." DRAKEMAN, *supra*, note 9, at 147–48.

[91] *See* DRAKEMAN, *supra* note 9, at 250 (discussing ecclesiastical taxes in Virginia, South Carolina, Georgia, and New England states). Eleven of the thirteen states at the time of the founding restricted office holding to Christians, and most, not only excluded Muslims and Jews but also Catholics. *Id.* at 253 (citing THOMAS J. CURRY, THE FIRST FREEDOMS 221 (1986)).

[92] *See generally* DRAKEMAN, *supra* note 9.

[93] *See, e.g.*, Dreisbach, *supra* note 9, at 252 ("They may have deliberately settled on language vague in meaning and subject to multiple interpretations and, thus, acceptable to diverse constituencie. . . . Therefore, the search for a fixed, discernible original understanding of the First Amendment may be an impossible undertaking."). Drakeman's review and evaluation of the scholarly literature in light of the historical record (over 100 pages) led him to conclude that very little could be said regarding the meaning of the clause at the time. DRAKEMAN, *supra* note 9, at 228. Based on his research, there simply was no "common usage" of the term "establishment" at the time of the founding and further, "there was no reason that people needed to have a common understanding of the word 'establishment' to vote for (or against) the First Amendment, and the best description of all the available evidence is that they did not." *Id.* Thoughtful people disagreed on its meaning and he sees no reason to force the different uses of the term into a convenient common usage. *Id.* As he concludes the chapter, "the establishment clause represented, at most, broad, noncontroversial *language* on which a majority of the First Congress (and the ratifiers) could agree . . . ." *Id.* at 262.

[94] ALF J. MAPP, JR., THE FAITHS OF FATHERS: WHAT AMERICA'S FOUNDERS *REALLY* BELIEVED 2 (2003). That is, if they had much of a view on it at all. DONALD L. DRAKEMAN, CHURCH-STATE, CONSTITUTIONAL ISSUES 71 (1991). Note that there was no enumerated power for the federal government to establish a church. *See* U.S. CONST. art. I. Drakeman, in his earlier work, held the view that the Founding Era had a "lack of interest amounting virtually to apathy towards the establishment clause." DRAKEMAN, *supra*, at 71. Alf J. Mapp, Jr. notes that the religious attitudes of the Founding Fathers "were as varied as their political opinions." MAPP, *supra*, at 2. While many of the Founding Fathers were part of mainstream religious congregations, many were not. Gregg Frazer, *The Faith of the Founding Fathers*, MASTER'S UNIV. (Oct. 4, 2016), https://www.masters.edu/news/the-faith-of-the-founding-fathers.html. For example, while Washington was an Anglican, a Freemason, and did the Thanksgiving prayer, he also concluded a treaty with Tripoli that stated that "the government of the United States of America is not in any sense founded on the Christian religion . . . ." Treaty of Peace and Friendship between the United States of America and the Bey and Subjects of Tripoli of Barbary, art. 11, U.S.-Tripoli, Nov. 3, 1796, 8 Stat. 154. Jefferson refused to do the Thanksgiving prayer because he thought it

With that said, it is hard to know if catching the goose is impossible unless one tries. So, let us see if we can discover the original meaning of the Clause. One method for arriving at the original meaning of the text is to look to the original intent of the Framers; to do this one may look at the legislative history and debates in Congress concerning the text. Marion Tinling, in defense of his work on the subject, conjured the authority of William Blackstone, as he stated, "The fairest and most rational method to interpret the will of the legislator . . . is to explore his intentions at the time when the law was made."[95] Unfortunately, as Tinling demonstrates in his work, this is truly one of those areas where one can look out over the crowded cocktail party in search of one's friends.[96]

The truth of the matter is that the party was filled with friends and foes and those who did not appear to care all that much about the Clause.[97] To mix our metaphors, these geese are not all flying in the same direction, and most of them don't seem to care very much where they are going.

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was unconstitutional. Erin Blakemore, *Thomas Jefferson's Complicated Relationship with Thanksgiving*, HISTORY, https://www.history.com/news/thomas-jeffersons-complicated-relationship-with-thanksgiving (Nov. 18, 2019). Thomas Jefferson and Benjamin Franklin were deists, John Adams was Unitarian. *See, e.g.*, Carl T. Bogus, *Is this a Christian Nation?: An Introduction*, 26 ROGER WILLIAMS U. L. REV. 237, 257 (2021) ("Two, Franklin and Jefferson, expressly disavowed belief in the divinity of Jesus, and therefore cannot be classified as Christian. Adams may not be quite as clear but should probably also be classified as a non-Christian. Alexander Hamilton expressly said he believed in the divinity of Christ and therefore must be classified as Christian. The remaining two, George Washington and James Madison, cannot be definitively classified one way or the other.").

[95] Marion Tinling, *Thomas Lloyd's Reports of the First Federal Congress*, 18 WM & MARY Q. 519, 519–20 (1961). Unfortunately, this statement was taken out of context, for Blackstone never suggested that one look to legislative debates to understand the will of the legislature. The full quote from section 2 of his COMMENTARIES ON THE LAW OF ENGLAND is as follows:

> The fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law. Let us take a short view of them all.

1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 59 (William Carey Jones ed., 1916)

[96] Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). In *Conroy v, Aniskoff*, Justice Scalia described the use of legislative history using the analogy coined by Justice Leventhal, that it the "equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Id.* Justice Scalia famously criticized the approach, both here and in his other works, as being illegitimate. As he further stated in *Conroy*:

> The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators. As the Court said in 1844: "The law as it passed is the will of the majority of both houses, *and the only mode in which that will is spoken is in the act itself* . . . ." But not the least of the defects of legislative history is its indeterminacy. If one were to search for an interpretive technique that, *on the whole*, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history.

Id. (quoting Aldridge v. Williams, 44 U.S. 9, 24 (1844)). Notably, he also draws attention to the wasteful consequences of such an approach, even though, he argues elsewhere that consequentialist arguments are not appropriate for interpreting the Constitution. *Id.*

[97] LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 79 (1986).

Worse yet, we have very limited access to what took place at the party, and what we have is not very reliable.[98]

Take, for instance, James Madison's proposal. His proposed draft 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."[99] With regards to the establishment question, Madison's proposal was not as broad as the final text, for it only forbade the establishment of a national religion, not laws *respecting* an establishment.[100] Although we know what Madison brought to the party, we don't know for certain why his proposed amendment was rejected. His proposal went to both the House and the Senate.[101] While we have some clues as to what took place in the House, the Senate debates took place behind closed doors in secret, and there was no record taken of the debates.[102] Summaries of the House debates were written, but Madison himself complained that the notes gave "some idea of the discussion" but that they showed "the strongest evidences of mutilation & perversion, and of the illiteracy of the Editor."[103]

According to the Annals of Congress, the debate in the House that day began with a consideration of Article I, Section 9.[104] With the insertion of "no religion shall be established by law, nor shall the equal rights of conscience be infringed."[105] Only nine members of the House were reported as engaging in the debate on that day.[106] I will address them in the order they were reported. Mr. Sylvester feared that the proposed language might have the "tendency to abolish religion altogether."[107] Mr. Vining made the unintelligible suggestion that the "two members of the sentence"

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[98] *See*, *e.g.*, *id.* ("The debate was sometimes irrelevant, usually apathetic and unclear.").

[99] 1 ANNALS OF CONG. 451 (1789) (J. Gales ed., 1834) (James Madison's Resolution for Amendments to the Constitution on June 8, 1789). Natelson argues that this was an attempt to embody what he termed the "public bargain" or the "Gentleman's Agreement" that would allow for the Constitution's ratification. Natelson, *supra* note 51, at 136.

[100] U.S. CONST. art. I.

[101] Stephanie H. Barclay et al., *The Original Meaning of the Establishment Clause: A Corpus Linguistics Analysis*. 61 ARIZ. L. REV. 505, 513 (2019).

[102] *See* Tinling, *supra* note 95, at 520 ("The Senate sat with closed doors; aside from letters, memoranda, and journals of members, we have no record of its debates in the first Congress.").

[103] *Id.* (citing THE FEDERALIST NO. 58 (James Madison)). As Tinling notes, these criticisms applied to all reporters of the First Congress. *Id.* Questions regarding the accuracy of the various reporters and newspaper reports were often discussed in the House, and at one point a resolution was put forth to the effect that "the publishers of the debates in the *Congressional Register* and the New York newspapers had misrepresented them so flagrantly that the House should no longer give sanction to such reporting." *Id.* (citing Lloyd, *Cong. Reg.*, II, 442–43). Interestingly, Tinling notes that while Lloyd reported that specific blunders and misconceptions were pointed out in the debate, he also reported not taking down those specifics. *Id.*

[104] 1 ANNALS OF CONG. 757 (1789) (J. Gales ed., 1834).

[105] *Id.*

[106] *Id.* at 757–59.

[107] *Id.* at 757. His full statement as reported was, "Mr. Vining suggested the propriety of transposing the two members of the sentence." *Id.*

be "transpos[ed]."[108] Mr. Sherman thought the provision was unnecessary since Congress was given no power "to make religious establishments . . . ."[109] Mr. Carroll supported the provision noting that "the rights of conscience are, in their nature, of [a] peculiar delicacy, and will little bear the gentlest touch of governmental hand . . . ."[110] He also noted that "many sects" did not believe that they were "well secured" under the Constitution as it stood prior to amendment.[111] Responding to Mr. Sherman, Mr. Madison noted that some of the state Conventions feared that the Necessary and Proper Clause of Article I might give the Federal Government the power to enact such laws.[112] He interpreted the Religion Clauses to mean that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[113] Mr. Huntington agreed with the fears of Mr. Sylvester above.[114] He further noted that ministers and their "meeting-houses" were supported through contributions under by-laws, and as such, "[i]f an action was brought before a Federal Court on any of these cases, the person who neglected to perform his engagements could not be compelled to do it; for a support of ministers, or building of places of worship might be construed into a religious establishment."[115] He poked fun at the effects of Rhode Island's Establishment Clause, and thus, while he supported the freedom of conscience provision, he did not support the establishment provision.[116] Mr. Madison then came back and proposed that the word "national" be inserted before religion.[117] In support of the view, he stated that "[h]e believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform."[118] The insertion of the word "national" would point the Amendment in this direction and, by implication, away from the interpretation and concern of Mr. Huntington that the Clause could extend to state establishments.[119] But Mr. Livermore objected and proposed a more generous textual amendment which is arguably closer to the language of the final Amendment, namely, the "Congress shall make no laws touching religion, or infringing the rights of conscience."[120] Mr. Gerry also opposed inserting the term "national," for it implied that there was a "national"

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[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.* at 757–58.
[112] *Id.* at 758.
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.* He also did not want to patronize those who professed no religion at all. *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.* at 758–59.
[120] *Id.* at 759. He also noted that he did not want to dwell on the subject. *Id.*

government and not a "federal" government.[121] Oddly, Mr. Madison reportedly withdrew his proposal and then made the point that the insertion of the word "national" before "religion" did not imply that there was a national government.[122] They then voted on Mr. Livermore's motion, which passed thirty-one to twenty.[123] The Amendment came up again with the other amendments on August 20, 1789.[124] Without any arguments provided for the change, Mr. Ames proposed that the text now read, "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."[125] No debate on the alteration was recorded.[126] The record simply states that it was adopted and agreed to.[127]

What might be drawn from this? We do not know why the majority voted in favor of Livermore's language, given the absence of any stated views on the exact language and the fact that less than one-fourth of the representatives spoke on the subject at all. One might presume that the insertion of the word "Congress" accomplished the same goal as inserting the term "national" without the accompanying drawbacks. We know even less about why everyone changed their minds and voted for the amended establishment language, which changed "Congress shall make no laws touching religion" to "Congress shall make no law establishing religion . . . ."[128] The record does not give one much confidence that a majority of the House cared about the difference.[129] This does support the view that the main concern was to prevent overreach by the Federal Government, but it is inconclusive as to whether the majority really preferred the more limited language of prohibiting laws that established religion over the broader and more restrictive language of congressional laws touching on religion.

