

THE SUPREME COURT’S AHISTORICAL RELIGION CLAUSE HISTORICISM

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I. INTRODUCTION

“[T]he historical record is ‘complex,’” wrote Chief Justice Roberts in his 2020 opinion in *Espinoza v. Montana Department of Revenue*.¹ That pithy observation—or admission—was ironic in that Roberts had just rendered an interpretation of a contestable historical event, an interpretation that all but determined the outcome of that case. In *Espinoza*, the issue was whether the State of Montana could rely on a “no aid to religion” clause in its constitution to deny extending a state tax credit for a donation designed to pay for tuition at a religious school.² That clause,³ which dated back to 1884, was adopted

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¹ 140 S. Ct. 2246, 2259 (2020).

² *Id.* at 2251.

³ MONT. CONST. art. X, § 6 (West, Westlaw through July 2021 amendments) (“Aid prohibited to sectarian schools. The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or

eight years after the U.S. Congress narrowly failed to approve an amendment to the Constitution that would have expressly barred financial assistance from either the federal or state governments in support of religious education (aka, the “Blaine Amendment”).⁴ Because the Blaine Amendment arose at a time of heightened Protestant-Catholic tension and the debate surrounding that amendment was at times colored with anti-Catholic rhetoric, critics have associated its no funding language, and that of similar state no funding provisions, with anti-Catholic animus.⁵ As Chief Justice Roberts concluded in *Espinoza*, “The Blaine Amendment was ‘born of bigotry’ and ‘arose at a time of pervasive hostility to the Catholic Church and to Catholics in general’; many of its state counterparts have a similarly ‘shameful pedigree.’”⁶

The Court’s reliance on history in *Espinoza* to resolve a constitutional question was not an outlier. History has long been a touchstone in religion clause controversies (and for other constitutional questions, as well);⁷ yet, it has played an increasingly significant role in church-state cases in recent years.⁸ The justices are not simply referencing historical events more frequently or relying on history for greater guidance or explanation; several have embraced a historical analytical test for adjudicating certain religion

any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.”).

⁴This author has extensively examined the background and meaning of the Blaine Amendment. See STEVEN K. GREEN, *THE BIBLE, THE SCHOOL, AND THE CONSTITUTION* 179–253 (2012) [hereinafter GREEN, *THE BIBLE*]; Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 BYU L. REV. 295, 295–333; Steven K. Green, “Blaming Blaine”: *Understanding the Blaine Amendment and the “No-Funding” Principle*, 2 FIRST AMEND. L. REV. 107, 113–14 (2004) [hereinafter Green, “Blaming Blaine”]; Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 48–49 (1992) [hereinafter Green, *Blaine Reconsidered*].

⁵See, e.g., Kyle Duncan, *Secularism’s Laws: State Blaine Amendments and Religious Persecution*, 72 FORDHAM L. REV. 493, 497 (2003); Brandi Richardson, *Eradicating Blaine’s Legacy of Hate: Removing the Barrier to State Funding of Religious Education*, 52 CATH. U. L. REV. 1041, 1053 (2003); Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL’Y 551, 559 (2003).

⁶140 S. Ct. at 2259 (quoting *Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000) (plurality opinion)).

⁷See *Everson v. Bd. of Educ.*, 330 U.S. 1, 14–15 (1947); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 213 (1948).

⁸See *Espinoza*, 140 S. Ct. at 2258.

clause controversies, such that historical “facts” have become determinative of outcomes.⁹ As Justice Kennedy wrote in one of those cases:

[T]he Establishment Clause must be interpreted “by reference to historical practices and understandings” . . . [which means] that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.¹⁰

Or as Justice Alito concurred, if there is any inconsistency between the analytical tests the Court has used to adjudicate church-state controversies (i.e., the *Lemon* and Endorsement tests) and a “historical practice” [*sic*], “the inconsistency calls into question the validity of the test, not the historic practice.”¹¹

This article examines the Court’s expanded use of a historical approach for adjudicating religion clause controversies. In doing so, it analyzes this trend within the context of the Court’s longstanding fascination with using history to inform—and sometimes direct—interpretations of constitutional provisions. As numerous scholars have noted (including this one),¹² there are significant problems with the way most jurists have approached historical data and the manner in which they have applied it in their decision-making.¹³ While I do not call for the elimination of historical data and arguments from constitutional adjudication, as has been suggested,¹⁴ I argue that judges and advocates need to understand the nuances, limitations, and appropriate role of history for resolving religion clause disputes; in the words of Justice William Brennan, there are significant “reasons for [a] cautious application

⁹ See Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489, 493.

¹⁰ *Town of Greece v. Galloway*, 572 U.S. 565, 576–77 (2014) (citations omitted).

¹¹ *Id.* at 603 (Alito, J., concurring).

¹² Steven K. Green, “*Bad History*”: *The Lure of History in Establishment Clause Adjudications*, 81 NOTRE DAME L. REV. 1717, 1737 (2006).

¹³ See, e.g., Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U. L. REV. 727, 738 (2009).

¹⁴ Lisa Shaw Roy, *History, Transparency, and the Establishment Clause: A Proposal for Reform*, 112 PENN ST. L. REV. 683, 686, 712 (2008).

of the history of the Constitution's religious guarantees to contemporary problems."¹⁵

II. HISTORY AS AUTHORITY

At its core, constitutional interpretation involves the search for usable authority. The Constitution means little, and commands no fealty, unless it affirms the supremacy of existing authority. The law also requires predictability (and so do most clients), which means a consistency in the application of rules of authority. That imposes a heavy presumption against constantly changing substantive rules.¹⁶

A second, more compelling argument can be made for the role of authority in constitutional interpretation. The constitutional enterprise necessitates legitimacy.¹⁷ The judiciary commands no army or police nor appropriates any monies to secure obedience from the citizenry.¹⁸ Court decisions would command no respect or sway among policy makers and citizens unless the Court couched its holdings in authority that is cloaked in legitimacy. As Laurence Tribe has written, "[T]he search for ways to make judicial review legitimate, given the rejection of *Lochner* for reasons of institutional competence and authority, has preoccupied (one could say obsessed) constitutional scholarship for . . . years."¹⁹

In either case, this suggests that constitutional interpretation is a search for usable authority. So, what counts as usable authority to legitimize Court decisions? For interpreting statutes and regulations—the bulk of the Court's business—judges have developed rules of statutory construction, focusing on divining legislative will, and rules governing deference to agency expertise in the regulatory sphere (i.e., the *Chevron* doctrine).²⁰ Rules of construction have evolved for the area of constitutional interpretation, as well.²¹ Since the

¹⁵ *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 236 n.5 (1963) (Brennan, J., concurring).

¹⁶ Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601, 604 (1995) ("Constitutional law is based on ideas about authority . . .").

¹⁷ See generally RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005); David A. Strauss, *Reply: Legitimacy and Obedience*, 118 HARV. L. REV. 1854 (2005); Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111 (2003).

¹⁸ U.S. CONST. art. I, § 8, cls. 1, 12.

¹⁹ LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 584 (2d ed. 1988).

²⁰ See generally *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

²¹ See, e.g., *Gamble v. United States*, 139 S. Ct. 1960 (2019).

beginning of judicial review, history has served as a leading source of authority for interpreting the Constitution.²²

This raises the general question of “why.” Why does history continue to serve as a primary source of authority for constitutional interpretation—particularly for areas such as the First,²³ Second,²⁴ and Eighth Amendments,²⁵ among others—instead of using other interpretive models (e.g., textual; precedent; pragmatism; sociological legitimacy; international norms)? Initially, we should define what is meant by historical authority (as contrasted to precedent), at least the kind that influences constitutional decision-making. Here, we mean: dominant practices, either anterior or contemporary to the founding period; official and unofficial statements and proclamations by leading players; legislative history in the form of speeches, debates, minutes, and reports; contemporaneous pamphlets, letters, and correspondence (or, if one is so fortunate, legal and political treatises that commanded a following, such as Blackstone’s *Commentaries*, or those that have acquired significance over time, such as the *Federalist Papers*); or even contemporary dictionary definitions.²⁶ So, for example, in the case of *Boumediene v. Bush*, which considered whether the writ of habeas corpus should extend to territorial areas outside of the United States but controlled by the government (i.e., the naval base at Guantanamo Bay, Cuba), the Court majority engaged in a “broad historical narrative of the writ” extending back to the Magna Carta to determine the probable understanding of the reach of habeas corpus during the founding period.²⁷ (Ironically, it was the Court’s liberal wing, which commonly eschews relying on history, that undertook this historical inquiry; the conservative block, which more frequently seeks out historical authority for such questions, thought that the case was controlled by precedent).²⁸ In most instances, historical authority is in the nature of circumstantial or

²²CALVIN MASSEY & BRANNON P. DENNING, *AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES* 40, 43–45 (6th ed. 2019).

²³See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 14–15 (1947).

²⁴See, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

²⁵See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 966–85 (1991); see also John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008); John F. Stinneford, *The Original Meaning of “Cruel”*, 105 GEO. L.J. 441, 444 (2017).

²⁶See CHARLES A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 20–28 (1969) (discussing various forms of history used in judicial decision-making).

²⁷553 U.S. 723, 746 (2008).

²⁸See *id.*

secondary evidence, which is then used to inform how a particular player or the dominant majority may have understood a provision or clause. Direct evidence in the form of express statements about how a provision should apply to a particular controversy is usually lacking, if for no other reason than members of the founding generation could not have anticipated future advances in technology, science, etc. (e.g., does the Fourth Amendment's prohibition on illegal searches and seizures apply to aerial surveillance using photography or heat sensing equipment?).²⁹ This is why the *Federalist Papers*, authored chiefly by James Madison and Alexander Hamilton, has become such a seminal document for members of the Court, having been cited by the justices more than 300 times.³⁰ Despite that the *Federalist Papers* were written as propaganda to influence the ratification of the Constitution in New York, the fact that its authors were leading figures in the drafting of and debate surrounding the Constitution, and that they offered explanations for the meanings of the various clauses, has secured the status of the *Federalist Papers* for posterity.³¹

The reason for this reliance on historical authority is evident. First, the Constitution is a manifestation of the Rule of Law which places a strong reliance on consistency that history provides. Those people who interpret the Constitution most frequently—judges, lawyers, law professors—are trained in the law and are predisposed to value, if not venerate, a historical approach to legal epistemology. Professor Anthony Kronman once wrote:

[T]he authority of the past continues, perhaps, to exert a greater influence in the law than in other spheres of life [F]or most of the time that human beings have lived together in organized communities, every aspect of their communal lives—social, religious, political, and economic as well as legal—has to a large degree been organized on the assumption that the past has an inherent authority of just this

²⁹H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 669 (1987) (“[T]he founders thought, argued, reached decisions, and wrote about the issues that mattered to them, not about our contemporary problems.”).

³⁰See The Federalist Papers: *Judicial Use*, WIKIPEDIA, https://en.wikipedia.org/wiki/The_Federalist_Papers#Judicial_use (last updated on Aug. 19, 2021).

³¹See generally MICHAEL I. MEYERSON, *LIBERTY'S BLUEPRINT: HOW MADISON AND HAMILTON WROTE THE FEDERALIST PAPERS, DEFINED THE CONSTITUTION, AND MADE DEMOCRACY SAFE FOR THE WORLD* (2008).

kind, a sanctity that obligates us to respect the patterns it prescribes.³²

In addition, as Charles Miller observed, the “moral power” of the courts depends on “the weight of tradition, the authority of the government as a whole, and on the mystery of the law, particularly the reverence generally accorded the Constitution.”³³ One need not be a disciple of Edmund Burke to appreciate the value of tradition, which allows cultures to build on the cumulative wisdom and achievements of the past. The law, with its emphasis on precedent and continuity, promotes a reverence for historical authority.³⁴

Aside from the legal tradition surrounding the Constitution, constitutional interpretation has long turned to history for background and explanation of terms.³⁵ This rationale is relatively uncontroversial; both “originalists” (or “original meaning” proponents) and “living constitutionalists” accept this minimalist use of history.³⁶ But agreement on the relevance of history goes farther. The Constitution was a compact adopted by a particular generation of Americans—the “We the People” of the founding generation—which is the basis for popular sovereignty. Whether or not ratification was that “big bang” moment that created political sovereignty, the assumption is that popular sovereignty is the supreme authority in a constitutional democracy.³⁷ An analytical approach that seeks out the original understanding of a clause for members of the founding generation thus demonstrates fealty to that moment when the people “spoke.” Also, such an approach purportedly leads to consistency, predictability, and, most important for originalists, judicial fidelity to the text rather than to a judge’s own ideological predilections.³⁸ Even non-originalists acknowledge the importance of the founding period for illuminating the purposes and functions of constitutional text, though they

³² Anthony Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1044 (1990).

³³ MILLER, *supra* note 26, at 12.

³⁴ See EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (Frank M. Turner, ed., 2003); Kronman, *supra* note 32, at 1034.

³⁵ See, e.g., *M’Culloch v. Maryland*, 17 U.S. 316 (1819) (discussing the originating notion of popular sovereignty).

³⁶ Roy, *supra* note 14, at 706.

³⁷ Jack N. Rakove, *Fidelity Through History (or to It)*, 65 FORDHAM L. REV. 1587, 1602 (1997); MILLER, *supra* note 26, at 149 (“Judicial interpretation of the American Constitution takes place in a political world dominated by the belief in popular sovereignty.”).

³⁸ See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855, 864 (1989).

dispute the authenticity and binding authority of any original meaning.³⁹ Still, it seems that all sides agree that history matters.⁴⁰

Yet, as discussed in more detail below, an analytical approach that examines the text for an “original intent,” “original understanding,” or “original public meaning” to determine current controversies is rife with problems.⁴¹ The empowering provisions of the Constitution are generally written in broad language (e.g., the President “shall take Care that the Laws be faithfully executed”⁴²), employing terms that were familiar to members of the founding generation but not necessarily clearly defined. For then, as now, terms such as “search and seizure” or “cruel and unusual punishment” are not pellucid (how much easier would life be if all clauses of the Constitution were as self-evident as Article II, section 1, clause 5, declaring eligibility for President as someone “having attained to the Age of thirty five years”). The same can be said for what was understood to be a “law respecting an establishment of religion.”⁴³ Second, an “original understanding” or “original public meaning” approach suggests, if not requires, that there was a consensus or at least a prevailing perspective about particular constitutional questions or principles. As Stephen Gey once wrote, “[T]he history of religion in this country is a complicated and even contradictory affair [T]here is no one history of religion in America. There are actually multiple histories, each of which would support a somewhat different interpretation of the proper constitutional relationship between religion and government.”⁴⁴ Attempting to identify dominant understanding is difficult when “[t]he implementation of [church-state principles] was uneven and fraught with

³⁹ See Roy, *supra* note 14, at 707–08.

⁴⁰ See, e.g., Sunstein, *supra* note 16, at 604; Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901, 912 (1993) (“My point is certainly not that history should be irrelevant in constitutional interpretation.”); Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 549–50 (2009) (“Original meaning originalism and living constitutionalism are compatible positions.”).

⁴¹ See William Michael Treanor, *Against Textualism*, 103 NW. U. L. REV. 983, 983–85 (2009); Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 712 (2009).

⁴² U.S. CONST., art. II, § 3.

⁴³ See STEVEN K. GREEN, *THE SECOND DISESTABLISHMENT: CHURCH AND STATE IN NINETEENTH-CENTURY AMERICA* 24–31 (2010).

⁴⁴ Stephen G. Gey, *More or Less Bunk: The Establishment Clause Answers that History Doesn't Provide*, 2004 BYU L. REV. 1617, 1619–20.

inconsistency, even among the influential reformers of the age.”⁴⁵ And third, the legislative history—contained in Madison’s *Notes on the Convention*, Elliot’s *Debates* of the ratifying conventions, and the Annals of the First Congress—is incomplete and frequently does not address substantive questions, let alone modern ones.⁴⁶

So, with constitutional adjudication, particularly involving the religion clauses, the question is not *whether* to rely on history but on *how* to use it. The devil is in the details.

