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A HOLLOW HISTORY TEST: WHY ESTABLISHMENT CLAUSE CASES SHOULD NOT BE DECIDED THROUGH COMPARISONS WITH HISTORICAL PRACTICES

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I. INTRODUCTION AND SUMMARY

The Supreme Court's Establishment Clause jurisprudence has often been criticized. Judges and scholars have contended that existing Establishment Clause tests give courts too little guidance and too much discretion.[1] Some judges and advocates have been calling on the Court to replace those existing tests with a test that compares challenged practices to long-standing historically accepted ones.[2]

But that would be a very bad idea. Such a historical-practice test would be much more difficult to apply than the Court's current jurisprudence. Switching to a historical-practice test would only engender greater confusion among lower courts than there is now.

Proponents of a historical-practice test want to expand to all Establishment Clause cases the history-based analysis of the Supreme Court's two cases concerning opening prayers before legislative bodies[3]—*Marsh v. Chambers*[4] and *Town of Greece v. Galloway*.[5] The Supreme Court concluded in *Marsh* that legislative prayer is constitutional because, in 1789, Congress authorized public funding of legislative chaplains just three days before approving the language of the First Amendment.[6] The Court reasoned, therefore, that the First Amendment's framers could not have thought that its Establishment Clause prohibits legislative prayer.[7] The Court also emphasized that the practice of legislative prayer has continued in Congress from 1789 through the present, without interruption.[8]

Attempting to apply this kind of analysis to other types of Establishment Clause controversies would raise some problematic questions, however. First, whose actions should be relevant? Only actions of the federal government should matter, not actions by state or local governments.[9] That's because the Establishment Clause did not govern the states when the Bill of Rights was passed; it was the ratification of the Fourteenth Amendment in 1868 that rendered the Establishment Clause applicable to the states, and the Supreme Court did not recognize this until the 1940s.[10] So eighteenth- and nineteenth-century actions by state or local governments cannot properly be treated as evidence of how the Establishment Clause was originally understood. Indeed,

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1. *See infra* Section II.A.
2. *See infra* Section II.C.
3. *See infra* Sections II.B, II.C.
4. Marsh v. Chambers, 463 U.S. 783, 784 (1983).
5. Town of Greece v. Galloway, 572 U.S. 565, 569–70 (2014).
6. *Marsh*, 463 U.S. at 787–88, 790.
7. *Id.* at 790.
8. *Id.* at 788, 790.
9. *See infra* Section III.A.1.
10. *See infra* text accompanying notes 105–07.

in 1789 and long after, state and local governments engaged in conduct that egregiously violated the Establishment Clause—for example, by maintaining established churches and religious tests for office.[11]

Second, what time frame should be relevant? The further past the 1789 enactment of the First Amendment one looks, the less likely it is that federal-government action can be treated as consistent with the First Amendment's intent.[12] For the composition of Congress changes every two years, and the understanding of an enactment's intent grows dimmer over time.[13] Indeed, in 1798, less than a decade after approving the language of the First Amendment, Congress passed the Sedition Act[14]—a law that has long been condemned as plainly unconstitutional because it made criticizing federal officials or the United States a crime.[15] Therefore, only federal-government actions that took place in 1789 or shortly thereafter should be considered as potential indicators of how the Establishment Clause was originally understood.

This limited universe of federal actions may be sufficient in the legislative-prayer area, given Congress's authorization of legislative chaplains just three days before its approval of the language of the First Amendment, together with the unbroken continuance of legislative prayer in Congress since then.[16] But in most Establishment Clause contexts, there are no federal-government actions during the relevant historical period that courts can consider for guidance.[17] For example, Establishment Clause cases often concern the role of religion in the public schools, but free public education was virtually nonexistent in the late eighteenth century.[18] Religious displays on public property are another common source of Establishment Clause controversy, but the first federal monument is believed to have been erected in 1808.[19] One other regularly litigated Establishment Clause issue is the extent to which the Clause prohibits religious exemptions from employment-discrimination or public-accommodations laws, but in the late eighteenth century there were no federal laws barring discrimination by employers or businesses.[20] Establishment Clause cases also often relate to whether government can provide public funding to religious schools or religious social-service providers, but in the late eighteenth century