The version in the Senate went through several changes, but as noted above, no debate was recorded.[130] The version that came out of the Senate

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[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.* at 795.
[125] *Id.* at 796.
[126] *Id.* One might note that a typical law faculty meeting and vote on most any topic of importance or controversy generally elicits more participation and considerably more passionate discussion than is evidenced in the House debate on the Religion Clauses.
[127] *Id.* The next paragraph took up an amendment which would exempt conscientious objectors from the requirement that they take up arms. *Id.* at 796. Interestingly, Mr. Scott objected to the clause, not because he wanted to deprive scrupulous sects of the exemption, but because he did not want those who are of no religion to get the exemption. *Id.* He noted the observation that "religion is on the decline [and] if so, the argument is more strong in my favor, for when the time comes that religion shall be discarded, the generality of persons will have recourse to these pretexts to get excused from bearing arms." *Id.* Mr. Boudinot argued strongly in favor of the exemption. *Id.* The reporter then notes that "[s]ome further desultory conversation arose . . . ." *Id.*
[128] *Id.* at 759, 796.
[129] *Id.* at 796.
[130] *See also* Tinling, *supra* note 95, at 520.

read: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble and petition the Government for the redress of grievances."[131] But before getting here, the Senate rejected three drafts that explicitly only banned the preference of one religious sect over the other.[132]

In the end, the conference committee of the two houses returned the final version, which replaced the limited language with the broader language we now have, namely, "Congress shall make no law *respecting an establishment of religion*."[133] Douglas Laycock points out that:

> The establishment clause actually adopted is one of the broadest versions considered by either House. It forbids not only establishments, but also any law respecting or relating to an establishment. Most important, it forbids any law respecting an establishment of "religion." It does not say "a religion," "a national religion," "one sect or society," or "any particular denomination of religion." It is religion generically that may not be established."[134]

It is fairly well-settled that the state debates leading to ratification were "scanty" and not very enlightening.[135] It is commonly accepted that the states were mainly concerned with federal overreach, and so they most likely preferred the broader, and thus the more restrictive, language of the final draft than the previous House or Senate drafts. From the beginning, Anti-Federalists were concerned that a national/federal established religion would undermine the freedom of conscience.[136]

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[131] *The Two Religion Clauses*, TEACHING AM. HIST., https://teachingamericanhistory.org/resource/themes/religion-clauses/ (last visited June 13, 2022).

[132] Douglas Laycock, "*Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 879–81 (1986). Laycock argues that since the Senate rejected a version that would have allowed non-preferential aid to religion, then non-preferential aid must be forbidden by the clause. *Id.*

[133] U.S. CONST. amend. I. (emphasis added).

[134] *Id.* at 881.

[135] Natelson, *supra* note 51, at 77 ("The records of state ratification of the Bill of Rights are scanty.").

[136] Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 398–404 (2002). Feldman argues that

> [w]hen 'establishment' was prohibited, the Framers meant at least that such preferential arrangements violated liberty of conscience and were therefore unacceptable. Whether nonpreferential systems that purported to allow exemptions for dissenters violated liberty of conscience was a subject of debate; even if we assume that Congress did not intend to bar such systems at the federal level (the answer seems shrouded in uncertainty), we still know that the Framers agreed on the principle of liberty of conscience.

Id. at 405.

VI. IS THERE MORE TO BE FOUND ELSEWHERE IN THE HISTORICAL RECORD?

Robert Natelson concedes that the debate over the Bill of Rights in the First Congress appears inconclusive.[137] But for him, this is only when it is not read in the right context.[138] According to Natelson, the too oft reliance on the views of Jefferson and Madison and their arguments made during the Virginia disestablishment battle are not the right place to look.[139] For Natelson, the right place to look is in the deal that Federalists had to make with moderate Anti-Federalists to get the Constitution ratified.[140] Rather than look to the few actors that debated the Amendment in the House and the views of prominent Founding Fathers on the subject like Jefferson and Madison, the answer is said to lie in the articles, pamphlets, and partial transcripts of the ratifying conventions written by hundreds of actors.[141]

Natelson argues that "if the meaning of a writing (here, the Establishment Clause) is uncertain, one way to resolve the uncertainty may be to examine the transactions that produced the writing."[142] According to Natelson, the First Amendment was written because of the demands of political reality, which meant that in order to get the Constitution ratified, Federalists had to agree with Anti-Federalists to make the Amendments.[143] There is, however, something of a disconnect between the "deal" made, which he refers to as the "Gentleman's Agreement," and his conclusions regarding the Establishment Clause.[144] His enumeration of the Agreement does not mention religion or establishment issues at all.[145] Natelson details three principle kinds of concessions made in the Agreement, namely: (1) providing authoritative interpretations of worrisome parts of the unamended Constitution (none having anything to do with religion); (2) reassurances that states would retain wide and exclusive jurisdiction over certain matters (again no mention of religion); and if these were not sufficient,

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[137] Natelson, *supra* note 51, at 77. "[S]everal have pronounced the historical record hopelessly confused." *Id.* at 76–77 (citing JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1411 (7th ed. 2004)). In their 8th edition, the authors note that "[t]here is a seemingly irresistible impulse to appeal to history when analyzing issues under the religion clauses. This tendency is unfortunate because there is no clear history as to the meaning of the clauses." JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1548 (8th ed. 2010).

[138] Natelson, *supra* note 51, at 77.

[139] *Id.* at 77–78.

[140] *Id.* at 79.

[141] *Id.*

[142] *Id.* at 80 (footnote omitted). He goes on to point out that "[y]et in the case of the Gentlemen's Agreement leading to the Establishment Clause, commentators have tended not to do so." *Id.*

[143] *Id.* at 79.

[144] *Id.* at 79–80.

[145] *Id.* at 82–83. Natelson details three principal kinds of concessions, namely: (1) providing authoritative interpretations of worrisome parts of the unamended Constitution (none having anything to do with religion); (2) reassurances that states would retain wide and exclusive jurisdiction over certain matters (again no mention of religion); and (3) if the terms they agreed to were not sufficient, the Constitution could be amended after ratification. *Id.*

(3) that there would be amendments after the Constitution was ratified.[146] Natelson then describes Madison's proposed amendments as fulfilling that bargain.[147]

Thus, Natelson views Madison's proposed Amendment that "[t]he 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" as merely fulfilling this Agreement.[148] He quotes a letter from Senator Butler to James Iredell, which states:

> A few *milk-and-water* amendments have been proposed by Mr. M[adison]., such as liberty of conscience, a free press, and one or two general things already well secured. I suppose it was done to keep his promise with his constituents, to move for alterations; but, if I am not greatly mistaken, he is not hearty in the cause of amendments.[149]

He also quotes a letter from Tench Coxe to Madison applauding his proposed amendments as being pleasing to "the most ardent [and] irritable among our friends" and as not arousing any "unfavorable animadversion" from the opposition.[150]

This does not inspire much confidence regarding the considered judgments of the Framers or their constituents with regards to the Establishment Clause's meaning. The "Agreement" itself was exceptionally vague regarding the religion clauses. It was, at best, an empty vessel. If Madison's proposal satisfied the Agreement, then presumably, the opposition/Anti-Federalists would have been okay with a provision that protected freedom of conscience in addition to the free exercise of religion. Freedom of conscience goes beyond the free exercise of religion and would

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[146] *See id.* at 82–83 (mentioning the Ex Post Facto Clause and the General Welfare Clause, the regulation of real estate within state boundaries, governance of agriculture and manufacturing, adjudication of matters between citizens of the same state, and care of the poor).

[147] *Id.* at 85–86. Natelson excepts Madison's recommendation to limit state infringements on individual liberties because, according to Natelson, there was no public support for the view. *Id.* at 85. He does not, however, except Madison's proposed religion amendment. *Id.* at 85–86.

[148] 1 ANNALS OF CONG. 451 (1789) (J. Gales ed., 1834) (James Madison's Resolution for Amendments to the Constitution on June 8, 1789.

[149] Natelson, *supra* note 51, at 85 n.67 (quoting Letter from Pierce Butler to James Iredell (Aug. 11, 1789), *in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 274 (Helen E. Veit et al. eds., 1991) [hereinafter CREATING THE BILL OF RIGHTS)).

[150] *Id.* at 86 n.73. As he stated:

> In short the most ardent & irritable among our friends are well pleased with them. On the part of the opposition, I do not observe any unfavorable animadversion. Those who are honest are well pleased at the footing on which the press, liberty of conscience, original right & power, trial by jury &ca. are rested. . . . I feel very great satisfaction in being able to assure you generally that the proposed amendments will greatly tend to promote harmony among the late contending parties and a general confidence in the patriotism of Congress.

Id. (quoting Letter from Tench Coxe to James Madison (June 18, 1789), *in* CREATING THE BILL OF RIGHTS, *supra* note 149, at 252).

include the right to not believe. If Madison's attempted amendment was seen as fulfilling the bargain, then it is difficult to see how Natelson concludes:

> We have seen that by the terms of the Gentlemen's Agreement, the policy against establishment was designed to further the policy of free exercise, and that free exercise extended to all theists, but only to theists. We have seen further that government service was to be open to all theists, but only to theists. It is logical to deduce, therefore, that the Establishment Clause was designed to protect all theists, but only theists, and that the Clause permitted government to support all faiths on a non-preferential basis. This deduction is supported by a plethora of historical evidence.[151]

But further, Natelson gets here in the same way that many who search the historical record do. They fill up the vessel, here the Gentleman's Agreement, with what they perceive to be helpful in the historical record.[152] But finding a few people who make somewhat vague comments respecting the Free Exercise Clause, or freedom of conscience, is not a solid foundation for claims as to the meaning of the Establishment Clause.[153] Natelson relies almost exclusively on the views of Oliver Ellsworth and John Locke for the proposition that the Founders' views on the Free Exercise Clause included freedom of conscience for theists but not for atheists.[154] While Ellsworth was an important Founding Father, and the views of John Locke were very influential on some of the Founding Fathers, Locke's comments regarding toleration were not directly on point. If historians question the relevance of Jefferson's views regarding the original meaning of the Establishment Clause, then Locke is at least once more removed.[155] Locke—who was not an American, much less a Founding Father—is quoted as saying:

> Lastly, those are not at all to be tolerated who deny the being of a God. Promises, covenants, and oaths, which

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[151] *Id.* at 112. This echoes the views of Justice Scalia, who stated, "the Establishment Clause . . . permits the disregard of devout atheists." McCreary Cnty. v. Am. C.L. Union of Ky., 545 U.S. 844, 893 (2005) (Scalia, J. with Rehnquist, CJ. & Thomas, J., dissenting).