III. HISTORY AND THE RELIGION CLAUSES

In no area of constitutional adjudication has history had a greater impact than in the Court’s interpretations of the religion clauses of the First Amendment.⁴⁷ (Some day, the Second Amendment may rival that record, if *Heller* and *McDonald* provide any foresight).⁴⁸ Initially, history was chiefly the tool of separationist-leaning justices. Justice Hugo Black ushered in the modern era of church-state adjudication and its reliance on the historical method in *Everson v. Board of Education*, where he used history, rather than precedent, to resolve the first modern dispute over the meaning of non-establishment.⁴⁹ With help from Justice Wiley Rutledge, Black resurrected Thomas Jefferson’s Act for Establishing Religious Freedom in Virginia and James Madison’s Memorial and Remonstrance, turning the two documents into constitutional canon.⁵⁰ In so doing, *Everson* elevated Jefferson and Madison to demigod status, anointing them the authoritative expositors on the meaning of non-establishment and free exercise as found in the First

⁴⁵ Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 960 (1995).

⁴⁶ See *infra* Part VII.

⁴⁷ Ethan Bercot, *Forgetting to Weight: The Use of History in the Supreme Court’s Establishment Clause*, 102 GEO. L.J. 845, 846–55 (2014).

⁴⁸ See Ethan Bercot, *Forgetting to Weight: The Use of History in the Supreme Court’s Establishment Clause*, 102 GEO. L.J. 845, 846–55 (2014); *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

⁴⁹ See 330 U.S. 1 (1947).

⁵⁰ As Justice Rutledge remarked in his *Everson* dissent, these documents from the “Virginia struggle for religious liberty . . . became [the] warp and woof of our constitutional tradition . . .” *Id.* at 39 (Rutledge, J., dissenting). Their interaction is discussed in detail in STEVEN K. GREEN, *THE THIRD DISESTABLISHMENT: CHURCH, STATE, AND AMERICAN CULTURE, 1940–1975*, at 111–19 (2019).

Amendment.⁵¹ Black interpreted the command of the Act and Memorial in simple and stark terms: “no tax,” “no law,” while he disregarded other historical evidence that may have suggested a different interpretation.⁵² Black reaffirmed the validity of relying on history to resolve religion clause controversies the following year in *McCullum v. Board of Education*, striking the popular practice of releasing schoolchildren for on-campus religious instruction.⁵³ Significantly, Black’s historical approach did not raise a dissent among his fellow justices. Justices Rutledge (dissenting in *Everson*) and Felix Frankfurter (concurring in *McCullum*) fully embraced the relevance of history, the significance of Black’s sources, and the interpretations to be drawn therefrom, only arguing for a stricter application of those principles.⁵⁴ As Justice Rutledge remarked, “No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment.”⁵⁵ Only Justice Stanley Reed in *McCullum* expressed some reservation in embracing the “wall of separation” metaphor, remarking that a “rule of law should not be drawn from a figure of speech.”⁵⁶

Coming as it did in that initial case, Rutledge’s pithy observation may have had a self-fulfilling quality to it; since *Everson*, lawyers and judges have readily used history to bolster their arguments and holdings about the proper relationship between church and state.⁵⁷ For the next twenty-five years, the

⁵¹ See *Everson*, 330 U.S. at 13 (declaring that Madison and Jefferson played “leading roles” in the drafting and adoption of the First Amendment).

⁵² *Id.* at 15–16 (“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. . . . 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, the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and State.’”) (internal citation omitted).

⁵³ 333 U.S. 203, 212 (1948) (“[A]s we said in the *Everson* case, the First Amendment had erected a wall between Church and State which must be kept high and impregnable.”).

⁵⁴ See *Everson*, 330 U.S. at 28–43 (Rutledge, J., dissenting); *McCullum*, 333 U.S. at 212–32 (Frankfurter, J., concurring).

⁵⁵ *Everson*, 330 U.S. at 33 (Rutledge, J., dissenting).

⁵⁶ 333 U.S. at 247 (Reed, J., dissenting).

⁵⁷ See *McCullum*, 333 U.S. at 213–25 (Frankfurter, J., concurring); *id.* at 244–48 (Reed, J., dissenting); *McGowan v. Maryland*, 366 U.S. 420, 431–47 (1961); *id.* at 484–95 (Frankfurter, J., concurring); *Engel v. Vitale*, 370 U.S. 421, 425–30 (1962); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 254–58, 266–76 (1963) (Brennan, J., concurring); *Marsh v. Chambers*, 463 U.S. 783, 786–89 (1983); *Wallace v. Jaffree*, 472 U.S. 38, 92–106 (Rehnquist, J., dissenting).

Court's historical approach and separationist perspective went hand-in-hand. Justice Black returned to history in the first school prayer case, *Engel v. Vitale*, drawing an analogy between the mandated prayers of the New York public schools in 1962 with those of the colonial Anglican Church.⁵⁸ The following year in the Bible reading case, *Abington School District v. Schempp*, Justice William Brennan offered an extended historical exegesis on school-directed religious exercises going back to 1682!⁵⁹ And in *Walz v. Tax Commission*, upholding state tax exemptions for church properties, the Court noted the historical pedigree of exemptions reaching back to the founding period.⁶⁰ Again offering a historical lesson in his concurrence, Justice Brennan noted how Virginia's statutory exemption for churches "had been reaffirmed . . . before and after ratification of the First Amendment," remarking that it could "reasonably be inferred that the Virginians did not view the exemption for 'houses of divine worship' as an establishment of religion."⁶¹ Direct reliance on historical authority became less common in the 1970s, but the damage was already done; the justices reaffirmed the rhetoric from the earlier decisions that had relied on history – such as repeating the wall of separation metaphor – throughout the remainder of the decade.⁶²

To be sure, the Court's early separationist holdings with their supporting historical narrative did not evade criticism. Following the 1947–48 cases, a handful of conservative scholars criticized the holdings and the justices' historical analytical method.⁶³ Writing in 1949, Princeton University's Edward S. Corwin charged that the Court had adopted "an unhistorical conception of what is meant by 'an establishment of religion,'"⁶⁴ while Catholic theologian John Courtney Murray accused the justices of engaging

⁵⁸ 370 U.S. 421, 424–30, 442 n.7 (1962).

⁵⁹ 374 U.S. 203, 266–76 (1963) (Brennan, J., concurring).

⁶⁰ 397 U.S. 664, 677–78, 680 (1970).

⁶¹ *Id.* at 683–84 (Brennan, J., concurring). Relying further on the coincidence of historical events as authority, Brennan also noted how Thomas Jefferson had been President when tax exemptions were first given to churches in Washington, D.C. *Id.* at 684.

⁶² *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968); *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 792 (1973) (noting "no historical precedent for New York's recently promulgated [tuition] tax [credit] program").

⁶³ Edward S. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3, 10 (1949); MARK DEWOLF HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* (1965). See also John Courtney Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROBS. 23 (1949); JAMES M. O'NEILL, *RELIGION AND EDUCATION UNDER THE CONSTITUTION* (1949).

⁶⁴ Corwin, *supra* note 63, at 20.

in “bad history,” writing that the “historical evidence does not yield the absolute Everson conclusion.”⁶⁵ Writing later, Harvard Professor Mark DeWolf Howe claimed the Court was “building constitutional law upon history . . . oversimplified.”⁶⁶ But neither Corwin, Murray, nor Howe (or other early critics for that matter) condemned the Court’s reliance on historical authority generally, only that its use in *Everson* and *McCullum* was incomplete and misleading.⁶⁷ Howe offered one specific alternative to the Jeffersonian-Madisonian model—an evangelical basis for separation—and apparently would have been satisfied with the Court’s analytical approach had his view prevailed.⁶⁸ He did not address the more complex questions of completeness, proper use, and ultimate relevance of history.⁶⁹ Even then, these early critiques represented the minority view within the academy, as lawyers and scholars generally embraced the secularizing trend of the 1960s and 1970s that these initial interpretations supported. The Court’s separationist approach, with its historical authority, remained constitutional canon for 35 years.⁷⁰

In the 1980s, a new and more robust round of criticism of the Court’s separationist holdings and its historical narrative began to emerge, facilitated by the resurgence of political and religious conservatism represented by the rise of the Religious Right and the election of Ronald Reagan.⁷¹ In 1982, political science professor Robert L. Cord published a highly influential revisionist history of the creation of the religion clauses, *Separation of Church and State: Historical Fact and Current Fiction*, which emphasized early practices and perspectives that challenged the accepted Jeffersonian-Madisonian interpretation, going so far as to question the separationist pedigrees of the great men themselves.⁷² Five years later Notre Dame’s Gerard V. Bradley added his blistering critique of the *Everson* holding and its historical conclusions, writing that the Court “has . . . been fundamentally

⁶⁵Murray, *supra* note 63, at 25.

⁶⁶HOWE, *supra* note 63, at 10–11.

⁶⁷See HOWE, *supra* note 63, at 3–4. See generally Corwin, *supra* note 63; Murray, *supra* note 63.

⁶⁸HOWE, *supra* note 63, at 8, 15–16, 19.

⁶⁹See *id.*

⁷⁰STEVEN K. GREEN, *THE THIRD DISESTABLISHMENT: CHURCH, STATE & AMERICAN CULTURE, 1940–1975*, at 3–4, 7 (2019).

⁷¹*Id.* at 7.

⁷²ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982).

in error since 1947, and condemnably so . . . [T]he justices should confess their sin [of historical misinterpretation] and embark at the earliest opportunity on the path first forsaken in 1947.”⁷³ It was only a matter of time that this alternative view of the relevant historical narrative began to impact Supreme Court jurisprudence.

The first significant reassessment of the relevant history came in the 1983 case of *Marsh v. Chambers*, which considered a challenge to the constitutionality of paid chaplains in state legislative assemblies (and by implication, in Congress as well).⁷⁴ In upholding that practice, Chief Justice Burger bypassed the dominant analytical standard (i.e., the three-part *Lemon* test), with its basis in the *Everson* account, to rely on historical evidence.⁷⁵ However, Burger’s method deviated from *Everson*’s focus on broad ideological principles (derived from historical writings) to consider specific practices contemporaneous to the Founding.⁷⁶ Burger noted that three days after approving the Bill of Rights, the First Congress had authorized the appointment of paid chaplains.⁷⁷ This led him to conclude that “[c]learly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment”⁷⁸ While that action was conclusive for Burger’s legal inquiry, he found reinforcement in an “unambiguous and unbroken history of more than 200 years.”⁷⁹ Burger acknowledged that historical patterns could not justify contemporary constitutional violations, but here, the historical record conclusively indicated “what the draftsmen intended the Establishment Clause to mean,” as if the members of Congress were of one mind as to both enactments.⁸⁰

Neither of Burger’s claims survives a closer examination. In his comprehensive review of legislative chaplains, Professor Christopher Lund has remarked that the *Marsh* Court’s “view of that history was deeply partial—partial in the sense of being a bit slanted as well as partial in the

⁷³GERARD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* 135 (1987). An earlier revisionist monograph that was influential in conservative circles was MICHAEL J. MALBIN, *RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT* (1978).

⁷⁴463 U.S. 783, 784 (1983).

⁷⁵*Id.* at 786–91.

⁷⁶*Id.* at 790–91.

⁷⁷*Id.* at 788.

⁷⁸*Id.* at 788.

⁷⁹*Id.* at 792.

⁸⁰*Id.* at 790.

sense of being somewhat incomplete.”⁸¹ According to Lund, Chief Justice Burger’s historical analysis omitted several important details, such as contemporary objections to the practice and of how members of Congress later used chaplaincies to advance sectarian goals.⁸² “*Marsh’s* view of legislative prayer is a somewhat idealized and romanticized one,” Lund notes.⁸³ “It perpetuates the very false illusion that the chaplaincies were altogether innocuous and universally supported; it ignores all of the ways in which the chaplaincies were sometimes controversial and divisive. In the end, the Court’s desire to portray the chaplaincies as benign ends up distorting its historical analysis.”⁸⁴

The following year in *Lynch v. Donnelley*—considering the display of a government-owned creche at Christmastime—Burger again searched for what “history reveals,” finding that there was “an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.”⁸⁵ This “contemporaneous understanding” of the Establishment Clause “takes on special significance” for present-day application of the constitutional principles, Burger asserted, and thus supplanted the Court’s own analytical tests.⁸⁶

Burger’s opinions in *Marsh* and *Lynch* announced that there was an alternative historical narrative that focuses on specific events and statements contemporaneous to the Founding (e.g., Washington’s Farewell Address) that, where applicable, could be used to overcome the more general separationist interpretation announced in *Everson*. With the gauntlet thrown down that an alternative narrative to *Everson* exists, Justice William Rehnquist attacked the Jeffersonian-Madisonian interpretation directly in his 1985 dissent in *Wallace v. Jaffree* (striking Alabama’s “silent prayer” statute).⁸⁷ Relying heavily on Cord’s book, Rehnquist minimized Jefferson’s significance (in France during the critical time) and distinguished the Virginia disestablishment struggle from the drafting of the First Amendment, concluding that these is “simply no historical foundation for the proposition that the Framers intended to build the ‘wall of separation’ that was

⁸¹ Christopher C. Lund, *The Congressional Chaplaincies*, 17 WM. & MARY BILL RTS. J. 1171, 1211 (2009).

⁸² *Id.* at 1199, 1211, 1213.

⁸³ *Id.* at 1173.

⁸⁴ *Id.* at 1213.

⁸⁵ 465 U.S. 668, 673–74, 679 (1984).

⁸⁶ *Id.* at 673–74.

⁸⁷ 472 U.S. 38, 40, 61 (1985); *id.* at 92–100 (Rehnquist, J., dissenting).

constitutionalized in *Everson*.⁸⁸ Rehnquist's stinging critique not only challenged the separationist narrative; he effectively seized the historical method for future use by Court conservatives. "The true meaning of the Establishment Clause can only be seen in its history," he declared, "but no amount of repetition of historical errors in judicial opinions can make the errors true."⁸⁹ In embracing the command of history, however, Rehnquist did not explain how much weight should be afforded to historical evidence in constitutional adjudication or how to reconcile conflicting historical accounts.⁹⁰

Since the 1980s, attacks on the *Everson* account of history have only intensified. Conservative historians and legal scholars – led by academics such as Michael McConnell, Steven Smith, Donald Drakeman, Philip Hamburger, Daniel Dreisbach, Mark David Hall, and Phillip Munoz, among others – have become leading proponents of a revisionist historical approach to religion clause interpretation.⁹¹ Interestingly, revisionists have advocated two diametrically opposing methods of historical analysis. Advancing a minimalist approach, Smith and Drakeman argue that little, if any, consensus understanding can be drawn from the founding debates over church and state, such that the religion clauses represent only a settlement over retaining state jurisdiction of such questions (Smith) or an agreement on the lowest common denominator: no national church (Drakeman).⁹² In contrast, Hamburger, Dreisbach, Hall, and Munoz have sought to expand on possible contemporary understandings of the clauses, arguing (like Cord) for a greater role of

⁸⁸ *Id.* at 92, 106 (Rehnquist, J., dissenting).

⁸⁹ *Id.* at 107, 113.

⁹⁰ *See id.* Justice Rehnquist's polemic led Justice O'Connor to respond in her concurrence that "[a]lthough history provides a touchstone for constitutional problems, the Establishment Clause concern for religious liberty is dispositive here," suggesting that important religious liberty values exist independent of the historical experience. *Id.* at 81 (O'Connor, J., concurring).

⁹¹ *See generally* Michael McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986); STEVEN D. SMITH, *FOREORDAINED FAILURE* (1995); DONALD L. DRAKEMAN, *CHURCH, STATE, AND ORIGINAL INTENT* (2010); PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (1st ed. 2002); DANIEL L. DREIBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* (2002) [hereinafter DREIBACH, *WALL OF SEPARATION*]; DANIEL L. DREIBACH, MARK D. HALL, AND JEFFREY H. MORRISON, *THE FOUNDERS ON GOD AND GOVERNMENT* (2004); VINCENT PHILLIP MUNOZ, *GOD AND THE FOUNDERS* (2009).