11. *See infra* text accompanying notes 109–17.
12. *See infra* Section III.A.2.
13. *See infra* text accompanying notes 124–29.
14. Sedition Act, ch. 74, 1 Stat. 596 (1798).
15. *See infra* text accompanying notes 130–32.
16. *See infra* text accompanying note 154.
17. *See infra* Section III.B.1.
18. *See infra* text accompanying notes 158–66.
19. *See infra* text accompanying notes 167–74.
20. *See infra* text accompanying notes 175–76.

the federal government was not funding general education or social-service programs.[21]

Indeed, opinions and briefs that advocate an Establishment Clause analysis focusing on long-standing historical practices identify only three arguably relevant actions that were taken by the federal government close in time to Congress's approval of the First Amendment: (1) the creation of the congressional chaplaincies; (2) Congress's passage in 1789 of a resolution asking the president to issue Thanksgiving proclamations; and (3) Congress's authorization in 1791 of chaplains in the military.[22] Even assuming that legislative prayer, Thanksgiving proclamations, and military chaplains are consistent with the Establishment Clause's intent (the First Amendment's leading architects, James Madison and Thomas Jefferson, thought that they weren't), they provide little guidance for how to resolve the kinds of Establishment Clause cases that commonly confront the courts today.[23] For legislative prayer is a ceremonial act that is principally directed at legislators themselves, not the public.[24] The Thanksgiving proclamations given by early presidents were nonsectarian, ecumenical, isolated written statements that were not presented in coercive environments.[25] And military chaplains are viewed as necessary to enable members of the military to practice their religions, for soldiers often are in places where they otherwise would not have access to clergy.[26] None of these practices is helpful to determining how the Establishment Clause should be applied in the coercive setting of public schools, to permanent and prominent sectarian displays, to requests on religious grounds for exemptions from anti-discrimination laws, or to the provision of substantial sums of public funds to private religious institutions.

And even if there were more relevant historical practices against which current practices could be measured, how exactly are courts to compare modern practices with historical ones? Justice Kennedy, in a partially concurring and partially dissenting opinion in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, advocated for a historical-practice test that "must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion."[27] How is one to judge whether one

21. *See infra* text accompanying notes 177–79.
22. *See infra* text accompanying notes 238–40.
23. *See infra* text accompanying notes 241–47.
24. *See infra* text accompanying note 248.
25. *See infra* text accompanying note 249.
26. *See infra* text accompanying notes 250–51.
27. County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

practice has a "greater potential for an establishment of religion"[28] than another?[29]

All that said, we do not contend that there should be no role for history in Establishment Clause analysis. But what is proper for courts to principally consider are the historical events that led to the Clause's creation, not the events that occurred after the Clause was adopted.[30] And such proper historical analysis does not require the Supreme Court to reinvent the wheel. For the Supreme Court already engaged in such analysis in devising its existing Establishment Clause tests, looking at European and colonial history to understand what kinds of practices the First Amendment's framers wanted to stop, as well as the writings of the leading thinkers behind the Establishment Clause, Madison and Jefferson.[31]

Already informed by history, the Supreme Court's existing Establishment Clause tests well protect the values underlying the Clause, prohibiting (among other conduct) public funding of religious activity, governmental favoritism for any religion over another or for religion over nonreligion, governmental coercion to take part in religious exercise, and governmental entanglement with religion.[32] Abandoning these clear rules for a vague and amorphous historical-practice test would harm those values, in addition to confusing judges.[33] The Court should not venture down this ill-advised path.

II. THE SUGGESTIONS THAT CURRENT ESTABLISHMENT CLAUSE JURISPRUDENCE BE REPLACED WITH A HISTORICAL-PRACTICE TEST

A. Current Establishment Clause Jurisprudence and Criticism of It

The polestar of Establishment Clause analysis has long been a three-part test known as the *Lemon* test, named after one of the cases that set it forth, *Lemon v. Kurtzman*.[34] At the most general level, the test asks whether governmental action has a primary purpose of advancing religion, has a principal effect of doing the same, or fosters excessive governmental entanglement with religion.[35]

More specifically, the Supreme Court has enunciated a number of particular ways in which an unconstitutional effect of advancing religion may be shown. For example, the government must not favor or endorse any religion over