[152] For example, Natelson focuses almost exclusively on the views of Ellsworth on Free Exercise and his view that government could punish Atheists. Natelson, *supra* note 51, at 97–101 (citing 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 150, 450, 482–83 (Merrill Jensen et al. eds., 1976)).

[153] Ellsworth is quoted as saying:

> But while I assert the right of religious liberty; I would not deny that the civil power has a right, in some cases, to interfere in matters of religion. It has a right to prohibit and punish gross immoralities and impieties; because the open practice of these is of evil example and public detriment. For this reason, *I heartily approve of our laws against drunkenness, profane swearing, blasphemy, and professed atheism*.

Id. at 99 (quoting 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 152, at 451)

[154] *Id.* at 97–101.

[155] *See* Reid, *supra* note 51, at 220–21 (noting Jefferson's "relevance" in relation to the separation of church and state).

> are the bonds of human society, can have no hold upon an atheist. The taking away of God, though but even in thought, dissolves all; besides also, those that by their atheism undermine and destroy all religion, can have no pretence [*sic*] of religion whereupon to challenge the privilege of a toleration.[156]

Unfortunately, Natelson fails to note or realize that Locke also did not extend toleration to Catholics. As Locke stated:

> Since men usually take up their religion in gross, and assume to themselves the opinions of their party all at once in a bundle, it often happens, that they mix with their religious worship, and speculative opinions, other doctrines absolutely destructive to the society wherein they live, as is evident in the Roman Catholics that are subjects of any prince but the pope. These therefore blending such opinions with their religion, reverencing them as fundamental truths, and submitting to them as articles of their faith, ought not to be tolerated by the magistrate in the exercise of their religion unless he can be secured, that he can allow one part, without the spreading of the other, and that the propagation of these dangerous opinions may be separated from their religious worship, which I suppose is very hard to be done.[157]

Thus, if the Framers' views of the religion clauses track the views of Locke, then free exercise did not extend to all theists but only to Protestant Christians, and by his logic, the Establishment Clause also did not run to all theists, not even to all Christians.

That still leaves the views of Ellsworth, but as noted, those views conflict with those of Jefferson and Madison.[158] Further, as Douglas Laycock reminds us, both Maryland and Virginia rejected providing non-preferential financial aid, and although some states in New England provided financial aid to more than one Christian sect, these were "preferential in practice and

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[156] Natelson, *supra* note 51, at 101 (quoting JOHN LOCKE, TREATISE ON CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION (Charles L. Sherman ed., 1965) (1689)).

[157] JOHN LOCKE, *An Essay Concerning Toleration*, *in* JOHN LOCKE: A LETTER CONCERNING TOLERATION AND OTHER WRITINGS 105, 117–18 (Mark Goldie ed., 2010) (1667) (footnote omitted); *see* also J.C. Walmsley & Felix Waldman, *John Locke and the Toleration of Catholics: A New Manuscript*, 62 HIST. J. 1093, 1094 (2019) ("Locke's position would evolve to tolerate every religious sect on the basis of their speculative beliefs and worship, but consistently except Catholics for their seditious articles of faith: the pope's power to dissolve oaths, to legislate infallibly, and to depose foreign rulers as excommunicates or heretics. The manuscript below reveals that Locke reached this position only after he had addressed a number of arguments in favour of Catholic toleration."); JEFFREY R. COLLINS, IN THE SHADOW OF LEVIATHAN: JOHN LOCKE AND THE POLITICS OF CONSCIENCE 271–314 (David Armitage et al. eds., 2020) (refuting claims that Locke softened his position on the intolerability of Catholics by appealing to a 'loyalist', oath-taking minority tradition and demonstrating Locke's lifelong refusal to countenance such Gallican—or, in the English context, 'Blackloist'—solutions to the Catholic question).

[158] *See supra* notes 147–53 and accompanying text.

were the source of bitter religious strife."[159] If this is coupled with the Senate drafting history, which rejected three explicitly non-preferential drafts of the Clause, then Natelson's conclusions are woefully under-supported.

Drakeman, in *Church, State, and Original Intent*, concludes his search for the historical high ground as to the original meaning of the Establishment Clause, with the view that it does not provide "any recipe for the future of church-state relations."[160] Based on his research, there simply was no "common usage" of the term "establishment" at the time of the Founding.[161] In essence, this means they left us with a relatively empty vessel.[162] But why would they do that? Why leave something so important so unsettled? As Drakeman argues, they did not need to agree on what the text meant, "there was no reason that people needed to have a common understanding of the word 'establishment' to vote for (or against) the First Amendment, and the best description of all the available evidence is that they did not."[163] His review of the debates in the ratifying conventions and the First Congress only establishes that a few people expressed concern that Congress might create a national religion.[164] The Clause clearly succeeds in prohibiting this, but as he argues, "there is no body of evidence that supports any more detailed sense of what the language meant to the people who voted for it or to the American public who received it."[165]

Thus, Drakeman finds that there is no "originalist" support for a number of more detailed views of the Establishment Clause: whether it be the view that non-preferential economic support of religion was acceptable while preferential support was not, the view that the Establishment Clause embodies a non-coercion consensus, or even the view that the Establishment Clause was meant to prohibit the Federal Government from interfering with state establishments.[166]

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[159] Laycock, *supra* note 132, at 878.

[160] DRAKEMAN, *supra* note 9, at 262.

[161] *Id.* at 228.

[162] To be clear, Drakeman does not argue that the vessel is completely empty or that the historical search ends with indeterminacy. *Id.* at 342–43. Rather, he argues that the historical record supports the limited view that the Clause was meant to forbid the establishment of a national religion. *Id.* at 342. Drakeman confesses that in his earlier work, he took the view that the original intentions were "unknowable." *Id.* at 343 n.24. As he stated in earlier work,

> In fact, all of these suggestions about how to interpret the establishment clause based on the framers' intentions are just short of complete speculation because they are based solely on the extremely sparse and highly questionable historical records. The records simply contain too little evidence. To the extent that we can broadly read the sense of the secondhand historical documents, they most clearly show a lack of interest amounting virtually to apathy towards the establishment clause.

DRAKEMAN, *supra* note 94, at 71.

[163] DRAKEMAN, *supra* note 9, at 228.

[164] *Id.* at 262.

[165] *Id.* at 260.

[166] *Id.* at 229–58, 261 (discussing non-preferentialism at 249-58, anti-coercion at 261 n.197, and enhanced-federalism at 229-49).

Drakeman debunks the idea that non-preferential financial support of religion was somehow acceptable while preferential support of religion was thought to be improper. Catholics were often not thought of or treated as "Christians," and eleven of the thirteen original states limited office holders to "Christians."[167] As Drakemen argues:

> [G]eneral assessments in effect at the time of the Bill of Rights were intentionally and explicitly for the benefit of Protestants, . . . in most cases, they existed primarily for the benefit of the demographically dominant denomination. Whether genuinely non-preferential financial support for religion in general would have constituted an establishment in the minds of Americans in the Founding Era is an interesting but entirely hypothetical question since it would have been unthinkable politically, socially, and religiously to provide tax support for Roman Catholicism in New England or for Judaism or Islam anywhere in the new nation, let alone government funding for all of the forms of religiosity found in the country at the time, including Native American religions, slave religions, witchcraft, Shakerism, and other manifestations of non-mainstream religiosity.[168]

Thus, Natelson's argument that the founding generation came to adopt a non-preferentialist view of the Establishment Clause is true if what we mean by non-preferentialism is that one can prefer Protestants to Catholics, Jews, Native Americans, slaves, Shakers, and those who practiced witchcraft. His view that people thought of it as protecting theists, but not atheists and agnostics, is again supported if, by-in-large, Catholics, Jews, and other non-Protestants are not viewed as theists.[169] From the perspective of the Protestant majority, preferences for Protestants or "Christians" in general would not offend the Establishment Clause.[170] Did the Catholics, Jews, etc.,

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[167] *Id.* at 253.

[168] *Id.* at 255–56. For the view that in the six states that provided state subsidies for multiple religious organization were non-preferential, see LEONARD W. LEVY, JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 201–02 (1972). Note that Levy describes these practices as "multiple establishments." *Id.* In other words, his work does not support the view that these non-preferential subsidies were not considered establishments at the time of the founding, rather the practice of state aid of religion, even if non-preferential, was considered an establishment practice at the time of the founding.

[169] Natelson, *supra* note 51, at 138. Drakeman notes that many ministers viewed Catholics as having succumbed to the prince of darkness. DRAKEMAN, *supra* note 9, at 251 (citing CHARLES P. HANSON, NECESSARY VIRTUE: THE PRAGMATIC ORIGINS OF RELIGIOUS LIBERTY IN NEW ENGLAND 9 (1998)).

[170] *Id.* at 256. There is some dispute as to whether a majority of people during the Founding Era were actually practicing religion. *See id.* at 253–54 (citing Jon Butler, *Why Revolutionary America Wasn't a 'Christian Nation,' in* RELIGION AND THE NEW REPUBLIC 187, 191 (James H. Hutson eds., 1999) (arguing that less than 20% were practicing); Patricia U. Bonami & Peter R. Eisenstadt, *Church Adherence in the Eighteenth Century British American Colonies*, 39 WM & MARY Q. 246, 246–86 (1982) (arguing that 80% were church adherents)).

as well as atheists and agnostics, see it the same way? We know that Baptists opposed the government's support of religion.[171] While some Catholics supported non-preferentialism in theory, other prominent Catholics supported a strict separationist view of the Clause.[172] If this is where originalism takes us, then it must be rejected as a guide to current and future church-state doctrine. Surely no member of the Catholic-dominated Supreme Court would endorse what appears to be the dominant "original" understanding, namely, that Catholics were not really Christians and that they, along with Jews, Muslims, and other theists, could be discriminated against when it comes to federal funding.