⁹² SMITH, *supra* note 91, at 17–18, 27, 68; DRAKEMAN, *supra* note 91, at viii–ix.

religion in the Founding.⁹³ (While both approaches have found favor among conservative jurists, the latter approach is more popular.)⁹⁴ Although constituting different methods, both approaches have marginalized the separationist interpretation and forced separationist-leaning scholars into a defensive retreat in their use of history. Today, few separationist scholars make strong historically based arguments, preferring instead to advance policy laden interpretations.⁹⁵

As noted, with the *Everson* historical narrative shown to be vulnerable, the revisionist historical approach to religion clause analysis has increasingly become the favorite tool of Court conservatives. Since *Lynch*, conservative justices have raised historical arguments to validate religious displays in government buildings (Kennedy, *Allegheny County v. ACLU*), prayer at public school graduations (Scalia, *Lee v. Weisman*), in-kind assistance to parochial schools (Thomas, *Mitchell v. Helms*), government-owned Ten Commandment monuments (Rehnquist and Thomas, *Van Orden v. Perry*) (Scalia, *McCreary County v. American Civil Liberties Union of Kentucky*), “under God” in the Pledge of Allegiance (Rehnquist and Thomas, *Elk Grove School District v. Newdow*), and to restrict plaintiff standing for bringing Establishment Clause challenges (Scalia, *Hein v. Freedom From Religion Foundation*).⁹⁶ Fueling this revisionist historical approach has been its originalist presuppositions. Justice Scalia was the leading proponent for an originalist approach to interpreting the religion clauses while he was in the Court. In his dissent in *Lee v. Weisman*, Scalia made possibly his strongest plea for that approach:

Justice Holmes’ aphorism that “a page of history is worth a volume of logic,” applies with particular force to our Establishment Clause jurisprudence. As we have

⁹³HAMBURGER, *supra* note 91, at 13–14, 17; DREISBACH ET AL., *supra* note 91, at xvii, 196; MUNOZ, *supra* note 91, at 206–07.

⁹⁴See Green, *supra* note 12.

⁹⁵Christopher S. Grenda, *Giving Up on the Founding: The Separation of Church and State and the Writing of Establishment Clause History*, 6 POL. & RELIGION 402–34 (2013).

⁹⁶*Allegheny Cty. v. ACLU*, 492 U.S. 573, 655, 669–70 (1989) (Kennedy, J., concurring); *Lee v. Weisman*, 505 U.S. 577, 631–33 (1992) (Scalia, J., dissenting); *Mitchell v. Helms*, 530 U.S. 793, 801 (2000); *Van Orden v. Perry*, 545 U.S. 677, 686–92 (2005); *id.* at 692 (Thomas, J., concurring); *McCreary Cty. v. ACLU*, 545 U.S. 844, 885–88 (2005) (Scalia, J., dissenting); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 18, 26–30 (2004) (Rehnquist, J., concurring); *id.* at 45 (Thomas, J., concurring); *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 633, 638 (2007) (Scalia, J., concurring).

recognized, our interpretation of the Establishment Clause should comport with what history reveals was the contemporaneous understanding of its guarantees. The line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers. Historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to contemporaneous practices. Thus, the existence from the beginning of the Nation's life of a practice, while not conclusive of its constitutionality, is a fact of considerable import in the interpretation of the Establishment Clause.⁹⁷

And then, in his *McCreary* dissent, Justice Scalia again detailed the revisionist approach to historical authority.⁹⁸ In contrast to *Marsh*, with its direct evidence of early legislative chaplains, there was no evidence from the Founding regarding the use or acknowledgement of the Ten Commandments.⁹⁹ Undeterred by that lack of specificity, Scalia related more general acknowledgments of religion by early public officials, asserting that the Establishment Clause “was enshrined in the Constitution’s text, and these official actions show *what it meant*. . . . What is more probative of the meaning of the Establishment Clause than the actions of the very Congress that proposed it, and of the first President charged with observing it?”¹⁰⁰ Justice Thomas was equally insistent in his *Van Orden* concurrence, calling for a “return[] to the original meaning” of the Establishment Clause:

[O]ur task would be far simpler if we returned to the original meaning of the word “establishment” than it is under the various approaches this Court now uses. The Framers understood an establishment “necessarily [to] involve actual legal coercion.” . . . There is no question that, based on the

⁹⁷ 505 U.S. at 632–33 (Scalia, J., dissenting) (quotation marks and internal citations omitted).

⁹⁸ 545 U.S. at 889, 895 (Scalia, J., dissenting).

⁹⁹ *See id.* at 886–89 (listing examples of Founding-era practices and beliefs, none of which dealt with the Ten Commandments).

¹⁰⁰ *Id.* at 896–97 (emphasis in original).

original meaning of the Establishment Clause, the Ten Commandments display at issue here is constitutional.¹⁰¹

Initially, separationist-leaning justices refused to give up on a historical approach, as was demonstrated in the extended debate between Justices Souter and Thomas in *Rosenberger v. Rector & Visitors of the University of Virginia*.¹⁰² There, the issue was whether the university (UVA)—with its symbolic lineage to its founder Thomas Jefferson—could be required to fund a student religious publication.¹⁰³ Noting that the university already funded publications presenting non-religious viewpoints, Justice Kennedy held that UVA could not discriminate against speech with a religious viewpoint.¹⁰⁴ Concurring, Justice Thomas challenged the conventional interpretation of the 1785 Virginia assessment controversy as excluding all aid to religion, arguing that that historical incident had involved preferential aid to religion, not the neutral funding of religion as in the case at bar.¹⁰⁵ In contrast, Justice Souter vigorously defended the traditional interpretation of the Virginia controversy, maintaining that Madison opposed all forms of aid to religion, which in turn informed the understanding of the First Amendment.¹⁰⁶ Ironically, in examining the same historical record, both justices reached opposite conclusions as to what that record taught. Yet, each justice believed that history, if correctly interpreted, supplied the definitive answer, with Justice Thomas quipping: “history provides an answer for the constitutional question posed by this case, but it is not the one given by the [Souter] dissent.”¹⁰⁷ Later exchanges over the proper interpretation of founding history took place between Justices Thomas and Souter in *Mitchell v. Helms* and in *Zelman v. Simmons-Harris*.¹⁰⁸ With Souter’s retirement from the bench, Justice Sotomayor has assumed the mantle of defending the separationist interpretation, though she has rarely challenged her conservative brethren on historical details. For religion clause questions, the

¹⁰¹ 545 U.S. at 693–94 (Thomas, J., concurring).

¹⁰² See 515 U.S. 819 (1995).

¹⁰³ *Id.* at 822–23.

¹⁰⁴ *Id.* at 837.

¹⁰⁵ *Id.* at 854–55 (Thomas, J., concurring).

¹⁰⁶ *Id.* at 869 (Souter, J., dissenting).

¹⁰⁷ *Id.* at 863 (Thomas, J., concurring).

¹⁰⁸ *Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000); *id.* at 870–72 (Souter J., dissenting); *Zelman v. Simmons-Harris*, 536 U.S. 639, 678–79 (2002) (Thomas, J., concurring); *id.* at 711–12 (Souter, J., dissenting).

field of historical analysis has generally been ceded to the conservatives on the Court.¹⁰⁹

IV. *TOWN OF GREECE V. GALLOWAY*

With this background in mind, this article first turns to the Court's use of history in its 2014 holding in *Town of Greece v. Galloway (Greece)*.¹¹⁰ *Greece* involved an Establishment Clause challenge to an official policy/practice of clergy-delivered prayers at the beginning of city council meetings.¹¹¹ Prior to 1999, the town of Greece—a suburb of Rochester, New York, with a population of 94,000—had opened its city council meetings with a moment of silence.¹¹² That year a newly elected town supervisor decided to change the practice to one where the city would invite a local clergy to deliver an invocation at the front of the council chambers at the beginning of the meetings.¹¹³ The practice evolved such that a city employee would solicit local ministers by calling congregations listed in the city telephone directory.¹¹⁴ Due to the religious composition of the city—and the council's decision not to solicit clergy from the more religiously pluralistic city of Rochester with its Jewish and Muslim congregations—the overwhelming number of clergy invited to pray were Christian, with a significant number evincing an evangelical perspective.¹¹⁵ As a result, many of the prayers—directed to the audience—reflected “a distinctly Christian idiom,” with clergy commonly giving prayers “in Jesus’ name” with some noting Jesus’s redemptive mission of substitutional atonement.¹¹⁶ Relying on the authority of *Marsh*, the district court upheld the city’s practice, declaring that *Marsh* had not required that legislative prayer must be non-sectarian,

¹⁰⁹Clearly, with interpretations of the meaning and scope of the Second Amendment, liberal justices have not been willing to accede the authority of historical analysis to the conservatives, as the debates between Justices Scalia and Stevens in *Heller* and Justices Alito and Stevens in *McDonald v. City of Chicago* demonstrated. See generally Geoffrey Schotter, *Diachronic Constitutionalism: A Remedy for the Court's Originalist Fixation*, 60 CASE W. RES. L. REV. 1241 (2010).

¹¹⁰572 U.S. 565 (2014).

¹¹¹*Id.* at 572.

¹¹²*Id.* at 570.

¹¹³*Id.*

¹¹⁴*Id.* at 571.

¹¹⁵*Id.*

¹¹⁶*Id.* at 572. Apparently, after complaints by the plaintiffs, the city invited laymen—one Jewish and one Baha'i—to give prayers and allowed a Wiccan priestess to do the same. *Id.*

even though the Court had highlighted that factor in that case.¹¹⁷ The Second Circuit reversed, however, holding that the “steady drumbeat” of “[s]pecifically sectarian Christian prayers” would lead a reasonable observer to conclude that the city was endorsing Christianity.¹¹⁸ (The court noted that city council members regularly stood and bowed their heads during the prayers, with some making the sign of the cross, further conveying the message that the city was endorsing Christianity.)¹¹⁹ The court distinguished the practice of sectarian prayers at the Greece town meetings with the nonsectarian prayers given in the *Marsh* case.¹²⁰

The Supreme Court had not revisited the constitutionality of legislative prayers since the *Marsh* decision thirty-one years earlier. With its similarities to the *Marsh* case, participants and observers alike knew that history would figure significantly into the Court’s decision in *Greece*.

Justice Kennedy authored the opinion for a five-justice majority.¹²¹ On one level, Kennedy struggled with the facts of the case, emphasizing that the city had neither discriminated among local clergy nor reviewed the content of their prayers in advance, intimating, but never declaring (as he could not), that the city had created some type of public forum.¹²² (“Once it invites prayer into the public square, government must permit a prayer giver to address his or her own God or gods as conscience dictates”)¹²³ Despite flirting with public forum doctrine, Kennedy acknowledged that the clergy were invited by the city to pray as part of an official meeting bearing the imprimatur of city authority, such that the prayers were akin to “government speech.”¹²⁴ Turning to an alternative theory, Kennedy touted the practical benefit of the prayer moment, suggesting it satisfied a valid secular purpose: “[L]egislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society.”¹²⁵ And finally, again at tension with the facts, Kennedy asserted that the prayer practice reflected, if not promoted, religious

¹¹⁷Galloway v. Town of Greece, 732 F. Supp. 2d 195, 238–43 (W.D.N.Y. 2010), *rev’d*, 681 F.3d 20 (2d Cir.), *rev’d*, 572 U.S. 565 (2014).

¹¹⁸Galloway v. Town of Greece, 681 F.3d 20, 32 (2d Cir. 2012), *rev’d*, 572 U.S. 565 (2014).

¹¹⁹*Id.*

¹²⁰*Id.* at 30.

¹²¹*Greece*, 572 U.S. at 568.

¹²²*Id.* at 571.

¹²³*Id.* at 582.

¹²⁴*Id.* at 582, 585.

¹²⁵*Id.* at 575.

pluralism: “It acknowledges our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds. . . . [The] prayers strive for the idea that people of many faiths may be united in a community of tolerance and devotion.”¹²⁶ These rationales were all secondary, however, as observers knew that the case hinged on the historical legacy of official prayers.

Turning to the history, as was inevitable, Kennedy refined the historical approach the Court had applied in *Marsh*. According to Kennedy, rather than creating an exception to the doctrinal standards for religion clause adjudication, as Chief Justice Burger had suggested, *Marsh* simply held that resorting to tests was unnecessary when history addressed the question at hand.¹²⁷ Making two a priori assumptions, Kennedy wrote that:

Marsh stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.¹²⁸

Pointing to the same evidence that Chief Justice Burger had relied on thirty years before, Kennedy noted that the First Congress had appointed chaplains “only days after approving the language for the First Amendment.”¹²⁹ This evidence, rather than inviting a syllogistic trap, simply demonstrated “that the Framers considered legislative prayer a benign acknowledgement of religion’s role in society.”¹³⁰ Kennedy cited the authoritative nature of this historical coincidence more than once in his opinion.¹³¹ He was unclear, however, whether this historical evidence

¹²⁶*Id.* at 579, 584. This rationale was particularly weak, as Kennedy went on to criticize the potential censorship that would arise if the city engaged in “an effort to achieve religious balancing”—shades of racial balancing?—as a “quest to promote ‘a “diversity” of religious views’ would require the town ‘to make wholly inappropriate judgments about the number of religions [it] should sponsor.’” *Id.* at 586 (alteration in original) (quoting *Lee v. Weisman*, 505 U.S. 577, 617 (1992) (Souter, J., concurring)). See generally Caroline Mala Corbin, *Christian Legislative Prayer and Christian Nationalism*, 76 WASH. & LEE L. REV. 453, 464 (2019) (disputing that legislative prayers promote pluralism).

¹²⁷*Greece*, 572 U.S. at 577.

¹²⁸*Id.*

¹²⁹*Id.* at 576.

¹³⁰*Id.*

¹³¹*Id.* at 575–76.

controlled the ultimate decision. At one place, he disclaimed the binding authority of history: “*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation.”¹³² “The case teaches instead that the Establishment Clause must be interpreted ‘by reference to historical practices and understandings,’” suggesting that relevant history simply informs the appropriate legal standard.¹³³ Yet elsewhere, Kennedy implied that an example from history would negate the purported constitutional violation: that in a conflict between history supporting a particular practice and the Court’s jurisprudence, history would prevail.¹³⁴

Any uncertainty left by Kennedy’s opinion about the role of history was supplied by the concurring opinions of Justices Alito and Thomas, with Justice Scalia joining on both. Actions taken by the First Congress, Alito wrote, “are presumptively consistent with the Bill of Rights, and this principle has special force when it comes to the interpretation of the Establishment Clause. This Court has always purported to base its Establishment Clause decisions on the original meaning of that provision.”¹³⁵ Elaborating on that approach, Alito wrote:

There can be little doubt that the decision in *Marsh* reflected the original understanding of the First Amendment. It is virtually inconceivable that the First Congress, having appointed chaplains whose responsibilities prominently included the delivery of prayers at the beginning of each daily session, thought that this practice was inconsistent with the Establishment Clause. And since this practice was well established and undoubtedly well known, it seems equally clear that the state legislatures that ratified the First Amendment had the same understanding.¹³⁶

If there was any doubt as to Alito’s position, he restated it in clearer language: “[I]f there is any inconsistency between any of those [doctrinal] tests and the historic practice of legislative prayer, the inconsistency calls into

¹³² *Id.* at 576.

¹³³ *Id.* (quoting *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring)).

¹³⁴ *See id.* at 577.

¹³⁵ *Id.* at 602 (Alito, J., concurring) (citations omitted).

¹³⁶ *Id.* at 602–03.

question the validity of the test, not the historical practice.”¹³⁷ Justice Thomas, while reiterating his fixation with reverse incorporation of the Establishment Clause, restated his originalist position that the justices were bound by the Framers’ “understanding of *what constituted an establishment*” of religion.¹³⁸ History controlled.

The holding drew two dissenting opinions, the lead dissent written by Justice Kagan with a shorter opinion by Justice Breyer.¹³⁹ Significantly, neither dissent contested the constitutionality of legislative prayer generally, only when it occurs in a sectarian form.¹⁴⁰ Equally significant, neither dissent challenged the majority’s reliance on history or, except in a passing footnote, its historical interpretation of the practice.¹⁴¹ Rather, Breyer and Kagan argued that the sectarian Christian nature of the prayers created the appearance of the town’s imprimatur of “a particular religious creed.”¹⁴² This, the dissenters emphasized, was inconsistent with *Marsh*’s holding approving nonsectarian invocations.¹⁴³ In her brief challenge to the majority’s interpretation of the historical record, Justice Kagan argued that official prayers during the founding period were overwhelmingly inclusive in nature and couched in nonsectarian language, a record that was contrary to the practice in *Greece*.¹⁴⁴ Aside from that brief exchange, again contained in a footnote, Justices Kagan and Breyer ceded the historical method and record to the Court conservatives. History had prevailed, effectively constitutionalizing a de facto practice of officially sanctioned prayers reflecting a particular religious perspective, despite existing precedent that appearances of government endorsement of religion—and of a particular faith—are unconstitutional.¹⁴⁵

¹³⁷*Id.* at 603.