28. *Id.*
29. *See infra* text accompanying notes 252–53.
30. *See infra* text accompanying note 254.
31. *See infra* text accompanying notes 255–84.
32. *See id.*
33. *See infra* text accompanying note 285.
34. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).
35. *See id.* at 612–13; *see also, e.g.*, McCreary County v. ACLU of Ky., 545 U.S. 844, 859–60 (2005); Zelman v. Simmons-Harris, 536 U.S. 639, 648–49 (2002); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963).

another or religion over nonreligion.[36] It must not coerce anyone to participate in religion or its exercise.[37] It must not provide funding for religious instruction or activity.[38] It must not delegate governmental power to religious institutions.[39]

Despite these detailed rules, the Court's Establishment Clause jurisprudence has often been criticized as vague and difficult to apply.[40] For a replacement test, critics of the existing jurisprudence have looked to a history-oriented analysis that has thus far been applied by a majority of the Court as a principal test only in the Court's two cases concerning prayer at the opening of sessions of legislative bodies, *Marsh v. Chambers*[41] and *Town of Greece v. Galloway*.[42]

B. The Supreme Court's Limited Use of Historical-Practice Analysis

In *Marsh*, the Supreme Court considered the Nebraska state legislature's practice of employing a publicly funded chaplain to open its sessions with prayer.[43] The Eighth Circuit had applied the *Lemon* test to hold the practice unconstitutional.[44] But the Supreme Court reversed, concluding that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."[45]

The Court emphasized that the First Congress passed a statute providing public funding for congressional chaplains on September 22, 1789, and that just three days later Congress approved the final language of the Bill of Rights.[46] In the Court's view, therefore, "the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment."[47] "It can hardly be thought," explained the Court,

> that in the same week Members of the First Congress voted to appoint and to pay a [C]haplain for each House and also voted to approve the

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36. *See, e.g.*, *McCreary*, 545 U.S. at 875–76; Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308, 316 (2000); County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 592–94 (1989), *dicta on different issue disapproved by* Town of Greece v. Galloway, 572 U.S. 565, 579–80 (2014).

37. *See, e.g.*, *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 310–12; Lee v. Weisman, 505 U.S. 577, 587 (1992).

38. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 840 (2000) (O'Connor, J., concurring in the judgment); Agostini v. Felton, 521 U.S. 203, 219, 228 (1997); Bowen v. Kendrick, 487 U.S. 589, 621 (1988).

39. *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127 (1982).

40. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398–400 (1993) (Scalia, J., concurring in the judgment).

41. Marsh v. Chambers, 463 U.S. 783, 790–92 (1983).

42. Town of Greece v. Galloway, 572 U.S. 565, 575–79 (2014).

43. *Marsh*, 463 U.S. at 784.

44. *Id.* at 786.

45. *Id.*

46. *Id.* at 788.

47. *Id.*

> draft of the First Amendment for submission to the States, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.[48]

"In this context," the Court added, "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 the practice authorized by the First Congress—their actions reveal their intent."[49] The Court also stressed that Congress's "practice of opening sessions with prayer has continued without interruption ever since" the First Congress.[50]

Yet the Court was careful to limit the reach of its historical analysis to the unusual circumstances before it. "Standing alone," cautioned the Court, "historical patterns cannot justify contemporaneous violations of constitutional guarantees."[51] "[B]ut," declared the Court, "there is far more here than simply historical patterns."[52] The close temporal proximity of Congress's approval of publicly funded legislative chaplains and its approval of the language of the Establishment Clause, together with the fact that legislative prayer has continued in Congress without interruption since 1789, combined for a "unique history."[53] The Court accordingly upheld the practice of legislative prayer "[i]n light of th[is] unambiguous and unbroken history of more than 200 years."[54]

Notwithstanding the care the *Marsh* Court took to cabin the circumstances in which its historical analysis could apply, some Supreme Court Justices have attempted to broaden the use of historical-practice analysis to other Establishment Clause contexts. Just one year after *Marsh*, in *Lynch v. Donnelly*, the Court upheld by a 5–4 vote a city holiday display that contained a crèche, along with numerous secular symbols.[55] The Court's opinion documented at length what it characterized as "an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."[56] The Court, however, ultimately used the traditional *Lemon* test to rule that the holiday display was constitutional.[57] And Justice O'Connor, despite technically joining the majority's opinion and providing the fifth vote for it, wrote a separate concurrence in which she argued that the principal

48. *Id.* at 790.
49. *Id.*
50. *Id.* at 788.
51. *Id.* at 790.
52. *Id.*
53. *Id.* at 791.
54. *Id.* at 792.
55. *See* Lynch v. Donnelly, 465 U.S. 668, 671, 687 (1984).
56. *Id.* at 674–78.
57. *See id.* at 679–85.