Drakeman also finds no support for the "anti-coercion" view of the Establishment Clause in the historical record.[173] He criticizes the view of Noah Feldman, who writes, "By the time of the American Revolution, it would have been difficult to find any American who disagreed with the proposition that every person was entitled to liberty of conscience and that no government could legitimately coerce people in matters of religion."[174] Drakeman argues that this could only be true if "'people' means solely Caucasian Protestants."[175] Interestingly, Drakeman reports that a study

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[171] *See, e.g.*, Charles McDaniel, *The Decline of the Separation Principle in the Baptist Tradition of Religious Liberty*, 50 J. CHURCH & ST. 413, 416–17 (2008) (stating that Baptists were known for their consistent strict separationist views, be it in the views of Roger Williams, John Leland, or Isaac Backus). Remember, Jefferson's famous phrase "wall of separation between Church & State" was in an 1802 letter in response to a letter he received from the Danbury Baptists who were both congratulating him on his election victory and relaying their concerns over their own persecution. Letter from Thomas Jefferson to the Comm. Danbury Baptists Ass'n (Jan. 1, 1802) (on file at https://www.loc.gov/loc/lcib/9806/danpre.html) ("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 & State."). For the view that Baptists were not seeking formal separation of church and state but merely sought to maintain the distinction between civil and spiritual office, see HAMBURGER, *supra* note 52, at 35.

[172] Carey, *supra* note 52, at 337–38. As Carey writes, "Some, like the Maryland Carrolls, saw in the non-establishment clause a restriction upon the government's preferential support for one religion. Others, like John England, saw in it an almost total restriction upon the government's support for any religion." *Id.* at 337. As he further notes, "Although [the Carrolls] accepted Maryland's constitutional preference for Christianity, they did not consider this an attempt to establish religion. It did not seem to bother them that the constitution restricted the civil rights of Jews." *Id.* (footnote omitted). Note that in Carroll's writing he indicates that

> Catholic citizens joined together with Presbyterians, Methodists, Quakers, and Baptists to oppose a minister's salary bill that would have activated the legislature's discretionary power [to provide non-preferential support for religion]. They were unwilling in this case even to accept a non-preferential approach to state aid to religion because they believed the bill would in fact give the Protestant Episcopal church a "predominant and irresistible influence."

Id. at 338 (quoting Letter from John Carroll to Charles Plowden (Feb. 27, 1785)). As he tells us, Bishop John England "printed the First Amendment on the masthead of his diocesan newspaper, the *United States Catholic Miscellany*, and generally understood it to put severe restrictions upon governmental aid to any and all religions." *Id.* at 339.

[173] DRAKEMAN, *supra* note 9, at 261.

[174] *Id.* at 261 n.197 (quoting NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM AND WHAT WE SHOULD DO ABOUT IT 42 (2005)).

[175] *Id.*

of indictments in Virginia between 1720 and 1750, revealed that missing church was one of the most commonly indicted offenses.[176]

As Drakeman concludes, "the establishment clause does not reflect . . . 'broad substantive values upon which a majority of early Americans could agree.'"[177] More specifically, unlike Green, who "asserts that the drafters and ratifiers had 'common, broad ideals that found their way into the language of the First Amendment: freedom of conscience, no compelled support of religion; no delegation of government authority to religious institutions; and equal treatment of all sects,'" Drakeman finds no evidence in the historical record to support this view.[178] The problem, according to Drakeman, is that these do not represent shared values at the time of the drafting, given the practice of compelling Catholics to support Protestant churches in Massachusetts and laws that banned Jewish people from holding office in many states.[179] Further, he argues that there simply is no evidence that the drafters or ratifiers were attempting to "imbue the constitutional language with any of these values . . . ."[180] After three hundred and forty-five pages of careful argument, Drakeman can only find support in the historical record for the view that the Clause was designed to prohibit a national religion.[181]

VII. ORIGINAL PUBLIC MEANING AND THE PROMISE OF META-DATA?

Again, this leaves our vessel relatively empty. But what if we try a different approach? What if we adopt a "new originalist" approach, as advocated by the late Justice Scalia and numerous contemporary academics, and try to identify the original public meaning of the Clause?[182]

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[176] *Id.* at 254 (citing Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2145 (2003)) (the most common in eleven of twenty-two counties and the second most common in seven others).

[177] *Id.* at 260-61 (quoting Steven K. Green, *Federalism and the Establishment Clause: A Reassessment*, 38 CREIGHTON L. REV. 761, 761, 767 (2005)).

[178] *Id.* at 261 (quoting Green, *supra* note 177, at 761, 767).

[179] *Id.*

[180] *Id.*

[181] *See generally id.*

[182] Leslie F. Goldstein, *Original Meaning, Precedent, and Popular Sovereignty?:* Whittington et al. v. Lincoln et al., 82 FORDHAM L. REV. 783, 784 n.6 (2013) ("The new originalism makes a point of dropping the older—circa 1970s to 1980s—emphasis on original (perhaps private) intention of the Framers or ratifiers, and turning toward the original public meaning of the constitutional text or original public understanding of the ratifying generation."). According to Lawrence Solum, the origins of "new originalism" can be traced to when Justice Scalia urged originalists to "change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning." Solum, *supra* note 5, at 463 (quoting Antonin Scalia, U.S. Supreme Court Justice, Address Before the Attorney General's Conference on Economic Liberties (June 14, 1986), *reprinted in*, U.S. DEP'T OF JUST., OFF. OF LEGAL POL'Y, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK app. C at 101, 106 (1987)). The academic origins of "new originalism" can be found in the works of H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Gary Lawson, *Legal Theory: Proving the Law.*, 86 NW. U.L. REV. 859, 874–75 (1992); and Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L. J. 541, 553 (1994). That tradition has continued with a wide range of

Given this suggestion, one may fairly—but mistakenly—believe that our journey is near its end, for Justice Scalia's view on the Establishment Clause and the *Lemon* Test are clear. He famously compared it to a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried . . . ."[183] As early as 1987 in *Edwards v. Aguillard*, he argued that the Court should abandon the "secular purpose" prong of the *Lemon* Test, although he provided no originalist argument in the case.[184] In *Lee v. Weisman*, he dissented from the view that "state-induced 'peer-pressure' coercion" offends the Establishment Clause.[185] Rather, only "coercion of religious orthodoxy and of financial support by force of law and threat of penalty" would rise to that level, in his opinion.[186] While he saw no problem with the endorsement of religion generally and with privileging believers over non-believers, he conceded that our constitutional tradition would rule out of order cases "where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)."[187] In his dissent in *McCreary County v. American Civil Liberty Union*, however, he did not view the King James version of the Ten Commandments as sectarian even though there are many different versions of the Commandments held by different religions and denominations, and of course, many religions that do not recognize or endorse the Ten Commandments.[188] In *Lee v. Weisman*, he claimed to take an originalist approach, but his actual arguments in the case had little to do with the substantive original public meaning of the Clause.[189] There is no historical reference to what anyone, much less what most people thought the Clause meant at the time of the Founding. Rather, his argument in *Lee*, as in the later case of *McCreary*, is that the existence of historical practices, such as prayers at public ceremonies, or the existence of religious figures and abstract depictions of the Ten Commandments at the Supreme Court, are to be taken as evidence that such practices do not offend the Clause.[190]

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scholars. *See generally* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004); Solum, *supra* note 5, at 463; JACK M. BALKIN, LIVING ORIGINALISM (2011).

[183] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398–99 (1993) (Scalia, J., concurring).

[184] Edwards v. Aguillard, 482 U.S. 578, 636, 640 (1987) (Scalia, J., dissenting).

[185] Lee v. Weisman, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting).

[186] *Id.*

[187] *Id.* at 641.

[188] McCreary Cnty. v. Am. C.L. Union of Ky., 545 U.S. 844, 909 (Scalia, J., with Rehnquist, CJ., & Thomas, J., dissenting). It was sufficient for Justice Scalia that the Ten Commandments were generally accepted by Judaism, Christianity, and Islam. Further, because he did not think the sectarian disputes were widely known, and because he did know of them, he did not view this as a sectarian. *Id.*

[189] *See generally Lee*, 505 U.S. 577, 631–46 (Scalia, J., dissenting).

[190] *Id.* at 632–35; *McCreary*, 545 U.S. at 885–89 (Scalia, J., dissenting). Note the abstract artistic rendering of the Ten Commandments at the Supreme Court does not contain the text of the Commandments and it is set within the context of other depictions of lawgiving. Note also that the Supreme Court

Unfortunately, appeals to our history and tradition, our practices at the time of the Founding and beyond, tell us very little about whether those practices were consistent or inconsistent with the original understanding of the Clause.[191] But further, as demonstrated above in Section VI, the practice was not to embrace theism over atheism, or even as Justice Scalia's position in *McCreary* seems to suggest, "people of the book" over those from other religious traditions.[192] Rather, in most cases, the practice and tradition was to embrace and privilege Protestants over Catholics, Jews, Muslims, and Unitarians, not to mention Native Americans and slaves.[193]

Although Justice Scalia, in practice, has let us down in our quest for the original understanding of the Clause, we can still follow his spirit. Justice Scalia himself acknowledged the difficulty of the task of sorting through the historical record.[194] Today, we have some tools that did not exist during Justice Scalia's lifetime, and there are some who think these tools might help us discover the text's original meaning. So, what if, unlike Justice Scalia, we broaden our scope and conduct a search for that meaning that is systematic and thorough, with a technique borrowed from linguistics known as "corpus linguistics" that searches through meta-data. Might there

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Courthouse was not built until the 1930s and so it is not clear that traditions that might have begun at that time regarding the architectural design of the building are at all relevant to original understanding of the Constitution. The Supreme Court did not have its own building prior to the 1930s but met in various rooms in the Capital building. *See, e.g.*, *Homes of the United States Supreme Court*, SUPREME COURT HISTORICAL SOCIETY, https://supremecourthistory.org/homes-of-the-supreme-court/ (last visited July 3, 2022).

[191] *See* Koppelman, *supra* note 15, at 733–40 (writing highly critically of Justice Scalia's purported originalist approach to the Establishment Clause). As Koppelman notes, Justice Scalia's originalist argument boils down to: "I have no idea what this provision means. But whatever it means, it cannot prohibit this, because the Framers approved of it." *Id.* at 737; *see also* Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 13–14 (2006) ("Justice Scalia is simply not an originalist. Whatever virtues he attributes to originalism, he leaves himself not one but three different routes by which to escape adhering to the original meaning of the text. These are more than enough to allow him, or any judge, to reach any result he wishes. Where originalism gives him the results he wants, he can embrace originalism. Where it does not, he can embrace precedent that will. Where friendly precedent is unavailing, he can assert the nonjusticiability of clauses that yield results to which he is opposed. And where all else fails, he can simply punt, perhaps citing the history of traditionally-accepted practices of which he approves.").

[192] *See* discussion *supra* Section IV.ii.

[193] *See* discussion *supra* Section V.

[194] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989) (Justice Scalia acknowledged the difficulties of applying originalism correctly in his Taft Lecture.).

> [I]t is often exceedingly difficult to plumb the original understanding of an ancient text. Properly done, the task requires the consideration of an enormous mass of material—in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states. Even beyond that, it requires an evaluation of the reliability of that material—many of the reports of the ratifying debates, for example, are thought to be quite unreliable. And further still, it requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day. It is, in short, a task sometimes better suited to the historian than the lawyer.