¹³⁸*Id.* at 609 (Thomas, J., concurring in part and concurring in the judgment). As supporting evidence of an original understanding with respect to legislative prayer, Thomas noted that at the time of the enactment of the Fourteenth Amendment, thirty state constitutions contained some reference to God or the deity. *Id.*

¹³⁹*Id.* at 610–15 (Breyer, J., dissenting); *id.* at 615–38 (Kagan, J., dissenting).

¹⁴⁰*Id.* at 613 (Breyer, J., dissenting); *id.* at 627 (Kagan, J., dissenting).

¹⁴¹*Id.* at 619 n.1 (Kagan, J., dissenting).

¹⁴²*Id.* at 619.

¹⁴³*Id.* at 616.

¹⁴⁴*Id.* at 619 n.1 (citing Brief for Paul Finkelman et al. as Amici Curiae in Support of Respondents, *Greece*, 572 U.S. 565 (2014) (No. 12-696), 2013 WL 5400264).

¹⁴⁵See generally Alan Brownstein, *Constitutional Myopia: The Supreme Court’s Blindness to Religious Liberty and Equality Values in Town of Greece v. Galloway*, 48 LOY. OF L.A. L. REV. 371 (2014).

V. *AMERICAN LEGION V. AMERICAN HUMANIST ASSOCIATION*

Five years later, the Court considered another case involving government religious expression,¹⁴⁶ returning to the question of the constitutionality of a government-owned religious symbol.¹⁴⁷ This time, the symbol was not a creche at Christmastime or a Ten Commandments monument but the “‘defining symbol’ of Christianity:” a Latin cross.¹⁴⁸ Even though the massive, thirty-two-foot cross had been constructed in 1925 by a private group as a war memorial and subsequently taken over by the American Legion, the cross stands on a traffic island at the center of a busy three-way highway intersection and was acquired in 1961 by the local governmental planning commission, which maintained it using public funds.¹⁴⁹

The outcome in *American Legion*—with the Court upholding the cross’s constitutionality based on its status as a war memorial—was not surprising.¹⁵⁰ Less certain was the Court’s legal rationale for rejecting the Establishment Clause challenge. Declining to apply the analytical test from *Lemon v. Kurtzman*,¹⁵¹ Justice Alito offered several rationales for upholding the cross: that when dealing with longstanding symbols, “identifying their original purpose or purposes may be especially difficult”; that over time, “the purposes associated with an established monument, symbol, or practice often multiply” as may the “message conveyed”; and that removing a symbol that has generally become accepted by a local community may be perceived as “scrubbing away any references to the divine” and as being “aggressively

¹⁴⁶ *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019).

¹⁴⁷ In the interim, the Court handed down its decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, involving whether a state could deny extending a financial benefit to a church based on the no-funding of religion principle. 137 S. Ct. 2012, 2017 (2017). The majority brushed aside that principle, holding that the denial of funds constituted discrimination against religion. *Id.* at 2025. In her dissent, Justice Sotomayor chided her conservative brethren for now ignoring history, reminding them that “[t]his Court has consistently looked to history for guidance when applying the Constitution’s Religion Clauses.” *Id.* at 2032 (Sotomayor, J., dissenting). Citing to Justice Kennedy’s opinion in *Greece*, Sotomayor declared that the holding “discounts centuries of history and jeopardizes the government’s ability to remain secular,” likely a comment on the majority’s selective decision whether to rely on history. *Id.* at 2041.

¹⁴⁸ *Am. Legion*, 139 S. Ct. at 2107 (Ginsburg, J., dissenting). Justice Ginsburg referred to the thirty-two-foot concrete structure as “[a]n immense Latin cross.” *Id.* at 2103.

¹⁴⁹ *Id.* at 2076–78 (majority opinion).

¹⁵⁰ *Id.* at 2089.

¹⁵¹ 403 U.S. 602, 612 (1971). As Justice Alito wrote: “In many cases, this Court has either expressly declined to apply the [*Lemon*] test or has simply ignored it.” *Am. Legion*, 139 S. Ct. at 2080 (plurality opinion).

hostile to religion.”¹⁵² In offering these rationales, Alito did not dispute the religious meaning of the cross (“a preeminent Christian symbol”)—as he could not, considering his final consideration—but simply that the *message* conveyed might be ambiguous.¹⁵³ Alito’s formula for dealing with government religious symbols has significant limitations, however. While it potentially avoids having to address concerns associated with government endorsements when the purpose or messaging are ambiguous, it doesn’t provide an answer when either the religious purpose or message are clear. Neither does Alito’s formula identify whose view of ambiguity or clarity controls; as Justice Ginsburg observed in her dissent, for the thirty percent of non-Christian Americans, the message conveyed by a publicly displayed cross is generally not ambiguous.¹⁵⁴ Finally, Alito limited the factors to longstanding monuments, not to new ones, which effectively grandfathers the religious symbols of the nation’s earlier religious majority (i.e., Christians), but still does not address how to approach newer displays of religious symbols (or what timeline controls).¹⁵⁵

Alito then offered an additional rationale for discarding the *Lemon* test and upholding the government display of the cross: that in dealing with such controversies, the Court has “taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance.”¹⁵⁶ Relying on *Marsh* and *Greece*, Alito reaffirmed that “the Establishment Clause must be interpreted ‘by reference to historical practices and understandings’” coincident with the Founding.¹⁵⁷ Unlike the legislative prayers in *Marsh* and *Greece*, however, there was an absence of historical evidence of the government displaying crosses on public property (the exception being individual crosses on graves in government cemeteries).¹⁵⁸ Lacking a specific

¹⁵²*Am. Legion*, 139 S. Ct. at 2082, 2084–85 (majority opinion).

¹⁵³*Id.* at 2074, 2090 (“The cross is undoubtedly a Christian symbol, but that fact should not blind us to everything else that the Bladensburg Cross has come to represent.”).

¹⁵⁴*Id.* at 2106 (Ginsburg, J., dissenting) (“To non-Christians, nearly 30% of the population of the United States . . . the State’s choice to display the cross on public buildings or spaces conveys a message of exclusion . . .”).

¹⁵⁵*Id.* at 2085 (Alito, J., concurring) (“These four considerations show that retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones. The passage of time gives rise to a strong presumption of constitutionality.”).

¹⁵⁶*Id.* at 2087.

¹⁵⁷*Id.*

¹⁵⁸*See* Brief for Respondents, *American Legion v. American Humanist Ass’n*, 139 S. Ct. 2067 (2019) (No. 17-1717), 2019 WL 338889, at *73.

tradition to apply, Alito resorted to the fallback approach of relying on historical generalities: President George Washington's Thanksgiving Proclamation and Farewell Address; the appointment of congressional chaplains by the First Congress; etc.¹⁵⁹ These instances indicated the government's long "recognition of the important role that religion plays in the lives of many Americans," Alito wrote.¹⁶⁰ "Where categories of monuments, symbols, and practices with a longstanding history follow in that tradition, they are likewise constitutional."¹⁶¹ In so stating, Alito effectively reaffirmed his declaration in *Greece* that practices that can be traced back to the Founding "are presumptively consistent with the Bill of Rights" and are per se constitutional.¹⁶²

Interestingly, this last discussion commanded the votes of only three other justices, raising the question whether a majority of justices were uncomfortable with using the historical rationale in this context. Justices Thomas's and Gorsuch's refusal to sign onto that section of the opinion can be misinterpreted, however. Justice Thomas's concurrence in the Court's judgment likely reflected his continuing position on the non-incorporation of the Establishment Clause and his frustration that the majority opinion did not go the next step and overrule *Lemon*, which he noted "has no basis in the original meaning of the Constitution."¹⁶³ Justice Gorsuch, in a concurrence joined by Thomas, argued that the plaintiffs lacked standing to challenge the cross and seconded Thomas's argument that *Lemon* should be jettisoned.¹⁶⁴ Otherwise, Gorsuch (and Thomas) agreed with Alito's reliance on a "historically sensitive approach," and he reaffirmed that "the Establishment Clause must be interpreted by reference to historical practices and understandings," declaring that that approach "'must be' used *whenever* we interpret the Establishment Clause."¹⁶⁵ Those statements, taken in conjunction with Justice Kavanaugh's observation that the decision also

¹⁵⁹*Am. Legion*, 139 S. Ct. at 2087–88.

¹⁶⁰*Id.* at 2089.

¹⁶¹*Id.*

¹⁶²572 U.S. 565, 602 (2014).

¹⁶³*Am. Legion*, 139 S. Ct. at 2097 (Thomas, J., concurring).

¹⁶⁴*Id.* at 2098, 2102 (Gorsuch, J., concurring).

¹⁶⁵*Id.* at 2101–02 (emphasis in original).

relied on history,¹⁶⁶ indicated that a majority of justices understood that a historical approach controls in such controversies.¹⁶⁷

VI. *ESPINOZA V. MONTANA DEPARTMENT OF REVENUE*

More recently, the justices used a historical approach to resolve a different category of Establishment Clause controversies: the public funding of religious activity. As discussed in the introduction, *Espinoza* involved a challenge to a state's refusal to allow a tax credit for a donation to a "student scholarship organization," which in turn used the donations for tuition scholarships for religious education.¹⁶⁸ The Montana Department of Revenue refused to grant the tax deduction based on the state constitution's no-aid-to-religion clause, which is similar to prohibitions found in the constitutions of thirty-seven other states.¹⁶⁹ Such provisions date back to the 1820s and arose as states were creating public school systems and establishing public "school fund" accounts from tax revenues to finance public education.¹⁷⁰ Writing for a five-justice majority, Chief Justice Roberts held the denial of the tax credit for religious schooling discriminated against religion and was therefore unconstitutional.¹⁷¹ Roberts relied on a decision three years earlier, *Trinity Lutheran Church v. Comer*, where in reviewing a similar denial of funding, the Court had distinguished prohibitions on religious *uses* (appropriate) from those directed at *status* (inappropriate).¹⁷² Because the Montana constitutional prohibition is partially directed toward institutions—"any church, school, academy, seminary, college, [or] university"—Roberts found the same fatal error here: "This case also turns expressly on religious status and not religious use."¹⁷³

¹⁶⁶*Id.* at 2092 (Kavanaugh, J., concurring).

¹⁶⁷In her concurrence, Justice Kagan declared her support for Justice Alito's various factors, though she declined "to sign on to any broader statements about history's role in Establishment Clause analysis." *Id.* at 2094 (Kagan, J., concurring).

¹⁶⁸140 S. Ct. 2246, 2251 (2020).

¹⁶⁹*Id.* at 2252; Brief of Respondents, *Espinoza*, 140 S. Ct. 2246 (2020) (No. 18-1195), 2019 WL 5887033, at *2.

¹⁷⁰See GREEN, *THE BIBLE*, *supra* note 4, at 45–54, 87–89.

¹⁷¹*Espinoza*, 140 S. Ct. at 2262–63.

¹⁷²137 S. Ct. 2012, 2023 (2017).

¹⁷³*Espinoza*, 140 S. Ct. at 2252, 2255–56. Article X, section 6 also prohibits aid "for any sectarian purpose" which would constitute a use. MONT. CONST. art. X, § 6 (West, Westlaw through Jul. 2021 amendments).

Montana asserted that its denial of the tax credit was justified by its “interest in separating church and State ‘more fiercely’ than the Federal Constitution” as expressed in its no-funding provision.¹⁷⁴ The legitimacy of that interest, and the state’s no-aid clause, became the focal point of the decision, and this is where the historical approach took over. Relying on dicta from the plurality opinion in *Mitchell v. Helms* twenty years earlier, Roberts wrote:

[M]any of the [state] no-aid provisions belong to a more checkered tradition shared with the Blaine Amendment of the 1870s. That proposal—which Congress nearly passed—would have added to the Federal Constitution a provision similar to the state no-aid provisions, prohibiting States from aiding “sectarian” schools. “[I]t was an open secret that ‘sectarian’ was code for ‘Catholic.’” The Blaine Amendment was “born of bigotry” and “arose at a time of pervasive hostility to the Catholic Church and to Catholics in general”; many of its state counterparts have a similarly “shameful pedigree.”¹⁷⁵

In no place in the opinion did Roberts cite any direct evidence of anti-Catholic animus associated with the drafting of the Montana no-aid provision in 1884 or its adoption in 1889, as there was none (see discussion below).¹⁷⁶ Instead, Roberts relied on a particular narrative about the Blaine Amendment generally (hereinafter, the “animus narrative”)—one that is contested among scholars¹⁷⁷—to dispute the legitimacy of the Montana provision. The anti-

¹⁷⁴ *Espinoza*, 140 S. Ct. at 2260.

¹⁷⁵ *Id.* at 2259 (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000)) (citations omitted).

¹⁷⁶ *See id.*

¹⁷⁷ For scholarship that disputes the animus narrative, see TIMOTHY VERHOEVEN, SECULARISTS, RELIGION AND GOVERNMENT IN NINETEENTH-CENTURY AMERICA 151–59 (2019); GREEN, THE BIBLE, *supra* note 4, at 179–223; LAURENCE H. WINER AND NINA J. CRIMM, GOD, SCHOOLS, AND GOVERNMENT FUNDING 40–48 (2015); Christopher C. Lund, *The New Victims of the Old Anti-Catholicism*, 44 CONN. L. REV. 1001, 1007 (2012); Jill Goldenziel, *Blaine’s Name in Vain: State Constitutions, School Choice, and Charitable Choice*, 83 DEN. U. L. REV. 57, 62–64 (2005); Frederick Mark Gedicks, *Reconstructing the Blaine Amendment*, 2 FIRST AMEND. L. REV. 85, 91, 94 (2003); Marc D. Stern, *Blaine Amendments, Anti-Catholicism, and Catholic Dogma*, 2 FIRST AMEND. L. REV. 153, 168–76 (2003); Laura S. Underkuffler, *The ‘Blaine’ Debate: Must States Fund Religious Schools?*, 2 FIRST AMEND. L. REV. 179, 194–95 (2003); STEPHEN MACEDO, DIVERSITY AND DISTRUST 54–63 (2000); Mark Tushnet, *Vouchers After Zelman*, 2002 SUP. CT. REV. 1, 16; Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & POL. 65, 111–12 (2002).

Catholicism that allegedly motivated the national Blaine Amendment also corrupted the enactment of the Montana provision some thirteen years later, Roberts wrote, chiefly by the state affirming the same principle against funding religious schooling.¹⁷⁸ Thus, specific evidence of animus in Montana’s enactment was not necessary.¹⁷⁹

Roberts was not the only justice to promote the animus narrative to attack Montana’s no-funding provision. In his concurring opinion, Justice Thomas—the author of the *Mitchell* plurality where he had written that “hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow”¹⁸⁰—took relying on history to another level of generality. Declining even to discuss the Blaine Amendment, Thomas declared that “[h]istorical evidence suggests that many advocates for [the no-aid] separationist view were originally motivated by hostility toward certain disfavored religions.”¹⁸¹ Apparently for Thomas, any expression of support for the no-aid principle is suspect, and most are corrupted because they reflect a “trendy disdain for deep religious conviction.”¹⁸²

Of all the opinions in the majority, Justice Alito’s concurrence most fully embraced a historical approach for resolving the constitutional question in *Espinoza*.¹⁸³ His entire opinion is essentially a broadside on the Blaine Amendment and the no-funding principle. Whether one agrees with Alito’s

¹⁷⁸ See *Espinoza*, 140 S. Ct. at 2259.

¹⁷⁹ Roberts’s other foray into history involved a discussion about how during “the founding era and the early 19th century, governments provided financial support to private schools, including denominational ones.” *Id.* at 2258. This early practice, Roberts insisted, demonstrates that there is no “‘historic [sic] and substantial’ tradition” against funding religious education. *Id.* Roberts’s selective historical account fails to mention that a system of public schooling did not arise until the 1820s, so that before then primary education took place in private academies, through tutors, or in denominational “charity schools” and all instruction had a sectarian, religious complexion. Once public schooling arose, however, its curriculum evolved into a nonsectarian approach—admittedly, a pan-Protestantism—while rules arose prohibiting the funding of religious schools. See Feldman, *supra* note 177, at 72–81; see also GREEN, THE BIBLE, *supra* note 4, at 13–20.

¹⁸⁰ *Mitchell*, 530 U.S. at 828 (Thomas, J., dissenting) (citing this author’s article, *The Blaine Amendment Reconsidered* 36 AM. J. LEGAL HIST. 38 (1992), out of context). Thomas added: “This doctrine, born of bigotry, should be buried now.” *Id.* at 829.