Establishment Clause test should be whether a practice has a purpose or effect of endorsing religion.[58]

In its 1989 decision in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, a majority of the Court accepted Justice O'Connor's endorsement test, upholding one holiday display and striking down another.[59] Justice Kennedy, however, wrote a partially concurring and partially dissenting opinion, joined by three other Justices, that advocated a much broader use of historical-practice analysis than what *Marsh* had permitted.[60] He argued that "whatever standard the Court applies to Establishment Clause claims, it must at least suggest results consistent with our precedents and the historical practices that, by tradition, have informed our First Amendment jurisprudence."[61] Justice Kennedy proposed that "the relevance of history" should not be "confined to the inquiry into whether the challenged practice itself is a part of our accepted traditions dating back to the Founding."[62] Rather, in his view, "the meaning of the Clause is to be determined by reference to historical practices and understandings."[63] Specifically, "[w]hatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion."[64]

An analysis focusing on historical practices again failed to gain approval of a Court majority in the 2005 decision *Van Orden v. Perry*.[65] There, by a 5–4 vote, the Court upheld the display of a Ten Commandments monument on state capitol grounds that also featured numerous secular displays.[66] A four-Justice plurality spent much of its opinion cataloguing past "official acknowledgment by all three branches of government of religion's role in American life" and "of the role played by the Ten Commandments in our Nation's heritage."[67] The plurality did not attempt to enunciate any particular historical-practice test—or, for that matter, any test—that it felt should govern religious-display or other Establishment Clause cases, however.[68] Moreover, Justice Breyer, the fifth Justice in the majority, refused to join the plurality's analysis and instead wrote

58. *See id.* at 690 (O'Connor, J., concurring).

59. County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 592–94 (1989), *dicta on different issue disapproved by* Town of Greece v. Galloway, 572 U.S. 565, 579–80 (2014).

60. *Id.* at 669–74 (Kennedy, J., concurring in the judgment in part and dissenting in part).

61. *Id.* at 669.

62. *Id.*

63. *Id.* at 670.

64. *Id.*

65. Van Orden v. Perry, 545 U.S. 677 (2005).

66. *Id.* at 681 & n.1, 691–92 (plurality opinion).

67. *Id.* at 686–89 (plurality opinion).

68. *See id.* at 686 (plurality opinion).

a separate concurrence that focused on whether the monument was divisive and its content, setting, and purpose.[69]

Subsequently, in the 2014 legislative-prayer case *Town of Greece v. Galloway*, a Supreme Court majority—as in *Marsh*—applied a historical-practice analysis.[70] The Court held that it was permissible for legislative prayers to contain expressly sectarian references, emphasizing that sectarian legislative prayers date back to the First Congress and have continued ever since.[71] In so ruling, the Court relied heavily on *Marsh*, stating that "[t]he case teaches . . . that the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'"[72]

But as in *Marsh*, the Court was careful to limit the reach of such historical analysis. The Court cautioned that "*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation."[73] Rather, "*Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted."[74] In other words, "[a]ny test the Court adopts must acknowledge a practice that [1] was accepted by the Framers and [2] has withstood the critical scrutiny of time and political change."[75]

Greece did not point to any practices outside the legislative-prayer context that meet these two requirements, however. Indeed, far from holding that challenged practices must be measured against historical practices in all Establishment Clause contexts, *Greece* applied long-standing standard Establishment Clause rules in the legislative-prayer context. In addition to conducting a historical analysis, the opinion relied on the principles that government must not become excessively "involve[d] . . . in religious matters,"[76] must "maintain[] a policy of nondiscrimination" instead of favoring one faith

69. *See id.* at 698–705 (Breyer, J., concurring in the judgment).

70. Town of Greece v. Galloway, 572 U.S. 565, 577–79 (2014).

71. *Id.* at 578–79.

72. *Id.* at 576 (quoting County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part)).

73. *Id.*

74. *Id.* at 577.