Id. at 856–57.

be light at the end of this rather long and dark tunnel regarding the original meaning of the Clause?

The corpus linguistics method searches large collections of digitized sources from the given period to help understand the use and meaning of given words or phrases.[195] Stephanie H. Barclay, Brady Earley, and Annika Boone were the first to use this approach to understand the original meaning of the Establishment Clause.[196] While they do not claim to conclusively resolve the historical debate over the original meaning of the Clause, they do claim to provide "probable answers" using new historical sources.[197] Their approach is to search their databases containing material from the period to see how frequently or infrequently certain coded characteristics can be found in connection with the "establishment of religion."[198] Although they do not claim that their findings are conclusive, they are extensive and, if followed, would have a significant impact on our understanding of the Clause and of its application to future cases.[199] In their findings, "by far the most common issue discussed in the context of an establishment of religion involved legal or official designation of a specific church or faith."[200] Their findings also showed:

> Other common characteristics involved [were]: (1) government coercion of individuals with respect to prohibitions or mandates on religious practices enforced by legal penalties or government persecution; (2) government interference with church affairs . . . ; (3) preferential public support of the established church . . . ; and (4) restrictions of civic or political participation to members of the established church.[201]

What their data did not reveal, however, was "confirming evidence for a number of current theories regarding the original meaning of the Establishment Clause . . . ."[202] They did not find any support for the view that establishment of religion was implicated by any of the following: (1) government religious displays; (2) Sunday closing laws; (3) prayer in schools; (4) even-handed religious exemptions; or (5) preferential treatment of religion over nonreligion.[203]

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[195] Barclay et al., *supra* note 101, at 508–09.
[196] *See generally id.*
[197] *Id.* at 509.
[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Id.*
[203] *Id.* It is not surprising that school prayer did not come up because public schools as we know them today did not exist at the time of the founding. *See generally History and Evolution of Public Education in the US*, GEO. WASH. U.: CTR. ON EDUC. POL'Y, https://files.eric.ed.gov/fulltext/ED606970.pdf (last visited June 14, 2022).

Thus, they conclude that their results regarding common characteristics are consistent with modern theories that see these characteristics as "a necessary condition for an Establishment Clause violation," while their results do not support modern theories that "treat[] any one of these characteristics as a sufficient condition for an Establishment Clause violation."[204]

They venture beyond these general statements to more pointed statements regarding one recent and one pending Supreme Court case at the time their findings were published.[205] They argue that the only concern with the display of religious symbols was when the government destroyed the symbols and images of dissenting churches.[206] They further claim that this supports the decision in the *American Legion* case involving the forty-foot Bladensburg Cross World War I Memorial.[207] They further argue that public support of religious organizations was not a problem unless it was done "in a preferential way or as a means of leveraging government control over internal church affairs."[208] They then assert that the "*Espinoza* case may thus provide an important vehicle for the Supreme Court to revise much of its current jurisprudence that is out of step with a historical approach to analyzing the Establishment Clause."[209] Although the Supreme Court did not take up their scholarship in the *Espinoza* case and has not taken it up elsewhere as of yet, three Circuit Court cases address their scholarship.[210]

These are bold assertions, and so it is worth evaluating whether their data justify these conclusions.[211] Their search began in the Brigham Young

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[204] Barclay et al., *supra* note 101, at 509–10.

[205] American Legion v. American Humanist Association, —– U.S. ——–, 139 S. Ct. 2067 (2019); Espinoza v. Mont. Dep't of Revenue, —– U.S. ——–, 140 S. Ct. 2246 (2020).

[206] *Id.* at 510.

[207] *Id.* (The authors contend that "[t]he Court's recent *American Legion* decision was consistent with this finding."). The implication is that, since they could not find anyone complaining that majority-endorsed religious symbols like the forty-foot Bladensburg Peace Cross raised Establishment Clause problems, then it was not a problem. But, just because no one talked about symbols being establishments, did not mean that government displays of those symbols in those states that had establishments, were not part of the establishment, or were not at least "related" to those establishments.

[208] *Id.*

[209] *Id.* Note, no Supreme Court majority has endorsed the non-preferentialism approach endorsed by these authors. In 1985, Chief Justice Rehnquist adopted the approach in his dissent in *Wallace*, but not so much after that case. Wallace v. Jaffree, 472 U.S. 38, 91–114 (1985) (Rehnquist, C.J., dissenting). The Court in *Espinoza* did not adopt the approach, but rather found that the no-aid provision discriminated against religious schools and their families in violation of the Free Exercise Clause of the Federal Constitution. Espinoza v. Mont. Dep't of Rev., 140 S.Ct. 2246, 2253–63 (2020). The problem, according to the Court in *Espinoza*, was the discrimination on the basis of religion, and this was not saved by a concern not to aid religion. *Id.* at 2259–61 ("But it is clear that there is no 'historic and substantial' tradition against aiding such schools comparable to the tradition against state-supported clergy invoked by *Locke*.").

[210] Kennedy v. Bremerton Sch. Dist., 4 F.4th 910, 952 (9th Cir. 2021) (Ikuta, J., dissenting); Jones v. Governor of Fla., 975 F.3d 1016, 1104 (11th Cir. 2020) (Martin, J., dissenting); Napolitano v. St. Joseph Catholic Church, 308 So. 3d 274, 279 (Fla. Dist. Ct. App. 2020).

[211] Note that the authors do provide a caveat to their research as they state:

University's J. Reuben Clark Law School's Corpus of Founding-Era American English ("COFEA") and covered a wide range of digitized materials from 1760 to 1799.[212] According to the COFEA website, there are 126,393 texts in the collection with 136,915,894 words.[213] The collection contains "documents from ordinary people of the day, the Founders, and legal sources, including letters, diaries, newspapers, non-fiction books, fiction, sermons, speeches, debates, legal cases, and other legal materials."[214]

When searching for the term "Establishment of Religion" in COFEA, the authors only found eleven useful results.[215] These are very scant results for such a wide search of the term. But the authors were able to go wider by searching the Corpus of Early Modern English ("COEME"). This database includes 40,299 texts and 1,100,351,631 words from 1475 to 1800.[216] With this more expanded search, the authors identified forty useful references to the term.[217] Again, forty references over the span of over 300 years is fairly thin. Thus, they expanded their search further in order to see what words might appear six words to the right or left of "establish."[218] This turned up 500 words. These were then narrowed by identifying only those with a statistically significant relationship and those entries with some

> In this particular context, our methodology cannot capture important historical debates about the concept of an established church that did not actually use iterations of the term *establish*, such as Patrick Henry's Virginia Assessment Bill. Similarly, while we were looking for specific discussions in the context of an establishment that supported (or failed to support) various theories, some of these theories could arguably find support if evidence is viewed at a much higher level of abstraction. And while frequency data is useful in identifying the ordinary meaning of a term and can help identify the scope of ability with respect to original understanding, the data should be evaluated in context to determine which characteristics of the word were communicated. Further, our results are underinclusive. For example, consider the following hypothetical result: "Parliament selected the Church of England's ministers." This result would not be coded for some elements of an establishment, such as individual coercion. That does not mean the established Church of England did not involve individual coercion. It simply means that characteristic was not discussed in that particular result.

Barclay et al., *supra* note 101, at 555.

[212] *Id.* at 531.

[213] *About the Corpus*, *BYU Corpus of Founding Era American English (BYU-COFEA)*, BYU: LAW & CORPUS LINGUISTICS, https://lawcorpus.byu.edu/cofea/concordances (last visited June 14, 2022) [hereinafter *Corpus*].

[214] *Id.* COFEA draws primarily from "the National Archive Founders Online; William S. Hein & Co., HeinOnline; Text Creation Partnership (TCP) Evans Bibliography (University of Michigan); Elliot's Debates; Farrand's Records; and the U.S. Statutes-at-Large from the first five Congresses." *Id.* However, the database has its limitations, because "[i]t is representative mostly of elite white male voices of the founding era, and it does not have enough samples of some genres of the English language, notably newspapers." Barclay et al., *supra* note 101, at 532.

[215] Barclay et al., *supra* note 101, at 538. Their search turned up thirty-three results, but twenty-one of the thirty-three were simply quoting the phrase in the First Amendment with nothing more. *Id.* Nine of the eleven results used the term to talk about a "legal or official designation of a specific church or faith by a particular nation or colony." *Id.*

[216] *Corpus*, *supra* note 213.

[217] Barclay et al., *supra* note 101, at 541. This was culled down from eighty-eight results. *Id.*

[218] *Id.* at 545.

religious connotation.[219] This search resulted in just over twenty collated words.

The authors found it "particularly interesting that no version of the word *endorse* appeared anywhere in the COFEA database within six words to the right or left of any iteration of *establish*."[220] This they take as evidence "of an absence of any correlation," which they find important in light of some views of the *Lemon* Test.[221] This finding could be particularly important in light of modern conceptions of the *Lemon* Test that rely on some sort of equivalence between establishment of religion and the idea of government endorsement.

So, is this finally the evidence that we have been looking for that *Lemon* is not justified by the historical record since it neither appears in COFEA nor COEME?

If prayers in schools are not a problem, if endorsing religion is not a problem, and if non-preferential aid is not a problem, then the *Lemon* Test, which is contrary to all of these practices, would be a problem. Prayers do not have a secular purpose (unless one takes a very cynical view of state prayers), and neither does endorsing religion. Further, endorsing religion and providing non-preferential aid to religion while excluding non-religious institutions would have the primary effect of advancing religion and might raise entanglement problems in some situations.[222]

Although the Supreme Court has not cited the authors, the majority opinion of Justice Gorsuch in *Kennedy v. Bremerton School District* appears to endorse their views.[223] Justice Gorsuch labelled the *Lemon* approach as "'ambitiou[s],' abstract, and ahistorical."[224] In place of the Lemon and endorsement test, Justice Gorsuch argues that the "Establishment Clause must be interpreted by 'reference to historical practices and understandings.'"[225] Justice Gorsuch went on to state: "'[T]he line' that courts and governments 'must draw between the permissible and the impermissible' has to 'accor[d] with history and faithfully reflec[t] the understanding of the

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[219] *Id.*

[220] *Id.* at 547.

[221] *Id.*

[222] Remember, the *Lemon* Test is as follows: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (citations omitted).

[223] —S. Ct. —, 2022 WL 2295034 (U.S. Jun. 27, 2022).

[224] *Id.* at *13. The majority opinion of Justice Gorsuch did not engage any historical analysis, or cite any historical analysis for the claim, but it did cite broadly to *American Legion v. American Humanist Assn.*, 588 U. S. ——, ——, 139 S. Ct. 2067, —— (plurality opinion) and *Town of Greece v. Galloway*, 572 U.S. 565, 575–77 (2014). Although the majority opinion claims that the Court had abandoned the *Lemon* test and its offshoot, the endorsement test, long ago, the Court had never explicitly overturned *Lemon*, nor the endorsement test until the Kennedy decision. *See id.* at *13-14

[225] *Id.* at *14 (citing *Town of Greece*, 572 U.S. at 576, and *American Legion*, 588 U. S. at ——, 139 S. Ct. at 2087 (plurality opinion).