¹⁸¹ *Espinoza*, 140 S. Ct. at 2266 (Thomas, J., concurring) (citing HAMBURGER, SEPARATION OF CHURCH AND STATE, 391–454 (2002)).

¹⁸² *Id.* (quoting *Locke v. Davey*, 540 U.S. 712, 733 (2004) (Scalia, J., dissenting)).

¹⁸³ For a related discussion, see Caroline Mala Corbin, *Opportunistic Originalism and the Establishment Clause*, 54 WAKE FOREST L. REV. 617 (2019) (arguing that in *Trinity Lutheran*—and by implication in *Espinoza*—the justices abandoned their reliance on originalism, ignoring the legacy of the no-aid principle, to reach a desired outcome).

ultimate conclusion about the Blaine Amendment, his opinion is a notable example of the woeful historicism practiced by many members of the Court.¹⁸⁴

One of the many problems with the Court's use of history in its decision-making—discussed in greater detail below¹⁸⁵—is that judges rely in no small part on arguments and data supplied by the party briefs and those of amici representing public interest groups. Church-state scholar Alan Brownstein has observed that:

[M]ost judges, virtually all lay readers, and many scholars who work in the church-state area have not engaged in extensive independent research of primary sources in developing their views on this subject. Most of us, at least to some extent, formed opinions on the subject based on secondary sources. Our conclusions are derivative of the historical work performed by others.¹⁸⁶

Such was the case here. For decades, two groups in particular have attacked state no-funding provisions and tied them to an animus narrative about the Blaine Amendment: the Institute for Justice, a libertarian organization that advocates for private school choice; and the Becket Fund for Religious Liberty, which was founded by conservative Catholics.¹⁸⁷ The Institute for Justice represented the petitioners in *Espinoza*, whereas Becket Fund filed a leading amicus brief that called on the Court to declare all state no-funding provisions “presumptively unconstitutional.”¹⁸⁸

¹⁸⁴ See Lisa Shaw Roy, *History, Transparency, and the Establishment Clause*, 112 PENN. ST. L. REV. 683, 687 (2008) (referring to the Court's use of history as “mythistory”); Ira C. Lupu and Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles: A Comment on Fulton v. City of Philadelphia*, G.W. Law School Public Law and Legal Theory Paper No. 2021-27 (calling Justice Alito's historical method “tendentious” and remarking that “Justice Alito simply assumes the conclusions he wants to reach and ignores obvious contradictory evidence”).

¹⁸⁵ See *infra* Part VII.

¹⁸⁶ Alan Brownstein, *The Reasons Why Originalism Provides a Weak Foundation for Interpreting Constitutional Provisions Relating to Religion*, 2009 CARDOZO L. REV. DE NOVO 196, 197–98 (2009).

¹⁸⁷ See Blaine Info Central: Dismantling discriminatory Blaine Amendments, BECKET, <https://www.becketlaw.org/research-central/blaine-amendments-info-central/>; Blaine Amendments, INSTITUTE FOR JUSTICE, <https://ij.org/issues/school-choice/blaine-amendments/>.

¹⁸⁸ As the Becket Fund asserted in its amicus brief in *Espinoza*, there is “well-documented anti-Catholic animus that motivated the Blaine Amendments in the latter half of the 19th Century. This animus renders all Blaine Amendments presumptively unconstitutional.” Brief Amicus Curiae of

Justice Alito's shoddy historicism is revealed on its second page, where he candidly lists twenty amicus briefs, including that of the Becket Fund, as the source of his information about the history behind the no-funding principle, the Blaine Amendment, and the enactment of the Montana provision.¹⁸⁹ For Alito, the cumulative weight of these amicus briefs asserting the anti-Catholic roots of the Blaine Amendment and, by implication, those of the various state no-funding provisions, was authoritative and conclusive. "These briefs, most of which were not filed by organizations affiliated with the Catholic Church, point out that Montana's provision was modeled on the failed Blaine Amendment to the Constitution of the United States . . . [which] was prompted by virulent prejudice against immigrants, particularly Catholic immigrants."¹⁹⁰ From there, Alito proceeded to recount the animus narrative about the Blaine Amendment supplied in the briefs by the Petitioners and their amici, relating anecdotal accounts of anti-Catholic incidents and statements throughout the nineteenth century, most of which were unconnected with the Blaine Amendment or state no-funding provisions.¹⁹¹

Alito also highlighted the use of the word "sectarian" contained in the Montana provision (and in many other state no-aid provisions), which Protestants and educators used to distinguish Catholic parochial schools from the "nonsectarian" public schools.¹⁹² For over two decades, the Becket Fund and their allies have argued that the common use of the word "sectarian" during the nineteenth century was used chiefly if not exclusively in a derisive or pejorative manner to refer to the Catholic Church.¹⁹³ Justice Thomas adopted this interpretation of the word in his *Mitchell* opinion in writing that "it was an open secret that 'sectarian' was code for 'Catholic.'"¹⁹⁴ Thus according to the animus narrative, any use of the word "sectarian" in conjunction with a funding restriction—or any other church-state matter—evinces anti-Catholic animus. Like Chief Justice Roberts, Alito accepted this

the Becket Fund for Religious Liberty in Support of Petitioners, *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020) (No. 18-1195), 2019 WL 4512940, at *3.

¹⁸⁹ *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2268 (2020).

¹⁹⁰ *Id.* The implication of this statement is unclear. Does the side with the greater number of amicus briefs raising a historical argument therefore prevail on a question of historical interpretation?

¹⁹¹ See generally *id.* at 2268–74.

¹⁹² *Id.* at 2270–71.

¹⁹³ See Brief Amicus Curiae of the Becket Fund, *supra* note 188, at *9.

¹⁹⁴ 530 U.S. 793, 828 (2000).

interpretation, writing: “The resulting wave of state laws withholding public aid from ‘sectarian’ schools cannot be understood outside this context. . . . Montana’s no-aid provision retains the bigoted code language used throughout state Blaine Amendments.”¹⁹⁵ As Alito concluded: “Thus, the no-aid provision’s terms keep it ‘[t]ethered’ to its original ‘bias,’ and it is not clear at all that the State ‘actually confront[ed]’ the provision’s ‘tawdry past in reenacting it.’”¹⁹⁶

In reaching this conclusion based on material selectively supplied by Petitioners and their amici, Roberts, Thomas, and Alito ignored other scholarship, arguments, and data provided in the briefs by Respondent and its amici. Contrary to the impression related in the majority and concurring opinions, there is no historical consensus supporting the animus narrative as it relates to nonsectarian schooling, the no-funding principle, or even the Blaine Amendment.¹⁹⁷ All scholars acknowledge that the Blaine Amendment was proposed at a time of heightened controversy over the “School Question”—involving nonsectarian Bible reading in public schools and the public funding of religious schools—and during a period of increased tensions between Protestants and Catholics over immigration and labor competition. Scholars also agree that some supporters of the Blaine Amendment used anti-Catholic rhetoric in the public debates that accompanied the proposal. But, as several scholars maintain, it distorts the historical record to insist that anti-Catholicism was the only or primary motivation for the Amendment, the no-funding principle, or the actions of their supporters.¹⁹⁸ As this author has previously written:

[T]he Blaine Amendment was a fulcrum in the century-long struggle over the propriety, role, and character of universal public education in America while, at the same time, it served as the capstone of an eight-year controversy over the legitimacy of Protestant-oriented public schooling, a controversy that raged along side [sic] the parochial school funding question. The Blaine Amendment had as much to do

¹⁹⁵ *Espinoza*, 140 S. Ct. at 2270 (Alito, J., concurring). The only evidence of Protestant-Catholic conflict in Montana cited in Alito’s opinion was an incident, related in the amicus brief by Senator Danes, et al., of a riot over the hanging of an anti-Catholic sign over a Butte saloon in 1894, some *ten years after* the writing of the Montana no-funding provision. *Id.* at 2271.

¹⁹⁶ *Id.* at 2274 (quoting *Ramos v. Louisiana*, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring in part)).

¹⁹⁷ See sources *supra*, note 177.

¹⁹⁸ See sources *supra*, note 177.

with the partisan climate of the post-Reconstruction era and related concerns about federal power over education as it did with [anti-]Catholic animus. Included in the mix was a sincere effort to make public education available for children of all faiths and races, while respecting Jeffersonian notions of church-state separation. Those who characterize the Blaine Amendment as a singular exercise in Catholic bigotry thus give short shrift to the historical record and the dynamics of the times.¹⁹⁹

Relatedly, the animus narrative ignores the larger history behind the no-funding principle and the enactment of laws and constitutional provisions memorializing it. As noted, the concept of a legal prohibition on public funding of religious education arose in the 1820s, before the significant rise in Catholic immigration and the systematic development of Catholic schooling.²⁰⁰ The legal bans applied to Baptist, Methodist, and other Protestant schools; similarly, the word “sectarian” was a generic term and applied to any denominationally specific school.²⁰¹ Significantly, out of the thirty-eight no-funding provisions today, seventeen originated *before* the vote on the Blaine Amendment.²⁰² It is inaccurate to designate those state no-

¹⁹⁹Steven K. Green, “*Blaming Blaine*”: *Understanding the Blaine Amendment and the No-Funding Principle*, 2 FIRST AMEND. L. REV. 107, 113–14.

²⁰⁰See Duncan, *supra* note 5, at 504 (noting that Catholics represented only 3.3% of the U.S. population in 1840).

²⁰¹Professor Feldman has demonstrated that Horace Mann used the term “sectarian” to refer to doctrines of particular *Protestant* denominations, see Feldman, *Non-Sectarianism Reconsidered*, *supra* note 177, at 73–75, and in the 1831 New York controversy over funding denominational charity schools, opponents warned that “Methodist, Episcopalian, Baptist, and every other sectarian school” would seek a share of the school fund. WILLIAM OLAND BOURNE, *HISTORY OF THE PUBLIC SCHOOL SOCIETY OF THE CITY OF NEW YORK* 140 (New York, Wm. Wood & Co. 1870). In 1869, the Massachusetts Supreme Judicial Court applied MASS. CONST. amend. art. XVIII’s prohibition on appropriating public funds to any school controlled by a “religious sect” to bar funding for a school controlled by a Congregational Church. See *Jenkins v. Andover*, 103 Mass. 94 (1869). And in 1895, a Pennsylvania trial court enjoined religious exercises in a public school that tracked the doctrines of the Methodist Episcopal Church, declaring that “denominational religious exercises and instruction in sectarian doctrine have no place in our system of common school education.” *Stevenson v. Hanyon*, 4 Pa. Dist. Rep. 395, 396 (Pa. Com. Pl. 1895).

²⁰²COLO. CONST. art. V, § 34, art. IX, § 7 (1876); FLA. CONST. art. I, § 3 (1838); ILL. CONST. art. VIII, § 3 (1870); IND. CONST. art. I, § 6 (1851); KAN. CONST. art. VI § 8 (C) (1859); KY. CONST. art. XI, § 1 (1850); MASS. CONST. amend. art. XVIII (1855); MICH. CONST. art. I, § 4 (1835); MINN. CONST. art. I, § 16, art. VIII, § 3 (1857) (amended 1877); MO. CONST. art. II, § 7, art. XI, § 11 (1875); NEB. CONST. art. VIII, § 11 (1875); NEV. CONST. art. XI, § 10 (1864); OHIO CONST.

funding provisions as “Blaine Amendments” or tie any anti-Catholic animus associated with it to these earlier provisions. Even restricting consideration to those no-funding provisions enacted after 1876, the no-funding provisions in the earlier state constitutions more than likely served as models for the post-1876 provisions.²⁰³ Thus, “many of the state no-funding provisions would likely have been enacted regardless of the failed Blaine Amendment. No doubt the federal measure inspired several of the [later] state provisions, but it was not necessary for those enactments.”²⁰⁴

None of this evidence contesting the accuracy of the animus narrative was discussed in the majority and concurring opinions (and, sadly, neither in the dissenting opinions). This is not to say that justices cannot weigh historical evidence and decide which documents and accounts are more convincing and reliable. But that is not what the majority and concurrences did here. Rather than engaging the data and scholarship of this competing narrative, the opinions simply ignored them. It appears that the majority and concurring opinions were not about to allow a fuller consideration of the historical record stand in the way of their desired conclusions.²⁰⁵

VII. THE ERROR OF HISTORICAL ANALYSIS

Together, *Greece*, *American Legion*, and *Espinoza* announce the ascendancy of the historical approach while they reaffirm several assumptions that a majority of the justices share about using history to resolve religion clause controversies (as well as other constitutional claims). The justices apparently believe that historical evidence is readily accessible, reliable, understandable, and applicable to modern controversies. Equally important, they believe that once historical evidence is revealed, it will

art. VI, § 2 (1851); OR. CONST. art. I, § 5 (1857); PA. CONST. art. III, § 18, art. X, § 2 (1873); TEX. CONST. art. I, § 7 (1876); WIS. CONST. art. I, § 18 (1848).

²⁰³ Goldenziel, *supra* note 177, at 66–71; Green, *The Insignificance*, *supra* note 4, at 327–32.

²⁰⁴ GREEN, *THE BIBLE*, *supra* note 4, at 233.

²⁰⁵ Justice Alito selectively cited to this author’s article, “The Blaine Amendment Reconsidered,” for evidence of contemporary nativism, *see* *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2270, n.7 (2020), but failed to discuss any contrary material contained in that article, and the other sources listed in *supra* note 4, which was extensively discussed in the briefs of Respondent and supporting amici. *See* Brief of Respondents at 41–42, *Espinoza*, 140 S. Ct. 2246 (2020) (No. 18-1195); Brief of Baptist Joint Committee for Religious Liberty, et al. as Amici Curiae in Support of Respondents at 13–19, *Espinoza*, 140 S. Ct. 2246 (2020) (No. 18-1195).

disclose a consensus understanding from the founding period.²⁰⁶ Judges and lawyers who favor a historical approach also assume they are utilizing a complementary discipline (history) in an accurate and appropriate manner to assist in adjudicating legal claims. In essence, they believe historical evidence will conform comfortably within the preexisting structures of the law, meeting the needs of the legal process by supplying usable authority without causing any adulteration of the historical project.²⁰⁷

Employing history for constitutional interpretation—particularly where historical authority becomes so determinative—reveals a fundamental tension between the historical project and that of constitutional lawyering. Judges and lawyers tend to believe, or at least claim, that “[t]he past is fixed,” as Judge Jeffery Sutton has written—that *historical truths* exist.²⁰⁸ Professionally-trained historians categorically reject the notion of a fixed past. Certainly, some indisputable facts occurred. George Washington commanded the Continental Army, served as our first president, and owned slaves. While these “facts” are all “true,” simply by deciding which facts to select and emphasize (e.g., Washington’s slaveholding), the facts are inseparably intermingled with historical interpretation. “Historical judgments,” H. Jefferson Powell observed, “necessarily involve elements of creativity and interpretative choice.”²⁰⁹ (Rather than simply noting Washington was a slave owner—a *true fact*—one could also mention that he struggled with the propriety of slavery later in life and freed his slaves upon his death, additional facts that may portray a slightly different image.)²¹⁰ The point is that any exploration into history is selective, and all good accounts of history are interpretive. The difference is that historians acknowledge the selective and interpretive aspects of their craft, while jurists often act as if such indeterminacies are inconsistent with a historical analysis instead of

²⁰⁶Powell, *supra* note 29, at 684 (“Consensus or even broad agreement among the founders is a historical assertion to be justified, not assumed.”).

²⁰⁷See MILLER, *supra* note 26, at 25. According to David A.J. Richards, an originalist “model of constitutional interpretation derives its appeal from a simplistic philosophical picture of what legal interpretation must be, namely, reading legal texts on a naïve model of speaker’s meaning.” DAVID A.J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 6 (Oxford Univ. Press 1989).

²⁰⁸Jeffrey S. Sutton, *The Role of History in Judging Disputes About the Meaning of the Constitution*, 41 TEX. TECH L. REV. 1173, 1182 (2009).

²⁰⁹Powell, *supra* note 29, at 660–61.