75. *Id.*

76. *Id.* at 581 (citing Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188–89 (2012)).

over another,[77] must not "coerce its citizens 'to support or participate in any religion or its exercise,'"[78] and must not "proselytize . . . constituents."[79]

Most recently, in *American Legion v. American Humanist Ass'n*, some Supreme Court Justices again pushed for an expanded use of the historical-practice analysis, but the Court's majority opinion followed a quite different path.[80] *American Legion* upheld the display of a cross as a war memorial on public property.[81] In a plurality opinion, four Justices argued that the *Lemon* test should no longer be applied in cases involving "longstanding" "use[s], for ceremonial, celebratory, or commemorative purposes of words or symbols with religious associations."[82] The plurality contended that these kinds of cases should be decided by "focus[ing] on the particular issue at hand and look[ing] to history for guidance."[83] Principally relying on the history of legislative prayer, and mentioning several other types of late-eighteenth-century governmental actions as well, the plurality then concluded that "categories of monuments, symbols, and practices with a longstanding history" are "constitutional" if they reflect "respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans."[84]

The sections of the *American Legion* opinion that garnered a majority did not compare the cross display at issue to historical practices that date back to the Founding Era, however.[85] The majority opinion made only limited use of history, mainly considering the particular history of the cross itself and what it was understood to mean when it was erected.[86] In upholding the cross, the majority emphasized that (1) the cross communicated a secular message of honoring local soldiers who perished during World War I;[87] (2) all the individual soldiers honored by the cross apparently happened to be Christians;[88] (3) the cross's designers did not have "discriminatory intent" toward religious

77. *Id.* at 585; *accord* McCreary County v. ACLU of Ky., 545 U.S. 844, 875 (2005).

78. *Town of Greece*, 572 U.S. at 586 (plurality opinion) (quoting County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part)); *accord* Lee v. Weisman, 505 U.S. 577, 587 (1992).

79. *Town of Greece*, 572 U.S. at 587 (plurality opinion) (citing Salazar v. Buono, 559 U.S. 700, 720–21 (2010) (plurality opinion); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000)).

80. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019).

81. *Id.* at 2090.

82. *Id.* at 2081–82 (plurality opinion).

83. *Id.* at 2087 (plurality opinion).

84. *Id.* at 2088–89 (plurality opinion).

85. *See id*. at 2074–75, 2082–2087, 2089–91 (majority opinion).

86. *See id*. at 2074–78, 2089–90 (majority opinion).

87. *See id*. at 2089 (majority opinion).

88. *See id*. at 2077, 2090 (majority opinion).

minorities;[89] (4) many nonreligious monuments were erected near the cross;[90] and (5) removing the cross would send a divisive message of "hostility to religion."[91] In other words, though it did not say that it was applying the *Lemon* test, the majority analyzed whether the cross had a purpose or effect of advancing religion—*Lemon*'s principal criteria.[92]

C. Recent Arguments for Expansion of Historical-Practice Analysis

Even though *Greece* strictly cabined how far historical analysis should extend in Establishment Clause cases and applied traditional Establishment Clause tests, and even though the *American Legion* majority did not apply a historical-practice test, some judges and advocates have argued—incorrectly—that *Greece* and *American Legion* replaced existing Establishment Clause jurisprudence with a historical-practice test, or at least that the Supreme Court should do so. For example, in *New Doe Child #1 v. United States*, a case that challenged the use of the phrase "In God We Trust" on U.S. currency, two of a three-judge panel's members joined an opinion that took the position that *Greece* issued an "unqualified directive that the Establishment Clause 'must' be interpreted according to historical practices and understandings" and that "this historical approach is not limited to a particular factual context."[93] But as of this writing, in the five years since *Greece* was decided, *New Doe Child* has been the only appellate opinion known to the authors in which a majority of a panel took this position and relied principally on a historical-practice analysis to decide an Establishment Clause case outside the legislative-prayer area.

Other judges have floated similar arguments in concurring or dissenting opinions. For instance, in a concurrence in *Kondrat'yev v. City of Pensacola* (another case concerning a cross on public property), an Eleventh Circuit judge argued that "*Greece* states an unequivocal, exceptionless rule . . . : '[T]he Establishment Clause must be interpreted by reference to historical practices and understandings.'"[94] In a dissenting opinion in *Felix v. City of Bloomfield*, a Tenth Circuit judge called on the Circuit to "reexamine [its] Establishment Clause cases" and "return[] to a more historically-congruent understanding of the Establishment Clause."[95] And in a concurrence in *Smith v. Jefferson County*

89. *See id.* at 2074 (majority opinion).