Founding Fathers.'"[226] He further noted that although there has been disagreement as to "what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause" coercion "was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment."[227]

Although Justice Gorsuch cites James Madison for this view, he fails to acknowledge that James Madison had argued that the history and tradition of Congressional legislative prayer, which the Court used to justify the practices in *Marsh v. Chambers*, and in *Town of Greece*, violated the Establishment Clause.[228] Contrary to the decision in *Town of Greece*, which upheld the practice of sectarian prayers in town council meetings, Madison found the sectarian practices of appointing protestant chaplains in the House and Senate to be particularly problematic from the perspective of religious freedom and equality. As he stated:

> The establishment of the chaplainship to Congs. is a palpable violation of equal rights, as well as of Constitutional principles. The tenets of the Chaplains elected shut the door of worship agst. the members whose creeds & consciences forbid a participation in that of the Majority. To say nothing of other sects, this is the case with that of Roman Catholics & Quakers who have always had members in one or both of the Legislative branches. Could a Catholic clergyman ever hope to be appointed a Chaplain? To say that [his] religious principles are obnoxious or that his sect is small, is to lift the veil at once and exhibit in its naked deformity the

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[226] *Id.* (citing *Town of Greece*, 572 U.S. at 577) (quoting School Dist. of Abington Township v. Schempp, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)).

[227] *Id.* at 14. Justice Gorsuch does not cite an impressive array of historical support for this claim. In addition to citing his own recent opinion and the dissenting opinion of Justice Scalia in *Lee v, Wiseman*, he cited 1 Annals of Cong. 730–731 (1789) (Madison explaining that the First Amendment aimed to prevent one or multiple sects from "establish[ing] a religion to which they would compel others to conform"); and M. McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 WM. & MARY L. REV. 2105, 2144–2146 (2003). *Id.* at *29 n.5.

[228] 463 U.S. 783 (1983) (upholding Nebraska's legislative prayers); 572 U.S. 565 (2014). *See* James Madison, Detatched Memoranda, ca. 31 January 1820, FOUNDERS ONLINE, NATIONAL ARCHIVES, https://founders.archives.gov/documents/Madison/04-01-02-0549. He writes:

> Is the appointment of Chaplains to the two Houses of Congress consistent with the Constitution, and with the pure principle of religious freedom?
>
> In strictness the answer on both points must be in the negative. The Constitution of the U.S. forbids every thing like an establishment of a national religion. The law appointing Chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes. Does not this involve the principle of a national establishment, applicable to a provision for a religious worship for the Constituent as well as of the representative Body, approved by the majority, and conducted by Ministers of religion paid by the entire nation.

Id. (citations omitted).

> Doctrine th⟨at⟩ religious truth is to be tested by numbers, or that the major sects have a right to govern the minor.[229]

Thus, it is important to understand that recourse to historical practices has little to nothing to do with original intent or the original public meaning of the text. It is at best a distant cousin, and here, a very ugly distant cousin. The history and tradition so celebrated by the Court in *Town of Greece*, and presumably by Justice Gorsuch in *Kennedy*, was viewed by Madison to be a tradition of discriminatory religious practices that violated the Establishment Clause. Importantly these comments were not oblique comments made about religious principles or early proposed drafts of the Amendments or of the religion clauses, but are clear statements of his considered views that the practices of Congress during the years following the ratification of the Bill of Rights in 1789, violated the Establishment Clause. It is very doubtful Justice Gorsuch's approach to the Establishment Clause "faithfully reflects the understanding of the Founding Fathers" as to either the actual meaning of the Clause or to their approach to interpreting the Clause.[230]

i. Insufficient Data to Fill the Vessel

The authors' have very scant evidence for their conclusions, and some of the evidence is not on point.[231] For instance, when talking about government funding of religious schools, the authors appear to base their view

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[229] *Id.*

[230] Quote referencing Justice Brennan's concurrence in *School District of Abington Township v. Schempp*, 374 U.S. 203, 294 (1963). It might be argued that Madison adopted a historical practices approach to settling the meaning of "obscure or equivocal" provision to the Constitution in Federalist 37. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019). Whether the approach called liquidation is the same as the historical gloss approach is debatable. *See, e.g.*, Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1775 (2015) (describing the historical gloss approach as closely related to liquidation). For the view that Madison did not have a worked out theory of liquidation, see Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 59–72 (2020). Some have argued that framers of our constitution endorsed originalist methods of interpreting the Constitution. *See, e.g.*, JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 116–38 (2013). Others have argued that there was considerable uncertainty as to how to interpret the Constitution by both the Federalist and Anti-Federalist at the time of the Founding. *See* JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 116–23 (2018). For an earlier work arguing that the founding fathers were not originalists in their interpretive outlook see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985) ("It is commonly assumed that the 'interpretive intention' of the Constitution's framers was that the Constitution would be construed in accordance with what future interpreters could gather of the framers' own purposes, expectations, and intentions. Inquiry shows that assumption to be incorrect. Of the numerous hermeneutical options that were available in the framers' day—among them, the renunciation of construction altogether—none corresponds to the modern notion of intentionalism").

[231] Lawrence Solum supports this kind of work as part of triangulating original meaning, namely, using "corpus linguistics, immersion, and the constitutional record to discover the original public meaning of the constitutional text." Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1677 (2017). As we will see, if we do some triangulating, the corpus linguistics approach used by Barclay et al., does not help us zoom in on any specific original public meaning of the text. *See infra* notes 182–221 and accompanying text.

on comments regarding the established church in England, as they state, "When a concern did arise regarding religious schools, it involved a law that only allowed members of an established church in England to teach in schools, and that prevented parents from sending their children to a religious school that was consistent with the parents' religious beliefs."[232] It is hard to see how these comments shed any light on the question of the meaning of the Establishment Clause. England's establishment was very different from the various forms of establishment in the United States.[233]

When they turn to *funding* more generally, Barclay et al. argue that financial support alone did not capture the "characteristic associated with an establishment" but rather that discussion of establishments only occurred when the funding was "offered to the established church in a preferential way."[234] They provide three entries as support for this view.[235] One was in a pamphlet by Thomas Bradbury Chandler; the second was in a passage in the *American Whig* contrasting the state of religion in England to that in the United States; and the third consisted of statements by Rhode Island Pastor Ezra Stiles.[236] When read in context, these entries do not support the authors' findings.

The first entry and the quote taken from that entry are taken out of context. Contrary to the authors' views, the quote does not support the idea that only preferential aid is an establishment. The quote reads:

> [A]n established religion is a religion, which the civil authority engages, not only to protect, but to support; and a religion that is not provided for by civil authority, but which is left to provide for itself, or to subsist on the provision it has already made, can be no more than a tolerated religion.[237]

The quote, by its very language, does not distinguish between preferential support and general support when discussing what counts as an establishment. The language equates establishment with "protection and support." But further, if one turns to the pamphlet and reads the section that it comes from, one will note that Chandler is arguing against those who are critical of Canada's tolerance of Catholics; he is responding to those that hold the view that the treatment of Catholics in Canada amounts to an establishment.[238] He is referring to Catholics after the semicolon. The quote is written in a postscript, where he states, " Since the greatest part of this Address was

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[232] Barclay et al., *supra* note 101, at 510.
[233] DISESTABLISHMENT AND RELIGIOUS DISSENT, *supra* note 51, at 12–13.
[234] Barclay et al., *supra* note 101, at 550.
[235] *Id.* at 550–51.
[236] *Id.*
[237] *Id.* at 550 (quoting THOMAS BRADLEY CHANDLER, A FRIENDLY ADDRESS TO ALL REASONABLE AMERICANS, ON THE SUBJECT OF OUR POLITICAL CONFUSIONS 55 (N.Y., James Rivington 1774) (1974) (on file at https://quod.lib.umich.edu/)).
[238] CHANDLER, *supra* note 228, at 55.

printed off, the papers published by the Congress have come to hand; in which they say, that 'the Roman Catholic Religion, instead of being tolerated, as stipulated by the treaty of peace, [between France and England] is established' by the Act."[239] The focus here is not on the discrimination against Catholics and in favor of Anglicans amounting to an establishment, but whether the Act that allowed Catholics to raise their own revenue in the colony was an establishment. In the paragraph proceeding the quote, he notes that the King "compl[ied] with the reasonable expectations and requests of the Canadians, in allowing the Clergy to enjoy their wonted support, under certain restrictions and limitations. But this indulgence by no means converts the stipulated tolerations into an establishment, as the Gentlemen of the Congress are pleased to assert."[240] Here, he is talking about the law that allowed the Catholic Church to receive tithes from its parishioners. In the paragraph after the quote, he argues that this amounts to the mere tolerance of Catholics and does not amount to an establishment.[241] He ends the paragraph arguing: "If, after all, men will confound the meaning of words, and make no distinction[s] between *toleration* and *establishment*, they degrade themselves into the rank of quibblers and praters, and it is loss of time to dispute with them."[242] Yet, it appears that just a few years before our Declaration of Independence, members of the Canadian Congress took the view that merely allowing the Catholic Church to raise funds from its parishioners through tithing amounted to an establishment, and it also appears that the idea had enough traction that Chambers felt he needed to respond in this postscript.[243]

Thus, while some may have taken the view that only preferential aid was an establishment, others, at the time, took the view that tolerance of religion was an establishment.[244] While Chambers may have the better view that tolerance for Catholics was not an establishment, clearly important people in the Canadian Congress did not share his view. If tolerance of religion were thought to be an establishment by some, then surely endorsement would be.[245] The passage from Chambers cannot be read as supporting the view that only preferential support for religion was an establishment. Chambers nowhere says that. But this still leaves two entries.

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[239] *Id.* at 53.
[240] *Id.* at 55.
[241] *Id.*
[242] *Id.*
[243] Thomas Bradbury Chandler, *A Friendly Address, 1774*, *in* THE AMERICAN REVOLUTION: WRITINGS FROM THE PAMPHLET DEBATE, II: 1773–1776 285 (Gordon S. Wood ed., N.Y.: Libr. of Am. 2015).
[244] It is interesting that the authors did not find "tolerance" or "toleration" within six words of "establishment;" "toleration" and "establishment" are separated by only one word, "and," on page fifty-five of Chamber's work. *See* CHANDLER, *supra* note 243, at 55.
[245] Note that I am not arguing that the original meaning of the term "establishment of religion" includes tolerance of religion, but this view has about as much support in the materials found by Barclay et al. as their preferred reading of those materials.

The second entry merely contrasts the English establishment, which required dissenters to maintain the established clergy, with the practice in New England at the time, wherein each denomination had to maintain its own clergy.[246] Again, while it is clear that England had an established church, the passage does not contrast preferential support in England with non-preferential support in New England but instead contrasts preferential governmental support in England with no governmental support in New England.