²¹⁰See JOHN E. FERLING, THE FIRST OF MEN: A LIFE OF GEORGE WASHINGTON 475–80, at 502–03 (The Univ. of Tennessee Press 1988).

being part of the undertaking.²¹¹ The underlying problem, as Professor Rebecca Brown has noted, is that simply by asserting that the starting place in historical constitutional analysis is a search for historical truths or facts, judges and lawyers have skewed the inquiry in a direction that historians reject; in fact, this divergence in first principles makes reconciliation between constitutional lawyers and historians all but impossible.²¹²

A chief justification by originalists for using history in constitutional interpretation relies on a claim of objectivity, that history is a “neutral” referee for deciding legal disputes, as Judge Sutton has insisted.²¹³ Advocates of a historical/originalist approach presume that the “objectivity” of their approach legitimizes their enterprise.²¹⁴ But as stated, the selection and interpretation of historical data can be a very subjective exercise. Despite omissions and imperfections in the historical record (discussed below²¹⁵), a significant body of information exists that is waiting to be plumbed, data that can arguably support several positions. While some data may enjoy greater stature among historians and legal scholars than other data—e.g., the House debates contained in the *Annals*—there is no consensus as to which data is more authoritative. (As discussed, the modern-day authority of the *Federalist Papers* rests on it being the most complete polemic of the side that eventually prevailed, which in turn, makes Hamilton and Madison authoritative.²¹⁶ Many people are unaware of the much larger body of pamphlets and articles written by the Anti-Federalists who, of course, were on the losing side of the ratification debate.²¹⁷) Even if consensus existed as to the superiority of certain data, ambiguities in such meta-records would necessitate supplementation from second-tier data. As Charles Miller observed in his seminal book *The Supreme Court and the Uses of History*, there is

²¹¹ See R. G. COLLINGWOOD, *THE IDEA OF HISTORY* 218–19 (Oxford Univ. Press 1994); DAVID HACKETT FISCHER, *HISTORIANS’ FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT* 4–5 (Harper Torchbooks 1970); Powell, *supra* note 29, at 661.

²¹² Rebecca L. Brown, *History for the Non-Originalist*, 26 HARV. J. L. & PUB. POL’Y 69, 71, 73–74 (2003).

²¹³ Sutton, *supra* note 208, at 1183.

²¹⁴ Scott Soames, *Originalism and Legitimacy*, 18 GEO. J. L. & PUB. POL’Y 241 (2020).

²¹⁵ See *infra* Part VIII.B.

²¹⁶ I do not dispute the explanatory value of the *Federalist Papers*, as I use them in my constitutional law classes.

²¹⁷ See generally *THE COMPLETE ANTI-FEDERALIST* (Herbert J. Storing, ed., Univ. of Chicago Press 1981).

“considerable latitude of judicial choice [in data] that history offers as a vehicle of adjudication.”²¹⁸

The breadth of the historical record thus invites judges to emphasize data consistent with their prepossessions, causing them to drift from objectivity into subjectivity. Michael McConnell insists that “[o]riginalism is a historical enterprise, not a normative one.”²¹⁹ (Aside from the dubious nature of that claim, most originalists lack the command of history that Professor McConnell possesses.) Instead, as Andrew Koppelman writes, “the ‘originalism’ that one now finds on the Supreme Court is a phony originalism which is opportunistically used to advance substantive positions that the judges find congenial.”²²⁰ The problems inherent in the objectivity rationale behind an originalist approach are so numerous that one need not agree with Erwin Chemerinsky’s observation that “[u]sing history and tradition as the dominant interpretive methodology serves [an] ideological agenda” among conservative members of the Court.²²¹

On the other side, assuming that objective historical “facts” do exist, the legal system, with its adversarial process for resolving controversies, is a terrible place for elucidating them. Despite the best intentions of lawyers or judges to relate the historical record accurately, that effort is done within the context of legal advocacy, even if it does not resort to “law office history.” At its core, a lawyer’s use of history “is entirely pragmatic or instrumental.”²²² Constitutional lawyers approach history primarily as advocates seeking authority for the propositions they wish to prove. The numerous amicus briefs cited in Justice Alito’s *Espinoza* opinion were not filed with the goal of elucidating the nuances of the School Question controversy of the post-Civil War era;²²³ rather, they were filed with the singular purpose of convincing the justices that there was one simple motivation behind the Blaine Amendment and the no-funding principle: rampant anti-Catholicism. In contrast, historians study history not to provide “answers” to modern questions but to further understanding of our past in the

²¹⁸MILLER, *supra* note 26, at 28.

²¹⁹Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1755 (2015).

²²⁰Koppelman, *supra* note 13, at 749. “The most remarkable thing about the ‘originalist’ interpretation of the Establishment Clause is the consistency of its conclusions.” *Id.* at 729.

²²¹Chemerinsky, *supra* note 40, at 912.

²²²MILLER, *supra* note 26, at 192–93.

²²³See generally GREEN, THE BIBLE, *supra* note 4.

hope it may illuminate the present.²²⁴ According to legal historian Jack Rakove, this different approach reflects contrasting presuppositions:

[Historians seek] to recover the context within which [religion clause] disputes originated and to identify some of the historical connections, complexities, and ironies that bedevil this realm of jurisprudence. The analysis of a judicial doctrine by legal scholars will take a different path. Such an analysis is inherently *endogenous* in nature Historical analysis, by contrast, is inherently *exogenous*.²²⁵

Cass Sunstein has argued that this different approach does not necessarily make all uses of history by lawyers illegitimate. As discussed below, the practical application of historical inquiries can serve legitimate and important ends by providing a context.²²⁶ However, the important starting point is to recognize that historians—and their product upon which constitutional lawyers often rely—do not set out “to answer the kinds of questions that constitutional interpreters must resolve.”²²⁷ The historical and legal projects are much further apart than most people assume.²²⁸

A final error in an originalist or original public understanding approach is that it assumes there was a consensus or dominant understanding of the meaning of a text or an official practice. This is a curious argument in that no one applies it on any other period in American constitutional history.²²⁹ With respect to the original public understanding of the religion clauses or church-state matters generally, there was a wide variety of attitudes about the role of religion in government and the proper ordering of those relationships.

²²⁴ See generally FISCHER, *supra* note 211.

²²⁵ JACK N. RAKOVE, *BEYOND BELIEF, BEYOND CONSCIENCE* 138 (Oxford Univ. Press 2020).

²²⁶ Sunstein, *supra* note 16, at 602, 604 (“[T]he historian and the constitutional lawyer have legitimately different roles [T]here is nothing at all dishonorable in the idea that constitutional lawyers should try to identify those features of the constitutional past that are, in their view, especially suitable for present constitutional use.”).

²²⁷ Brown, *supra* note 212, at 71.

²²⁸ *Id.*

²²⁹ In fact, conservative scholars make the opposite argument in another context concerning the Establishment Clause—that because of the wide variety of attitudes, the only point of consensus about the meaning of the Clause was that it was intended to be a federalism provision designed to keep the federal government from interfering with state establishments. STEVEN D. SMITH, *supra* note 91, at 19–22, 33; Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1133 (1988) (noting that the Framers “simply could not have agreed on a general principle of governing the relationship of religion and government”).

Delegates to the Constitutional Convention and members of the First Congress hailed from states that maintained religious establishments, states that had recently abolished them, and states that had never had one.²³⁰ As such, “Americans likely disagreed over what factors were characteristic of a religious establishment.”²³¹ Even in New England, where the states continued their religious assessment systems, proponents denied that they maintained a religious establishment.²³² We have to acknowledge “the variety of viewpoints held by founders forgotten and non-forgotten [and] the humanness of founders who did not always practice what they preached.”²³³ Attempting to identify a dominant or prevailing understanding about particular practices is, therefore, impossible.

VIII. THE FOUNDERS, HISTORY, AND INTERPRETATION

A. *Our Non-Originalist Founders*

In addition to assuming that historical truths exist, that historical authority is reliable and accessible, and that it provides an objective source of authority, proponents of a historical approach presume that referencing the Founders’ contemporary statements and actions—Thanksgiving proclamations, etc.—reveals their understanding of constitutional provisions. This position also assumes that the Founders saw their views as not simply illustrative but conclusive about the breadth and scope of a constitutional provision. In essence, it presumes that the Founders thought their opinions not only mattered but were superior to those of later generations.²³⁴

Originalists rely on this presumption. For them, the Founding was the incomparable event in American history, and the Constitution’s authors and ratifiers were “special and privileged” in their apparent understanding of its contents.²³⁵ The Founding was that moment in time when the Founders

²³⁰ See generally THOMAS J. CURRY, *THE FIRST FREEDOMS* 192–222 (Oxford Univ. Press 1986).

²³¹ GREEN, *supra* note 43, at 27.

²³² *Id.* at 28–29.

²³³ Jeffrey Shulman, *The Siren Song of History: Originalism and the Religion Clauses*, 27 J. L. & RELIGION 163, 177 (2011–2012).

²³⁴ See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 902–04 (1985).

²³⁵ Larry Kramer, *Fidelity to History—And Through It*, 65 FORDHAM L. REV. 1627, 1627 (1997) (noting that jurists can treat the Founding as “special and privileged without making it fully determinative or conclusive”).

“bequeathed their values and deeds to the present.”²³⁶ This admiration for their product (and its durability) has allowed modern Americans to be “held captive by the success of the eighteenth-century Founding Fathers.”²³⁷

Not only do originalists consider the Founding to be unique and sacred, they tend to see it as a static and completed event. But this perspective contains multiple flaws. First, it ignores the long development of ideas and the myriad, incremental experiences that shaped eighteenth-century republican thought, of which the Founding represented only one brief period.²³⁸ Second, it suggests a past that was unified and positive—that again, there was a dominant “public understanding”—and that the Founders’ final product is unassailable (only if we ignore the Constitution’s various references to slavery). Finally, it is untrue to the perspective of the Founders themselves, who saw the ideas and political theories they were espousing to be part of a dynamic process, not something to be controlled by earlier generations.²³⁹

The core theoretical justification for an originalist approach—or one that seeks to divine the initial understanding of constitutional provisions—is that it honors and reaffirms the supremacy of the Constitution and the will of those people who enacted it. According to Justice Scalia, an originalist approach ensures the legitimacy of judicial review while reaffirming the principle that popular sovereignty is the supreme authority in a constitutional democracy.²⁴⁰ Making the same point somewhat differently, Scott Soames asserts: “The source of legal legitimacy in a democratic, representative republic that has ratified a written constitution by a super majoritarian process—thereby detailing the structure, power, and limits of government as an agent of a sovereign people—is *not* the evolving practice of a legal elite.”²⁴¹ On one level, this defense of an originalist approach represents a “straw man”—few if any constitutional scholars advocate interpreting the

²³⁶MILLER, *supra* note 26, at 175.

²³⁷*Id.* at 174.

²³⁸*See generally* GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (The Univ. of North Carolina Press 1969); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (The Belknap Press, Enl. ed. 1992).

²³⁹*See* MILLER, *supra* note 26, at 172–74.

²⁴⁰Scalia, *supra* note 38, at 854, 862; *accord*, McConnell, *supra* note 219, at 1758 (“The second principal rationale for the originalist approach is based on democratic (or perhaps republican) theory. In our system, the Constitution is legitimate only because it was adopted by the People – or rather, by delegates specially selected by the People to debate and ratify it.”).

²⁴¹Soames, *supra* note 214, at 255.

document without considering the purposes behind its provisions as illuminated by the contemporaneous history. Leading non-originalism scholars, including Jack Balkin, Richard Fallon, and Larry Kramer, among others, all acknowledge the relevance of history and the necessity of adhering to the integrity of textual language.²⁴² The divergence is in how one uses history and the best method of ensuring fidelity to the principles proclaimed in the document that transcend any generation.

Before we assume that the Founders intended their intentions or understandings to bind later generations, perhaps we should consider how they perceived and used history. Historians have long recognized, and admired, the historical literacy of the members of the founding generation. The leading Founders were steeped in historical knowledge, imbibing historical writings reaching back into the classical times. Their command of historical figures and events, and their ability to interpret the significance of those events for their time, casts shame upon most modern-day politicians and lawyers.²⁴³ The Founders knew the value of history—they saw history as providing lessons so future generations would not make similar mistakes. But they did not intend to be controlled by history—for it to shackle them.²⁴⁴ Thomas Jefferson knew too well that “[h]istory may distort truth” due to “the superior efforts at justification of those who are conscious of needing it most.”²⁴⁵

Accordingly, there is no evidence that any of the Founders intended or desired for their interpretations of constitutional provisions to control future generations.²⁴⁶ In fact, best evidence suggests the opposite intention. Seemingly anticipating the current fascination with “original meaning,” Jefferson observed in 1816 that:

²⁴² See generally Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427 (2007); FALLON, *supra* note 17; Kramer, *supra* note 235, at 1628.

²⁴³ WOOD, *supra* note 238, at 4–8 (noting that political leaders of the founding generation “sought nothing less than a ‘comprehensive knowledge of history and of mankind’ and believed that if they were successfully to resist tyranny ‘they ought to be well versed in all the various governments of ancient and modern states’ History was the most obvious source of information, for they knew that they must ‘judge of the future’ by the past”)

²⁴⁴ See MILLER, *supra* note 26, at 172–74; RICHARDS, *supra* note 207, at 19–24; Brown, *supra* note 212, at 76–77.

²⁴⁵ THOMAS JEFFERSON, THE QUOTABLE JEFFERSON 184 (John P. Kaminski, ed., Princeton Univ. Press 2006).

²⁴⁶ RICHARDS, *supra* note 207, at 7 (“The text of the Constitution clearly does not require that we ascribe to the founders an intent to bind their generation or later generations by their own conception of how language should be applied.”).

Some men look at [c]onstitutions with sanctimonious reverence [and] deem them, like the arc of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment But I know also that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.²⁴⁷

Persuasive evidence exists that the Framers believed that constitutional interpretation should be drawn from the express language of the document, illuminated by its common-law connections, and not from the statements of those who drafted the language. In his seminal article on the subject, “The Original Understanding of Original Intent,” H. Jefferson Powell insisted that “[t]he framers shared the traditional common law view—so foreign to much hermeneutical thought in more recent years—that the import of the document they were framing would be determined by reference to the intrinsic meaning of its words or through the usual judicial process of case-by-case interpretation.”²⁴⁸ The Framers, however, eschewed the idea of relying on statements or writings of those persons involved in either drafting or ratifying the Constitution.²⁴⁹ James Madison, for one, believed that the expressed views of particular Framers were least authoritative on the meaning of a constitutional provision, in that they reflected a “private intent” and were inherently biased. “[W]hatever veneration might be entertained for the body of men who formed our Constitution,” Madison declared in 1796, “the sense of that body could never be regarded as the oracular guide in expounding the Constitution.”²⁵⁰ As a result, a search for an original understanding, or to make history determinative for constitutional adjudication, is untrue to the “intent of the Founders.” Originalists and other advocates of a dominant historical approach have yet to explain why their view of the historical

²⁴⁷JEFFERSON, *supra* note 245, at 57–58.

²⁴⁸Powell, *supra* note 234, at 903–04.

²⁴⁹*Id.* at 903; Powell, *supra* note 29, at 686–87 (1987); Jack N. Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMMENT. 159, 164–68 (1996).

²⁵⁰5 ANNALS OF CONG. 776 (1796) (remarks of Rep. James Madison).

saliency of the Founders' opinions should prevail over the perspective of those very figures whose understandings they seek to expound.²⁵¹

B. *An Unreliable Record*

In addition, the Framers knew first-hand the unreliability of the written record that documented the founding events. First, people must recognize that the historical record of any era—the founding period being no exception—is always incomplete. We have only those documents that have been preserved, transcribed, compiled, and cataloged or published.²⁵² Many people would be surprised to learn that the provenance and accuracy of many leading documents—such as the *Journal* of the Constitutional Convention and Robert Yates's *Notes* of the debates—are highly questionable. As then-Secretary of State John Quincy Adams frustratingly remarked when preparing the *Journal* for publication in 1818, “[t]he journals and papers were very loosely and imperfectly kept.”²⁵³ Similarly, Yates's handwritten notes changed hands several times following his death in 1801 and were substantially altered by a partisan-motivated editor before their publication in 1821.²⁵⁴ Aside from those documents in the public realm, there can be no doubt that other important, unrecorded conversations and discussions about various provisions took place. James Hutson of the Library of Congress Manuscript Division described how one study of Madison's *Notes of Debates in the Federal Convention*—universally recognized as the most accurate and authoritative record of the Convention debates—revealed that based on his daily output, Madison likely recorded less than one-tenth of what was actually said at the Convention.²⁵⁵ The same problem exists for unrecorded, but possibly key, conversations about the purpose and understanding of the religion clauses that likely took place during the House Committee on Style, in the House debates, and in the unrecorded Senate debate that accompanied

²⁵¹ Brown, *supra* note 212, at 76–77.