90. *See id.* at 2077, 2089 (majority opinion).

91. *See id.* at 2087 (majority opinion).

92. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

93. New Doe Child #1 v. United States, 901 F.3d 1015, 1020 (8th Cir. 2018) (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

94. Kondrat'yev v. City of Pensacola, 903 F.3d 1169, 1179 (11th Cir. 2018) (Newsom, J., concurring in the judgment) (second alteration in original) (internal quotation marks omitted) (quoting *Town of Greece*, 572 U.S. at 576), *vacated and remanded*, 139 S. Ct. 2772 (2019).

95. Felix v. City of Bloomfield, 847 F.3d 1214, 1220–21 (10th Cir.) (Kelly, J., dissenting from denial of rehearing en banc), *cert. denied*, 138 S. Ct. 357 (2017).

Board of School Commissioners, a Sixth Circuit judge expressed the view that "*Greece* is apparently a major doctrinal shift regarding the Establishment Clause, declaring a two-pronged test for Establishment Clause cases, a test based upon the historical approach . . . and adding the [anti-]coercion principle."[96]

Though contentions that the federal courts should expand the historical-practice analysis of *Marsh* and *Greece* beyond the legislative-prayer context have gained little traction with judges, certain advocates have continued to press the Supreme Court and the circuit courts to do so. For example, one amicus brief filed in *American Legion* in support of the cross display argued that the Court should replace the *Lemon* test with the test that Justice Kennedy proposed in his *Allegheny* opinion: a practice is constitutional if it "is a part of our accepted traditions dating back to the Founding" or has "no greater potential for an establishment of religion."[97] Another amicus brief filed in *American Legion* similarly advocated jettisoning *Lemon* in favor of a test that asks whether a challenged "activity 'fits within the tradition long followed' throughout the Nation."[98] In *Kondrat'yev*, an amicus brief argued for adoption of an "analysis" that "look[s] to American history as a whole to determine whether the practice at issue is part of our heritage and tradition, part of our expressive idiom."[99] And a supplemental brief in *Kondrat'yev* contended that, under *American Legion*, the *Kondrat'yev* cross display should be compared to monuments erected long ago.[100]

III. QUESTIONS ABOUT AND FLAWS OF A HISTORICAL-PRACTICE ESTABLISHMENT CLAUSE TEST

Instead of making the law clearer, abandoning existing Establishment Clause jurisprudence in favor of a historical-practice test such as the one Justice Kennedy proposed in *Allegheny* would provide courts much less guidance than they have now. That is principally because there are very few historical practices to which current practices can properly be compared.[101] To find historical practices that might legitimately be viewed as reflecting the intent of the First

96. Smith v. Jefferson Cty. Bd. of Sch. Comm'rs, 788 F.3d 580, 602 (6th Cir. 2015) (Batchelder, J., concurring in part and concurring in the result).

97. Amicus Curiae Brief of the Am. Ctr. for Law & Justice in Support of Petitioners at 11–13, American Legion v. American Humanist Ass'n, 139 S. Ct. 2067 (2019) (No. 17-1717), 2018 WL 3159307 (quoting County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part)).

98. Corrected Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of Petitioners at 10, *American Legion*, 139 S. Ct. 2067 (No. 17-1717), 2018 WL 3159307 (quoting *Town of Greece*, 572 U.S. at 577).

99. Brief of the Int'l Mun. Lawyers Ass'n as Amicus Curiae in Support of Appellants at 14, Kondrat'yev v. City of Pensacola, 903 F.3d 1169 (11th Cir. 2018) (No. 17-13025), *vacated and remanded*, 139 S. Ct. 2772 (2019).

100. Appellants' Supplemental Brief at 12–13, *Kondrat'yev*, 903 F.3d 1169 (No. 17-13025).

101. *See infra* text accompanying notes 105–253.