The third and final entry from Pastor Ezra Stiles states that "[i]n Marylland [sic] and Virgina [sic] it is episcopacy [that is established], with appropriations of large revenue from tobacco for the established clergy only."[247] After quoting Ezra Stiles, Barclay et al. state, "In contrast, we did not find any examples of more neutral forms of government financial support for religious organizations, such as even-handed tax exemptions, being discussed as a characteristic of establishment."[248] But as with the entry from Chambers, if the authors had just read from the beginning of the section written by Stiles, just a little over a page before the language they quote, they would see that Pastor Stiles himself believes that colonies that provide non-preferential support to religion are considered religious establishments.[249] In the section in question, he is conducting a survey of the religious establishments in the British provinces at the time to see "what particular sect is most friendly to the public liberty."[250] As he states:

> Where all sects are equally established there is properly no *toleration*, all partaking in the benefit of the establishment. Where one sect is invested with power to enforce taxes on themselves for the support of their clergy, and all others exempted from such tax, there is a true and proper toleration, but perfectly easy as such dissenters are exempted from ministerial taxes. Where the established clergy are supported by a branch of provincial revenues appropriated, and dissenters are not exempted from contributing, and yet share no part of such appropriation, such dissenters are tolerated in the lowest sense, viz. on condition of their payment to the established clergy. And it

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[246] Barclay et al., *supra* note 101, at 550; *The American Whig, No. XV*, PARKER'S N.Y. GAZETTE, (June 20, 1768) *reprinted in* A COLLECTION OF TRACTS FROM THE LATE NEWS PAPERS, & C. 241 (N.Y., John Holt, 1768) (on file at https://quod.lib.umich.edu/).

[247] Barclay et al., *supra* note 101, at 550–51 (quoting EZRA STILES, A DISCOURSE ON THE CHRISTIAN UNION 99 (1760) (on file at https://quod.lib.umich.edu/)).

[248] *Id.* at 550–51.

[249] STILES, *supra* note 247, at 98–99.

[250] *Id.* at 97–98.

> may so happen that the same sects may be established, or dissenters in different provinces.[251]

While later he makes it clear that Virginia and Maryland are examples of preferential establishments, he starts out by talking about the situation in which all sects are established.[252] As he states in the sentence just preceding the language quoted by Barclay et al., "The religious establishment of the *Jersies* and *Pensylvania* is universal liberty as in *Rhode-Island*."[253] He then continues,

> From this view it appears, that in virtue of the religious establishment in the three provinces of Pensylvania, the Jerseys and *Rhode-Island*, there are no dissenters, but all enjoy the same common immunities . . . . But the happy policy of establishing one sect without infringing theessential rights of others is peculiar to the three New England provinces, where *congregationalism* is the establishment.[254]

Further, if we do some more triangulating, we find there is evidence outside these corpora that important actors during the founding era not only considered general, "non-preferential" assessments in support of religion to be establishments, but also found them to be problematic.[255]

ii. The Wrong Vessel: The Clause Reads, "Respecting an Establishment of Religion," not "Establishment of Religion"

As noted above, it is not surprising that there is no evidence in the corpora that prayer in public schools posed an establishment problem in the United States because public education did not exist at the time of the Founding. Further, while it might be mildly surprising that "endorsement" does not appear within six words of "establish" within the over one billion words in the database, what is most surprising to discover is that the actual text of the First Amendment Establishment Clause was not found by the authors.[256] More specifically, their search did not turn up the word "respecting" in connection with "establishment," or at least not enough for it to make the list.[257] The authors never even mention the term. When they

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[251] *Id.* at 99.
[252] *Id.* at 99–100.
[253] *Id.* at 100.
[254] *Id.*
[255] As noted by Donald Drakeman, not only did Madison—who was opposed to general assessments—consider general assessments as an establishment, but so did Theodore Sedgwick, who supported Massachusetts's general assessments. DRAKEMAN, *supra* note 9, at 236–37. But further, as we saw in the House debate, Huntington was concerned that the House proposal, which was not clearly limited to the federal government, might also forbid Connecticut's general assessment. *Id.* at 224–25. Further, as Douglas Laycock reminds us, not only did Virginia and Maryland reject non-preferential aid to religion in 1786 and 1785, but so did the Senate when drafting the Clause. Laycock, *supra* note 132, at 878.
[256] Barclay et al., *supra* note 101, at 554–55.
[257] *Id.*

point out the need for more meta-data research regarding the Establishment Clause at the time of the Fourteenth Amendment, they again do not call for research on the language of the Clause. As they state,

> In addition, further historical and corpus linguistics research is needed to evaluate the public meaning of "establishment of religion" during the Reconstruction period, and particularly surrounding the adoption of the Fourteenth Amendment. Since that Amendment has been interpreted to incorporate the Establishment Clause to the states, further inquiry into how public understanding of "establishment of religion" had evolved, if at all, by that time period could shed further important light on the meaning of the Clause.[258]

I find it curious that they appear to have no interest in researching the actual text of the Clause, either at the time of the Founding of the First Amendment or at the time of the Fourteenth Amendment, and no interest in how the public understanding of "respecting an establishment of religion" might have evolved.

When I conducted a search for the collocate "respecting" within six words left and right of "establishment" in COEME, it turned up nineteen entries.[259] While most of the entries are not really on point, one or two are arguably relevant. Some of them are, perhaps, as relevant as the materials discovered by Barclay et al., but as we will see, they are really not all that useful. None of them turned up the phrase "respecting an establishment of religion" before Congress adopted the proposed Amendment. In their own right, they tell us very little about the original understanding. Because they are just a very few of the dots in the sky, or pebbles of sand on the beach, there is no way to tell if they are in any way representative of the views of the founding generation.

Eight of the nineteen entries simply listed or quoted the Amendment or Clause without any comment. Five entries preceded the ratification of the Amendment. Three of the five have nothing to do with an establishment of religion and provide very little insight into the words' meaning. The other two simply listed the Amendments as proposed by Congress without comment. Only one entry potentially came in between the time of the drafting and its ratification, and it had nothing to do with the Amendment or Clause but concerned someone's established views. It reads, "Now this was

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[258] *Id.*

[259] "*Respecting" within six words left and right of "establishment", BYU-Corpus of Early Modern English (BYU-COEME)*, BYU: LAW & CORPUS LINGUISTICS, https://lawcorpus.byu.edu/byucoeme/concordances;q=establishment;cq=respecting;left=6;right=6;field=concordance%3BtextId.%3Byear%3Bgenre%3Bsource (last visited June 14, 2022).

so directly the reverse of the truth respecting my establishment in favour of infant baptism, that I could not be easy, nor answer a good conscience herein, to let it pass unnotic'd."[260] Several subsequent entries were also off point, for example, "respecting the establishment of his Head-Quarters"; "respecting the establishment of the National Bank by Congress"; "respecting the establishment of such troops as may be deemed indispensable . . . ."[261]

There was some substance to an entry in a 1793 book by Jedidiah Morse, A.M., in the *The American Uuniversal Geography*.[262] This author appears to view the religion clauses as working toward a complete separation of church and state when after quoting the religion clauses, he states:

> In this important article, our government, is distinguished from that of every other nation, if we except France. Religion here, is placed on its proper basis; without the feeble and unwarranted aid of the civil power, it is left to be supported by its own evidence, by the lives of its professors, and the Almighty care of its Divine Author.[263]

His use of the term "religion" also does not seem to distinguish believers from non-believers. As he further states:

> All being thus left at liberty to choose their own religion, the people, as might easily be supposed, have varied in their choice. The bull of the people would denominate themselves Christians; a final proportion of them are Jews; *some plead the sufficiency of natural religion, and reject revelation as unnecessary and fabulous*; and many, we have reason to believe, have yet their religion to choose.[264]

There was an entry from 1795 that recites the religion clauses in the context of Quaker conscientious objections to taking up arms.[265] The next entry from 1798 addressed the Alien and Sedition laws, arguing that the regulation of speech and press were reserved to states and the First Amendment provision meant that "libels, falsehoods, and defamation,

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[260] ISRAEL HOLLY, THE NEW TESTAMENT INTERPRETATION OF THE OLD, RELATIVE TO INFANT BAPTISM, AS A SPECIAL GROUND THEREOF, AND WARRANT THEREFOR 5 (1771) (on file at https://quod.lib.umich.edu/).

[261] PHILLIP JOHN SCHUYLER, THE PROCEEDINGS OF A GENERAL COURT MARTIAL 4 (1778) (on file at https://quod.lib.umich.edu/); JAMES WILSON, CONSIDERATIONS OF THE BANK OF NORTH-AMERICA 7 (1785) (on file at https://quod.lib.umich.edu/); GEORGE WASHINGTON, A COLLECTION OF THE SPEECHES OF THE PRESIDENT OF THE UNITED STATES 28 (1796) (on file at https://quod.lib.umich.edu/).

[262] JEDIDIAH MORSE, THE AMERICAN UNIVERSAL GEOGRAPHY (1789) (on file at https://quod.lib.umich.edu/).

[263] *Id.* at 252.

[264] *Id.*

[265] Letter from one of the Society of *Friends, Relative to the Conscientious Scrupulousness of its Members to Bear Arms* (1795) (on file at https://quod.lib.umich.edu/).

equally with heresy and false religion, are withheld from the cognisance of federal tribunals."[266] The last two entries are from the same publication in 1800, and both address the Freedom of Speech and Press Clauses in light of the Alien and Sedition Act.[267]

What is to be made of these entries? More perhaps could be said of Jedidiah Morse, A.M., who not only fathered the co-inventor of the single-wire telegraph and the Morse code, but was also known as the father of American geography.[268] One could perhaps even write a whole book on his religious views, given that he was also a minister who "throughout his life . . .was much occupied with religious controversy, and in upholding the faith of the New England church against the assaults of Unitarianism."[269] But would any of this really make one more confident that we understood what the text meant or did not mean at the time of the Founding? Does it help make the case that the father of American geography seemed to take a Jeffersonian view of the Clause? Although the authors' search must have turned up some of this evidence with respect to the actual language of the Clause, they did not find it either relevant or significant enough to even mention it.

It is not clear that I, or the authors who searched these two corpora, actually found anything new or particularly enlightening despite their bold findings. As Drakeman pointed out in 2010, we already have most of these resources, and there simply is not much there. As he noted, "We know with a fairly high degree of confidence what most people were saying about the establishment clause at the time it was adopted and ratified: nothing."[270] If anything, the search of these corpora supports this conclusion more than they support any of the findings by Barclay et al.