²⁵² See James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 38 (1986).

²⁵³ *Id.* at 7.

²⁵⁴ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at xiv–iv (Max Farrand, ed., Yale Univ. Press 1911); Hutson, *supra* note 252, at 7–12.

²⁵⁵ See generally JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (Adrienne Koch, ed., Ohio Univ. Press 1966). Hutson, *supra* note 252, at 34 (noting that on average, Madison recorded only 600 of a possible 8400 spoken words per hour).

proposals contained in the Senate Journal. Much important data is simply lost to time.²⁵⁶

Considering the records that do exist, many contain significant errors, if for no other reason than stenography was in its infant stage and skilled scribes were hard to come by. The debates of the Convention and of the First Congress were transcribed by people who made mistakes and self-edited as they went along (not to mention allegations that the transcriber for the *Annals* was frequently inebriated).²⁵⁷ Madison warned that the accuracy of the reported debates of the First Congress was “not to be relied on”:

The face of the debates shews that they are defective, and desultory, where not revised, or written out by the Speakers. In some instances, [the reporter] makes them inconsistent with themselves, by erroneous reports of their speeches at different times on the same subject. [The reporter] was indolent and sometimes filled up blanks in his notes from memory or *imagination*.²⁵⁸

The recorded debates of the state ratifying conventions (Elliot’s *Debates*) are even less reliable in that many of the scribes and stenographers were “egregiously partisan” in their support for ratification, with them expanding on the arguments of the Federalists, while frequently re-writing or deleting counter-arguments of Anti-Federalists.²⁵⁹ In essence, much of the historical record we have come to venerate and rely on was of a partisan nature (e.g., *The Federalist Papers*) and was recognized as such by the founding generation.²⁶⁰

Finally, remarks contained within documents considered to be reliable can easily be misunderstood. The Framers used terms and phrases familiar to the late eighteenth century and frequently employed rhetoric that was

²⁵⁶ See Hutson, *supra* note 252, at 31–35.

²⁵⁷ See *id.* at 36–38 (discussing the excessive drinking of the reporter, Thomas Lloyd, and relating that his notes were “frequently garbled and that he neglected to report speeches whose texts are known to exist elsewhere”).

²⁵⁸ *Id.* at 38 (quoting Madison to Edward Everett, Jan. 7, 1832).

²⁵⁹ See generally THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 (Jonathan Elliot, ed., Philadelphia, J.B. Lippincott Co., 2nd ed. 1891); see also Hutson, *supra* note 252, at 12–24 (noting the records are incomplete and reveal politically motivated editing); Rakove, *supra* note 249, at 160.

²⁶⁰ Hutson, *supra* note 252, at 12–24; Rakove, *supra* note 249, at 160.

intentionally vague, hyperbolic, or duplicitous.²⁶¹ For example, Benjamin Franklin's famous call for prayer at the Constitutional Convention²⁶² can be interpreted several ways: was it a statement of personal piety; a declaration about the necessity of God's guidance in matters of governance; an expression of irony; or an attempt to shame the delegates into compromise?²⁶³ Framers' remarks and letters also arose within particular contexts that may not be apparent from the documents themselves. As another example,

²⁶¹ See Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L. J. 409, 413 (1986).

²⁶² 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 254, at 450–52. (“The small progress we have made after 4 or five weeks close attendance & continual reasonings with each other—our different sentiments on almost every question, several of the last producing as many noes as ays, is methinks a melancholy proof of the imperfection of the Human Understanding. We indeed seem to feel our own want of political wisdom, since we have been running about in search of it

In this situation of this Assembly groping as it were in the dark to find political truth, and scarce able to distinguish it when presented to us, how has it happened, Sir, that we have not hitherto once thought of humbly applying to the Father of lights to illuminate our understandings? In the beginning of the Contest with G. Britain, when we were sensible of danger we had daily prayer in this room for the Divine Protection.—Our prayers, Sir, were heard, and they were graciously answered. All of us who were engaged in the struggle must have observed frequent instances of a Superintending providence in our favor. To that kind providence we owe this happy opportunity of consulting in peace on the means of establishing our future national felicity. And have we now forgotten that powerful friend? [O]r do we imagine that we no longer need His assistance. I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth – that *God governs in the affairs of men*. And if a sparrow cannot fall to the ground without his notice, is it probable that an empire can rise without his aid? We have been assured, Sir, in the sacred writings that “except the Lord build they labor in vain that build it.” I firmly believe this; and I also believe that without his concurring aid we shall succeed in this political building no better than the Builders of Babel: We shall be divided by our little partial local interests; our projects will be confounded, and we ourselves shall be become a reproach and a bye word down to future ages. And what is worse, mankind may hereafter from this unfortunate instance, despair of establishing Governments by Human Wisdom, and leave it to chance, war, and conquest.

I therefore beg leave to move—that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the Clergy of this City be requested to officiate in that service.”)

²⁶³ See THOMAS S. KIDD, BENJAMIN FRANKLIN: THE RELIGIOUS LIFE OF A FOUNDING FATHER 228–30 (2017); MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 194 (2016).

conservative authors frequently cite to Madison's statement that a purpose of the proposed First Amendment was to prevent a "national religion" as evidence of the limited scope of the Establishment Clause (and of Madison's true intent for that provision: to prohibit only a "national church").²⁶⁴ Pursuant to this interpretation of the clause, most forms of government aid to religion would be permissible provided they fall short of establishing one national religion (e.g., non-preferential aid).²⁶⁵ But a closer reading of the debates and the larger context reveals that Madison was emphasizing the limited authority of the national government generally while he was attempting to address the concerns of other members that "one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform."²⁶⁶ In that Madison initially did not believe a Bill of Rights was necessary or effective, his proposed language reflects an effort to be responsive to the half-dozen or so petitions from the state ratifying conventions, which were couched in non-preferential language.²⁶⁷ However, the fact that Madison was a member of the conference committee that decided the ultimate language for the Amendment (i.e., "no law *respecting* an establishment") suggests that he intended the clause to have a much broader scope. The point is that the precise meanings of recorded statements may be ambiguous at best.²⁶⁸

These overlapping problems about the reliability of the historical record cast significant doubt on the efficacy of the historical method for constitutional adjudication. Yet, no matter how much the Framers asked future generations not to quote them—while warning about the accuracy of the record—we quote them still.²⁶⁹

²⁶⁴CORD, *supra* note 72, at 25.

²⁶⁵*Id.*

²⁶⁶1 ANNALS OF CONG. 729–31 (Joseph Gales ed., 1834); *see also* 1 ANNALS OF CONG. 424–50 (Joseph Gales ed., 1834).

²⁶⁷THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, & ORIGINS 12–13 (Neil H. Cogan ed., 2d ed. 2015).

²⁶⁸Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 237 (1963) (Brennan, J., concurring) (“[T]he historical record is at best ambiguous, and statements can readily be found to support either side of the proposition. The ambiguity of history is understandable if we recall the nature of the problems uppermost in the thinking of the statesmen who fashioned the religious guarantees; they were concerned with far more flagrant intrusions of government into the realm of religion than any that our century has witnessed.”).

²⁶⁹*See* Powell, *supra* note 29, at 661, 686–87; *see also* 5 ANNALS OF CONG., *supra* note 250; RICHARDS, *supra* note 207 at 7; Hutson, *supra* note 252, at 7.

C. Contemporary Practices

Similar caution should be employed when the focus shifts from statements or writings by the Founders to contemporaneous practices and events. The argument is that certain actions by the Founders that relate to constitutional questions provide insight into how they understood those provisions. In the area of church and state, commentators and jurists have pointed to various contemporaneous actions or events to demonstrate how members of the founding generation understood church-state relations. The most common are the various calls for prayer and thanksgiving by the Continental Congress and Presidents Washington, Adams, and Madison;²⁷⁰ congressional resolutions in 1777 and 1782 calling for, respectively, the importation of 20,000 Bibles, and the printing of an American version of the Bible;²⁷¹ the use of the Capitol building for worship services during the Adams and Jefferson administrations;²⁷² and, as both Chief Justice Burger and Justice Kennedy emphasized, the appointments of congressional chaplains and their practices of prayer.²⁷³ As discussed, commentators and jurists argue that these various actions demonstrate that members of the founding generation were comfortable with the government's affirmation and promotion of religion, at least at a non-sectarian level, and that they perceived no conflict between such activities and constitutional values.²⁷⁴

These actions need to be seen in context, however.²⁷⁵ Many of these practices were common in the colonial assemblies and early state legislatures, and the delegates to Congress may simply have carried over the familiar practices with little thought. According to Derek Davis, author of the leading study on religion and the Continental Congress, "These practices were not new They were so much a part of the fabric of American social life that

²⁷⁰ See THE SACRED RIGHTS OF CONSCIENCE 222–24, 228, 235–36, 453–60 (Daniel L. Dreisbach & Mark David Hall eds., 2009).

²⁷¹ See *id.* at 231–35.

²⁷² See generally Daniel R. Roeber, THOMAS JEFFERSON'S CHURCH: RELIGIOUS SERVICES IN THE U.S. CAPITOL BUILDING, Salem Press, https://salempress.com/Media/SalemPress/samples/ci_jefferson_pgs.pdf.

²⁷³ See THE SACRED RIGHTS OF CONSCIENCE, *supra* note 270, at 218–19; *Marsh v. Chambers*, 463 U.S. 783, 788 (1983); *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014);

²⁷⁴ *CORD*, *supra* note 72, at 49–55; *DREISBACH, WALL OF SEPARATION*, *supra* note 91, at 56–59.

²⁷⁵ Esbeck, *supra* note 9, at 495 ("To the degree [that early practices] are not in conflict with the plain text they may shed light on the clause's original meaning. However, many of these actions were uneven, and at times, contradictory.").

hardly anyone noticed when the Continental Congress adopted the same practices.”²⁷⁶ They are “best explained as holdovers from the colonial period” with their religious establishments and were “deemed substantially harmless by most governmental leaders,” although they did spark some controversy at the time.²⁷⁷ As discussed earlier,²⁷⁸ Professor Lund has documented that legislative chaplaincies were more contentious than is popularly assumed, both at the Founding and in subsequent years, leading to a full-scale assault on the institution in the 1850s.²⁷⁹ And finally, while some members of the founding generation likely did not consider these practices to be controversial, at least in a constitutional sense, one should remember that people were focused on more consequential church-state issues, such as abolishing tax assessments for religious worship and removing religious barriers to participating in the new nation’s civic life. And the argument assumes that perspectives on certain issues did not evolve over time.²⁸⁰

Even if a majority of the Founders viewed such practices favorably, one should hesitate to draw conclusions that the actors involved were thinking in constitutional terms when they acted. Chief Justice Burger’s reasoning in *Marsh* that the members of the First Congress would not have voted for legislative chaplains if they believed the practice conflicted with religion clause values falls into the trap of syllogistic thinking (an error repeated by Justices Scalia, Kennedy, Thomas, and Alito): if authoritative players did *X* contemporaneous to enacting *Y*, then they must have intended *X* to inform our understanding of *Y*. Such reasoning extrapolates meaning from historical events removed from their larger contexts and announces their commanding relevance for current practices, committing what historian Martin Flaherty has described as the error of “poorly supported generalization[s].”²⁸¹ Again, when the Founders were enacting policy, they were addressing their own questions, not answering ours. This approach also assumes the Framers maintained an ever-present awareness of constitutional values and were

²⁷⁶DEREK H. DAVIS, RELIGION AND THE CONTINENTAL CONGRESS, 1774–1789, at 91 (2000).

²⁷⁷*Id.* at 82, 89–90.

²⁷⁸See *supra* text accompanying notes 81–84.

²⁷⁹Lund, *supra* note 81, at 1184–86, 1196–202.

²⁸⁰See generally Steven K. Green, *A ‘Spacious Conception’: Separationism as an Idea*, 85 OR. L. REV. 443 (2007) (discussing the dynamic and evolving understanding of separation of church and state in early America).

²⁸¹Martin S. Flaherty, *History ‘Lite’ in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 526 (1995); see also Powell, *supra* note 29, at 669.

forever consistent in applying those principles.²⁸² But as Justice Souter once noted, “Although evidence of historical practice can indeed furnish valuable aid in the interpretation of contemporary language, [some official] acts . . . prove only that public officials, no matter when they serve, can turn a blind eye to constitutional principles.”²⁸³

Take the example of George Washington. Washington has grown in estimation among scholars for evolving from being a supporter of religious establishments and privileges to being a leader with an ecumenical perspective who came to embrace the idea of not simply religious toleration but religious equality. Because of his undeniable historical stature (the “indispensable man”), and his presence at many of the crucial events (e.g., presiding officer over drafting of the Constitution and President at the time of the drafting of the First Amendment),²⁸⁴ his statements and actions contemporaneous to the Founding (e.g., his Thanksgiving proclamations; his Farewell Address) could be directly relevant to interpreting the religion clauses.²⁸⁵ But as Justice Souter warned, we should be cautious about drawing constitutional conclusions from the actions of leading Founders. One of first policies enacted by the Washington Administration, administered by Secretary of War Henry Knox, was to employ Christian missionaries to “instruct” (i.e., indoctrinate) Native Americans in the principles of Christianity.²⁸⁶ Congress followed that action by enacting a law in 1796, signed by Washington, providing a land grant to the Moravians for the purpose of “propagating the gospel among the heathen.”²⁸⁷ In other words,

²⁸²Brownstein, “The Reasons Why Originalism Provides a Weak Foundation,” *supra* note 186, at 204 (The argument for grounding the understanding of the religion clauses on “accepted practices” “has generic weaknesses since it seems to assume a degree of government attention and fidelity to constitutional principles that is probably unwarranted. Government officials are not always focusing on the constitutional implications of their decisions. Moreover, they do not always live up to their highest ideals, constitutional or otherwise.”).

²⁸³*Lee v. Weisman*, 505 U.S. 577, 616 n.3 (1992) (Souter, J., concurring).

²⁸⁴*See* JAMES THOMAS FLEXNER, *WASHINGTON: THE INDISPENSABLE MAN* 205, 207, 213 (1974).

²⁸⁵*See* MICHAEL NOVAK & JANA NOVAK, *WASHINGTON’S GOD: RELIGION, LIBERTY, AND THE FATHER OF OUR COUNTRY* 143–60 (2006).

²⁸⁶Louis Fisher, *Indian Religious Freedom: To Litigate or Legislate?*, 26 *AM. INDIAN L. REV.* 1, 1–2 (2001).

²⁸⁷*Id.* at 2; Act of June 1, 1796, ch. 46, § 5, 1 Stat. 490, 491; *CORD*, *supra* note 72, at 62; *see* R. PIERCE BEAVER, *CHURCH, STATE, AND THE AMERICAN INDIANS*, 63–65 (1966); *see also* ANSON PHELPS STOKES & LEO PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* 185–86 (1964) (discussing later efforts “for the civilizing of the Indians” after the Act).

Washington endorsed the government directed conversion of Native Americans, a form of religious genocide. In fact, it remained the official policy of the United States government to convert Native Americans to Christianity until the early 1930s.²⁸⁸ Applying the originalist reasoning of Justices Burger, Scalia, Thomas, and Alito, these actions should conclusively demonstrate the meaning of the Establishment Clause (particularly with the “unambiguous and unbroken history”²⁸⁹ of more than 140 years of official government policy).²⁹⁰ Yet no one today would dispute that the forced Christianization of the Indians was not only a tragic event but an egregious violation of the Establishment Clause (among other things).²⁹¹ As Justice Stevens noted in his *Van Orden* dissent, there are many early official practices and attitudes toward religion that we are no longer “willing to accept.”²⁹²

In other ways, Washington’s views about church-state matters expanded over time. As noted, Washington was not initially a deep thinker about religious matters, accepting the status quo of the Anglican religious establishment in Virginia and the privileges it entailed. Once appointed commander of the Continental Army, however, his views began to evolve. Faced with leading soldiers of various faiths, his appreciation for religious pluralism grew: he forbade his soldiers from engaging in anti-Catholic celebrations and acceded (grudgingly) to accommodations for the pacifist and neutral Quakers.²⁹³ Back in Virginia following the war, Washington

²⁸⁸BEAVER, *supra* note 287, at 210.

²⁸⁹BRADLEY, *supra* note 73, at 135.