Thus, if we want to critique how the Court has filled the vessel we call the Establishment Clause, it is more honest to admit that the Framers used novel language that did not have a common established meaning at the time of the Founding. If the various historical authors surveyed in this Article could not provide us with a convincing common understanding of the term "establishment of religion" in the debates, in the Gentleman's Agreement, or in the corpora, our chances of finding a common understanding of the phrase

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[266] THE ALIEN AND SEDITION LAWS, AND VIRGINIA AND KENTUCKY RESOLUTIONS. PUBLISHED BY ORDER OF THE LEGISLATURE OF MASSACHUSETTS (1798) (on file at https://quod.lib.umich.edu/).

[267] Alexander Addison, *Analysis of the report of the committee of the Virginia Assembly, on the proceedings of sundry of the other states in answer to their resolutions* 1, 41–42, 44–45 (1800) (on file at https://quod.lib.umich.edu/).

[268] Wendi A. Maloney, *The "Father of American Geography" Registers Early Copyright Claim, Sues under Federal law*, COPYRIGHT NOTICES, Mar. 2015, at 12–13, https://www.copyright.gov/history/lore/pdfs/.

[269] Marcus Benjamin, *Appletons' Cyclopædia of American Biography—Morse, Jedidiah*, WIKISOURCE, https://en.wikisource.org/wiki/Appletons%27_Cyclop%C3%A6dia_of_American_Biography/Morse,_Jedidiah (last visited June 14, 2022).

[270] DRAKEMAN, *supra* note 9, at 327.

"*respecting* an establishment of religion" is unrealistic. There are two reasons for this: First, the modifier "respecting" enlarges the scope of the phrase "establishment of religion," which is already vague on its own. The phrase, even without the "respecting" language, was read by some at the time of the Founding to include not just preferential support of religion, but also non-preferential support of religion and even, by some, tolerance of Catholic tithings, while for others only something akin to the Church of England would count. Second, as we saw, prior to the adoption of the First Amendment, there simply is no recorded use of the expression at all and only scant mention of the text of the Clause after. Thus, we have little to nothing in the historical record to guide our understanding of the actual text. Therefore, the rule constructed in *Lemon* fits the historical record as well as its rivals, although, admittedly, this says very little.

The reader may be disappointed that at the end of this journey we have not uncovered something more concrete and specific in the historical record that would tell us if the standard that was constructed in *Lemon* either goes too far in separating the state from religion or does not go far enough. The original public meaning of the text is as vague and open to numerous conflicting interpretations as the views and intentions of the Founders and Framers. Thus, it is more honest, more faithful to the "original understanding" to let go of the illusionary shackles of history. While the broad contours of the vessel the Framers gave us can still guide us, it is not a faithful reading of the text they gave us to pretend they somehow intended future generations to be limited to some set of more specific and determinate constructions that the Framers or their generation would have endorsed. Rather, it is a more natural and faithful reading of the text to imply that the Framers intended to avoid more specific language and more specific commitments when they adopted the broad principled language. As Ronald Dworkin stated long ago, "The clauses are vague only if we take them to be botched or incomplete or schematic attempts to lay down particular conceptions. If we take them as appeals to moral concepts they could not be made more precise by being more detailed."[271]

iii. What Does One Do When Originalism Does not Provide a Determinate Meaning?

What does one do when the originalist quest for determinate meaning seems to run out? New originalists provide different answers to this question, but the past is no longer the sole or determinative guide to the future. Some scholars have taken the view that in the absence of clear meaning, the judges should employ constitutional default rules. Thus, Gary Lawson has

[271] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 136 (Harvard. Univ. Press rev. ed. 1978) (1977) (footnote omitted).

argued that "[i]n the event that there is any uncertainty about what this Constitution means in any specific application, resolve the uncertainty against the existence of federal power and in favor of the existence of state power."[272] In our case, this would effectively un-incorporated the Establishment Clause. Michael Stokes Paulsen's default rule, which also requires deference to the political branches when the Constitution is vague, does not clearly distinguish between state and federal power.[273] As he states:

> The more unspecific a text, the more room it leaves for democratic choice, in accordance with the structures of government the Constitution creates at the federal level and mostly leaves alone at the state level. If the Constitution's text supplies no rule or standard governing the issue in question, the issue defaults to some other source of law or the designated authority of some decisionmaker who otherwise possesses policy discretion with respect to that issue. Where the document's broad or unspecific language admits of a range of possible actions, consistent with the language, government action falling within that range is not unconstitutional.[274]

Taken to its logical conclusion, this would work as an amendment to the Constitution, effectively removing the Clause. Given the pervasive vagueness of the text, this would make much of the Bill of Rights a dead letter.[275] As Lawrence Solum argues, these default rules are based on normative consideration and are not required by the semantic content of the constitutional text, by any logical implication of the text, nor even by any contextual enrichment of the text's semantic content.[276] As Solum notes, there are multiple baselines grounded in our constitutional tradition that could supply the presumption, be it (1) a presumption of judicial authority to construct rules when the text is vague, irreducibly ambiguous, or indeterminate; (2) a presumption of liberty in these situations, where we presume that the conduct of individuals is lawful; or (3) Paulson's presumption that legislation and executive action in these situations are constitutional.[277]

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[272] Gary Lawson, *Dead Document Walking*, 92 BOS. U.L. REV. 1225, 1234 (2012).

[273] Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U.L. REV. 857, 881–82 (2009).

[274] *Id.*

[275] Paulsen himself acknowledges the vagueness of the Fourth and Eighth Amendments, but these provisions are arguably clearer than the Free Speech Clause, or the Establishment Clause. McGinnis and Rappaport argue that when turning to provisions in the Constitution that general understandings or principles, that we should use the original expected application to limit the scope of the principle. John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 373, 378–79 (2007).

[276] Solum, *supra* note 5, at 517–23.

[277] *Id.* at 520. Solum goes on to note that

Other new originalists like Randy Barnett argue that justices are obliged to construct the Constitution in these cases, that is, to create more particular rules to give effect to vague or abstract provisions because these provisions delegate that authority to justices.[278] Lawrence Solum argues that construction is ubiquitous and occurs anytime the constitutional text is given effect.[279] He further argues that construction is "essentially normative" and that there may be a broad range of normative approaches to constructing rules to give effect to the text when it is vague, ambiguous, or otherwise indeterminate.[280] Here, the text of the Establishment Clause sets out a rather vague and open-ended principle. Jack Balkin argues that unless we have strong evidence to the contrary—and based on the analysis above, we do not—we should assume that the Framers chose general language, abstract principles, and/or open standards in order to give effect to general principles.[281] If they had intended a more specific meaning or commitment to more specific principles, then they could have avoided that commitment by using specific language.[282] For Balkin, originalism requires that we are not only faithful to the original meaning of the constitutional text but its underlying principles.[283]

Further, the original meaning is not the same as the original expected application of the text.[284] The question is not what would the Framers have

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> [o]f course, arguments of political morality can be advanced for each of the competing baselines. One could argue (1) for the presumption of constitutionality on the basis of popular sovereignty, (2) for the presumption of liberty based on a classical liberal (or contractarian) theory of justice, or (3) for the presumption of judicial authority based on an argument for the institutional competence of the courts. But these are normative arguments about the best construction and not linguistic arguments about communicative content. Putting this point just a bit differently, the presumption of constitutionality posited by Originalist Thayerianism requires a normative justification, and this fact strongly suggests that a principle of Thayerian deference is a construction and not an interpretation of the constitutional text.

Id. at 521.

[278] *See* Barnett, *supra* note 35, at 265. Barnett goes on to argue that

> when two constructions are equally consistent with the original meaning of the text, I have arguedthat courts should favor constructions that enhance the legitimacy of the Constitution. By "constitutional legitimacy" I mean that quality or qualities that enable a legal system to issue laws that bind in conscience those upon whom they are imposed.
>
> It is easy to imagine, however, that many choices among competing constructions are both equally consistent with original meaning and not clearly preferable on grounds of legitimacy.

Id. at 265.

[279] Solum, *supra* note 5, at 495.

[280] *Id.* at 472–73.

[281] Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 493 (2007).

[282] *Id.* at 493.

[283] *Id.* at 427.

[284] Balkin notes that conservative originalists will sometimes conflate original meaning with original intent or original expected application, or will argue that the latter is evidence of the former, or in some cases will simply call for the latter. *Id.* at 453. Balkin notes that Scalia does this in the case of the Eighth Amendment. *Id.* at 457–58. Balkin also criticizes John O. McGinnis and Michael Rappaport, who

expected the text to imply, but rather what does the meaning of the enacted text and its underlying principles imply—and this is particularly true when the language chosen by the Framers is broad and abstract. Contrary to those who believe that the open language of the Bill of Rights should be read to delegate as little as possible to the future, Balkin argues that the broader the language, the more broad the delegation.[285] The Framers knew how to draft specific provisions and clear rules, and some parts of the Constitution that are written this way provide little room for future courts to exert their discretion in constructing rules.[286] As Balkin states:

> The "whole purpose" of constitutions cannot be simply to forestall political judgment by later generations on important issues of justice, to preserve past practices of social custom or judgments of political morality, or to freeze existing assessments of rights in time. When we view these open-ended rights provisions together with the more rule-like structural features of constitutions, we can see that they serve a somewhat different goal. They are designed to channel and discipline future political judgment, not forestall it.[287]

Thus, for Balkin, rather than freezing the Constitution in time, the decisions the Framers made in the past provide structure for the decisions that will be made in the future so that our Constitution may "adapt itself to changing circumstances in ways that promote fairness, justice, political stability and other goods of political union."[288] Whether the *Lemon* Test fits that bill is another paper.

The Court in *Kennedy v. Bremerton School District* decided to overturn *Lemon v. Kurtzman* just as this article was about to be sent off to press.[289] However, given that a majority of the current Court does not have much regard for settled precedent, *Lemon* may someday rise again. Whether the resurrection will appear as a "phoenix from the ashes" of the wall that used to separate church from state, or as a "ghoul in a late-night horror movie" depends on complicated moral assessments of the consequences of the Court's current jurisprudence. While the Catholics on the Supreme Court might view themselves and other mainstream religions as the beneficiaries of a torn down wall, I would hope that they remember that founders like

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> argue that we should use original expected application to define the scope of constitutional principles so that they produce results that conform to the original expected application . . . . But to adopt this method is essentially to reinstitute a new form of expectations originalism under the guise of original meaning.

Id. at 453 (citing McGinnis & Rappaport, *supra* note 275, at 378–79).

[285] Balkin, *supra* note 281, at 457–58.

[286] For instance, the President must be at least thirty-five years old. U.S. CONST. art. II, § 1.

[287] Balkin, *supra* note 281, at 458.

[288] *Id.* at 459. Ronald Dworkin called for us "to lay principle over practice to show the best route to a better future, keeping the right faith with the past." RONALD DWORKIN, LAW'S EMPIRE 413 (1986).

[289] — U.S. —, — S. Ct. — , 2022 WL 2295034 (2022).

Madison viewed the wall as crucial to protecting the equal rights of not only persecuted minority religions, in particular Catholics at the time, but also those "whose creeds & consciences forbid a participation in that of the Majority."[290]

[290] James Madison, *supra* note 228.