²⁹⁰Brownstein, *supra* note 186, at 204 (“[S]hortly after the Bill of Rights was added to the Constitution, and for decades thereafter, Congress provided government resources to particular missionary groups for the purpose of converting Native Americans to Christianity and civilizing them through religious education. Does anyone seriously believe that such government activities are constitutional today? Yet if repeated practices relating to religion control the meaning of the religion clauses, the answer to my question should be an unequivocal, ‘Yes.’”) (internal footnote omitted).

²⁹¹Esbeck, *supra* note 9, at 620 (“Most difficult to reconcile with our present understanding of the clause are the missionary dealings with certain Indian tribes, but those transactions did not have the benefit of contemporaneous debate where someone raised a timely objection under the Establishment Clause. So just what this inattention by the two political branches teaches us about original meaning is not at all conclusive.”).

²⁹²545 U.S. 677, 729–31 (2005) (Stevens, J., dissenting).

²⁹³Paul F. Boller, Jr., *George Washington and Religious Liberty*, 17 WM. AND MARY Q. 486, 492–95 (1960) [hereinafter Boller, *Religious Liberty*]; PAUL F. BOLLER, JR., *GEORGE WASHINGTON AND RELIGION* 125–29 (1963) [hereinafter BOLLER, *RELIGION*]. Granted, part of Washington’s motivation was likely to diffuse religious dissension within the ranks.

initially supported Patrick Henry's 1784 religious assessment bill in Virginia, expressing little alarm "at the thoughts of making people pay towards the support of that which they profess."²⁹⁴ But as he later told George Mason, he concluded that the assessment was impracticable and unwise, expressing concern that it would "rankle and perhaps convulse, the State."²⁹⁵ He now hoped that "the Bill could die an easy death."²⁹⁶ Washington's evolving understanding of religious liberty, and of the need for a religiously neutral government, is most evident in his responses to a series of congratulatory letters he received from various religious groups upon his ascension to the presidency. In letters to Baptists, Lutherans, Methodists, Dutch Reformed, Catholics, and Jews, among others, he embraced the principles of *religious equality* in the new United States.²⁹⁷ In his famous reply to the Hebrew congregation in Newport, Rhode Island, he responded to Jewish concerns that their status as non-Christians rendered them second-class citizens. At that time, most states maintained religious tests for public office-holding, voting, oath-taking, or jury service, which effectively disenfranchised many Jews. No doubt Washington was aware of these legal disabilities, which makes his unqualified response that much more telling. Washington believed all American citizens "possess alike liberty of conscience and immunities of citizenship,"²⁹⁸ and he wrote:

It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people that another enjoyed the exercise, of their inherent natural rights. For happily the Government of the United States, which gives bigotry no sanction, to persecution no assistance requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support.²⁹⁹

²⁹⁴ Boller, *Religious Liberty*, *supra* note 293, at 490.

²⁹⁵ *Id.*

²⁹⁶ George Washington, Interaction with George Mason (Oct. 3, 1785), *in* BOLLER, RELIGION, *supra* note 293, at 122.

²⁹⁷ See Letters to Religious Bodies (1782–97), *in* 'IN GOD WE TRUST': THE RELIGIOUS BELIEFS AND IDEAS OF THE AMERICAN FOUNDING FATHERS 56–63 (Norman Cousins ed., 1958).

²⁹⁸ Reply to Moses Seixas, Sexton of the Hebrew Congregation of Newport (Aug. 17, 1790), *in* 'IN GOD WE TRUST': THE RELIGIOUS BELIEFS AND IDEAS OF THE AMERICAN FOUNDING FATHERS, *supra* note 297, at 61.

²⁹⁹ *Id.*

The point is that when we seek to rely on Washington's actions and views for modern legal authority, which Washington do we reference? Is it the Washington who initially supported religious establishments, spoke in providential terms, and authorized the forced conversion of Native Americans? Or is it the Washington who later rejected religious establishments and came to appreciate and support not just religious toleration but true religious equality? More important for constitutional adjudication, which version of Washington's perspective toward religious matters represents the historical "truth"?³⁰⁰

Once one has uncovered a historical statement or event that has an acceptable provenance and seems truly relevant, one must still consider what level of specificity or generality to apply to the current controversy.³⁰¹ This question, like others when dealing with historical authority, invites much subjectivity, which can preordain the result. Justices, particularly those inclined toward an originalist approach, have been inconsistent in their views. For example, in *Michael H. v. Gerald D.*, the Court, led by Justice Scalia, relied on history to turn back a claim for parental rights by an adulterous biological father.³⁰² The biological father had challenged a California law that created an irrebuttable presumption of parenthood in the husband of the biological mother, notwithstanding irrefutable proof of his paternity available via DNA testing.³⁰³ He claimed the California law interfered with his fundamental right of parenthood, under a due process liberty interest, as recognized by our history and traditions.³⁰⁴ Justice Scalia rejected the substantive due process claim. Although agreeing that a "liberty interest [must] be rooted in history and tradition," Scalia noted that history demonstrated that adulterous actors were entitled to little legal protection for their actions.³⁰⁵ In response to the dissent's claim that the plurality was ignoring a long tradition of recognizing parental rights, Scalia stated that when using history to support a legal claim, "[w]e refer to the most specific level at which a relevant tradition protecting, or denying protection to, the

³⁰⁰ See Esbeck, *supra* note 9, at 614 ("[P]ublic remarks of general religious content (whether oral or written) by presidents are best tied to the person and beliefs of the particular president rather than said to be controlled by the strictures of the Establishment Clause.").

³⁰¹ See Peter J. Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 485 (2017).

³⁰² 491 U.S. 110, 123, 124 (1989).

³⁰³ *Id.* at 110.

³⁰⁴ *Id.* at 110, 123.

³⁰⁵ *Id.* at 123, 124–26.

asserted right can be identified.”³⁰⁶ Thus, the appropriate level of inquiry was not whether the law historically had protected parental rights, but whether it had protected rights of adulterous parents. The answer to that specific inquiry was “no.”³⁰⁷

Fast forward to *American Legion*. The level of inquiry, as to its generality or specificity, was now reversed. As discussed above,³⁰⁸ in addition to proposing a four-factor rationale for grandfathering longstanding religious monuments, Justice Alito also looked to history for determining the constitutionality of the Bladensburg Cross.³⁰⁹ But here, there was no specific practice of government-erected crosses to reference. So instead, Alito had to rely on a general tradition of official religious affirmations coincident to the Founding, even though none of those he cited—Washington’s Thanksgiving Proclamation and Farewell Address—were sectarian or religion-specific, let alone having to do with permanent religious monuments. This general practice, however, was sufficient, as it indicated the government’s long “recognition of the important role that religion plays in the lives of many Americans. Where categories of monuments, symbols, and practices with a longstanding history follow in that tradition, they are likewise constitutional.”³¹⁰ This reasoning is of course fallacious. Merely because the First Congress did religious act *A* – appoint a legislative chaplain – could the modern state of Utah do religious act *B* – require that all legislative prayers be given by Mormon elders and reference Mormon theological beliefs? But, also from an analytical perspective, this approach allows for much subjectivity as to what is a sufficiently relevant, and analogous, practice.³¹¹

The same emphasis on historical generality was present in *Town of Greece*. Instead of considering how did Washington pray—the specific content or context of prayer proclamations and legislative prayers—the level of inquiry in Justice Kennedy’s majority opinion, and particularly in Justice Alito’s concurrence, was simply one of generality: did the Founders engage in public prayers? “[A]s precedent and historic practice make clear,” Alito wrote, “prayer before a legislative session is not inherently inconsistent with

³⁰⁶*Id.* at 127 n.6.

³⁰⁷*Id.*

³⁰⁸*See supra* Part V.

³⁰⁹*Am. Legion v. Am. Humanist Ass’n*, 139 S.Ct. 2067, 2087–89 (2019).

³¹⁰*Id.* at 2089.

³¹¹Chemerinsky, *supra* note 40, at 918 (“History . . . [a]t most, provides an objective-sounding basis for the Justices’ subjective choices.”).

the First Amendment”³¹² As *Town of Greece* demonstrates, the ability of judges to choose the level of specificity when it comes to historical data allows them to ordain the outcome of the case.³¹³ As the amicus brief filed by Legal Historians and Scholars of Religion and America Law demonstrated, however, the majority of Founders were self-consciously careful to couch their religious proclamations in ecumenical language. In contrast to many of the prayers given at the Greece town meetings, the Thanksgiving proclamations of the Continental Congress and the proclamations of Presidents Washington and Madison used nonsectarian terms (“Lord and Ruler of Nations,” “Almighty Being,” “Sovereign of the Universe,” “Great Parent and Sovereign”) and were couched in religiously inclusive language.³¹⁴ Only the proclamations of John Adams, issued in reaction to the quasi-war with deistic revolutionary France, employed sectarian language, asking Americans to “acknowledge before God the[ir] manifold sins and transgressions” with “sincere repentance.”³¹⁵ (Later, Adams regretted the prayers, attributing his loss in the 1800 presidential election to Jefferson, in part, on popular opposition to his religious proclamations.)³¹⁶ To be sure, the idiomatic usages of the period may reflect the strong influence of Enlightenment natural rights thought and a form of rational theism to which many members of the founding generation adhered. But this careful—and limited—use of inclusive religious language was purposeful. And this was at a time of much greater unanimity of religious belief, when the nation was overwhelmingly Protestant with few Catholics or Jews.³¹⁷

Two impulses motivated the Founders when it came to religion, not solely in the area of religious proclamations but also with their attitudes toward church-state matters generally. They were concerned about respecting rights of conscience and in diffusing religious dissension.³¹⁸ Thus, merely inquiring

³¹²*Town of Greece v. Galloway*, 572 U.S. 565, 597 (2014) (Alito, J., concurring).

³¹³See Smith, *supra* note 301, at 494 (noting that this practice “appears ad hoc, largely unconstrained, and thus susceptible to the same kind of results-oriented decision-making that originalists have long decried”).

³¹⁴See Brief for Paul Finkelman et al. as Amici Curiae in Support of Respondents at 11–25, *Town of Greece*, 572 U.S. 565 (No. 12-696), 2013 WL 5400264.

³¹⁵THE SACRED RIGHTS OF CONSCIENCE, *supra* note 270, at 456.

³¹⁶Brief for Paul Finkelman et al. as Amici Curiae in Support of Respondents, *supra* note 314314, at 21–22.

³¹⁷Brownstein, *supra* note 186, at 206.

³¹⁸Brief for Paul Finkelman et al. as Amici Curiae in Support of Respondents, *supra* note 314314, at 11–13.

into whether Washington prayed and issued Thanksgiving proclamations (or used religious rhetoric, for that matter), does not provide an answer to the question raised in *Town of Greece*. One must employ a greater level of specificity and ask: “How would Washington pray?”

The search for a public understanding, a historical consensus, is thus a false quest, particularly within the area of church and state matters. What we do know about the founding era is that church-state relationships were quickly transformed over a brief period of time. In the short fifteen-year period coinciding with the Founding (1775 to 1790), the religious landscape of America changed dramatically. In 1775, nine of thirteen colonies maintained religious establishments, that is, enforced tax support for religious worship and civil privileges for members of the dominant faith.³¹⁹ By 1790, that figure was effectively reversed, with ten of fourteen states now prohibiting establishments or failing to enforce such laws.³²⁰ In those four New England states that continued with their assessments, officials either denied that they maintained establishments or professed their “mild and equitable” nature, in the words of John Adams.³²¹ Also, all new states liberalized their religious prerequisites for civic participation, such as office-holding and jury service. And then, the Constitutional Convention took the dramatic step in abolishing all religious tests at the federal level.³²²

Some people were at the vanguard of these changes; others approached then with caution and reservation. Multiple and divergent reasons existed to support disestablishment: some people may simply have desired to prevent the possibility of a national church; others may have wanted to prevent federal interference with state arrangements; and still others may have envisioned broader conceptions of disestablishment. Attempting to identify a consensus understanding is all but impossible, as “[t]he implementation of [church-state] principles was uneven and fraught with inconsistency, even

³¹⁹ See Green, *supra* note 280280, at 456, 460, 462.

³²⁰ *Id.*

³²¹ See *id.* at 463–64; John Adams, *Diary of John Adams: In Congress, Sept.–Oct. 1774*, FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Adams/01-03-02-0016-0022> (last visited Nov. 18, 2021) (“[T]he Laws of Massachusetts, were the most mild and equitable Establishment of Religion that was known in the World, if indeed they could be called an Establishment.”).

³²² GREEN, *supra* note 43, at 50, 57–77 (“[I]deas about religious freedom and disestablishment during the revolutionary period were fluid and evolving.”); U.S. CONST. art. VI, cl. 3.

among the influential reformers of the age.”³²³ But no one can deny that the period was one of dramatic transformation, with conditions and attitudes being quite fluid. Additionally, there is no evidence that any of the Founders assumed they had achieved the perfect settlement on church-state issues. Commenting on the relaxing of religious tests in Massachusetts in 1780, Benjamin Franklin quipped that when one considered how far the old Puritan colony had progressed in 100 years, it should be commended for its “Liberality of Sentiment[] on religious Subjects,” while people should still “hope for greater Degrees of Perfection when their Constitution some years hence shall be revised.”³²⁴ With all of these overlapping considerations, how does someone today assess an “original understanding” or consensus about church-state matters during the founding period?

But even asking this question does not answer the larger question of why we should allow late eighteenth-century attitudes toward religious matters direct our analysis of church-state issues today. Despite the enlightened perspective of many leading Founders, they still lived in a society in which the major religious differences involved competing versions of orthodox Protestantism, a nation with fewer than 5,000 Catholics and 2,000 Jews out of a population of 3,000,000. They could not envision the religious pluralism of the present-day United States. But then, they did not expect future generations to rely on their attitudes about church-state matters any more than on their understandings of other constitutional principles. Instead, they left us the legacy of their wisdom and a “machine that would go of itself.”³²⁵

IX. CONCLUSION

This article has hopefully confirmed Chief Justice Roberts’s observation—yes, “history is complex”—and its casual and uncritical use in religion clause adjudication provides only lip-service to that complexity. Unwarranted reliance on history results in the confusion of normative and descriptive questions. At best, history provides descriptive answers to how predecessors viewed or addressed an issue. It is less successful in elucidating

³²³Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 960 (1995); Brownstein, *supra* note 186, at 200–02.

³²⁴Letter from Benjamin Franklin to Richard Price (Oct. 9, 1780), in *THE SACRED RIGHTS OF CONSCIENCE*, *supra* note 269270, at 368.

³²⁵See MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF* (1986) (The phrase is attributed to an 1888 essay by James Russell Lowell.).

why those people acted as they did. And it does not answer the normative question of why the Constitution should be interpreted in a particular way today.³²⁶

This does not mean that no meaning can be drawn from history. Recurring and consistent statements that reflect broad principles or points of agreement can be instructive for modern application of the religion clauses. Assuming the indeterminacy of the historical record, it is not necessary that the Framers reached any particular consensus on the meaning and/or application of the religion clauses; it is sufficient that they agreed on broad, general principles and viewed the Establishment Clause as facilitating those ends. Those principles that emerge from the ratification debates and drafting of the Bill of Rights include concerns for rights of conscience, no compelled support of religion, no delegation of government authority to religious institutions, avoidance of religious discord, and equal treatment of all sects.³²⁷ Historian Thomas Curry has summed up those shared concerns:

[T]he people of almost every state that ratified the First Amendment believed that religion should be maintained and supported voluntarily. They saw government attempts to organize and regulate such support as a usurpation of power, as a violation of liberty of conscience and free exercise of religion, and as falling within the scope of what they termed an establishment of religion.³²⁸

In essence, when it comes to constitutional adjudication, “our use of the history of their time must limit itself to broad principles, not specific practices.”³²⁹ This approach is more faithful to the wishes of the Founders that we learn from history but not be controlled by it.³³⁰

³²⁶Chemerinsky, *supra* note 40, at 918–19.

³²⁷See Steven K. Green, *Of (Un)Equal Jurisprudential Pedigree: Rectifying the Imbalance Between Neutrality and Separationism*, 43 B.C.L. REV. 1111, 1122–25 (2002) (identifying various values underlying nonestablishment).

³²⁸CURRY, *supra* note 230, at 222.

³²⁹Abington Sch. Dist. v. Schempp, 374 U.S. 203, 241 (1963) (Brennan, J., concurring).

³³⁰*Id.*; RICHARDS, *supra* note 207, at 7 (“The text of the Constitution clearly does not require that we ascribe to the founders an intent to bind their generation or later generations by their own conception of how language should be applied.”).