Amendment's framers, one must look only at federal practices, not state or local actions, because the First Amendment originally applied only to the federal government.[102] Moreover, one must consider only federal actions that occurred in 1789 or shortly thereafter, for less than a decade later, Congress had come to pass legislation that plainly violated the First Amendment.[103] The few federal actions relating to religion that satisfy these criteria shed little light on how to resolve most kinds of Establishment Clause controversies that confront courts today.[104]

A. What Kinds of Historical Practices Legitimately Shed Light on the Intent of the Establishment Clause's Framers?

Before proceeding with any attempt to apply historical-practice analysis similar to that of *Marsh* and *Greece* to ascertain the intent of the Establishment Clause's framers, one must first determine what kinds of historical practices can legitimately be considered as evidence of that intent. There are two principal questions: Whose actions are relevant? And what time frame is relevant?

1. Whose Actions Are Relevant?

Which governmental bodies' actions can properly be viewed as potentially evincing the intent of the First Amendment's framers? Only actions of the federal government—and not state or local actions—can legitimately provide guidance. That is because the First Amendment did not apply to the states when the Bill of Rights was enacted.[105] It was the ratification of the Fourteenth Amendment, in 1868, that rendered the First Amendment applicable to the states.[106] And the Supreme Court did not recognize that the Establishment Clause governed the actions of the states until the 1940s.[107]

Therefore, pre-1868—and arguably pre-1940s—actions by state and local governments cannot legitimately be considered as evidence of what the Establishment Clause was intended to allow. Indeed, in 1789 and long thereafter, many state and local governments engaged in conduct that egregiously violated the Establishment Clause.[108]

At the time Congress approved the Bill of Rights, for example, six states maintained established churches: Connecticut, Georgia, Maryland,

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102. *See infra* text accompanying notes 105–19.

103. *See infra* text accompanying notes 120–53.

104. *See infra* text accompanying notes 238–53.

105. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 49 (1985).

106. *Id.*

107. *See* Everson v. Bd. of Educ., 330 U.S. 1, 5, 14–15 (1947); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

108. *See infra* text accompanying notes 109–17.

Massachusetts, New Hampshire, and South Carolina.[109] Connecticut did not disestablish until 1818, New Hampshire until 1819, and Massachusetts—the last state to maintain an established church—until 1833.[110]

Moreover, most of the states had religious tests for holding office during the late eighteenth century.[111] Some of these restrictions limited office-holding to Protestants; some others limited it to Christians.[112] Many of these restrictions remained in place well into the nineteenth century or even beyond: for instance, Pennsylvania's stayed in place until 1874, New Hampshire's until 1877, and Maryland's restriction—which at its end limited office-holding to believers in God—remained on the books until the Supreme Court struck it down in *Torcaso v. Watkins* in 1961.[113]

In addition, many states' constitutions had other provisions that denied non-Christians full civil rights or otherwise favored Christians during the late eighteenth century. For instance, according to Douglas Laycock, at least five states "denied full civil rights to Catholics."[114] Pennsylvania reaffirmed in 1790 its Bill of Rights of 1776, leaving in a provision stating that no man "who acknowledges the being of a God" could be deprived of civil rights.[115] Pennsylvania law also made it a crime to "willfully, premeditatedly, and despitefully blaspheme, or speak lightly or profanely of Almighty God, Christ Jesus, the Holy Spirit, or the Scriptures of Truth."[116] And, until 1968, New Hampshire's Bill of Rights provided that "[e]very denomination of *Christians*, demeaning themselves quietly and as good subjects of the state, shall be equally under the protection of the law."[117]

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109. *See* Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1132–33, 1132 nn.97 & 98 (1988); *see also* Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 B.Y.U. L. REV. 1385, 1457–1536 (2004); Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2121–29 (2003).

110. *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 255 n.20 (1963) (Brennan, J., concurring) (citing SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY (1902)); *see also* MORTON BORDEN, JEWS, TURKS, AND INFIDELS 28–32 (1984); McConnell, *supra* note 109, at 2126; Steven K. Green, *The Separation of Church and State in the United States*, OXFORD RES. ENCYCLOPEDIAS (2014), http://oxfordre.com/americanhistory/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-29?print=pdf.

111. *See* Douglas Laycock, "*Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 916 (1986).

112. *See* J. Jackson Barlow, *Officeholding: Religious-Based Limitations in Eighteenth-Century State Constitutions*, *in* RELIGION AND AMERICAN LAW: AN ENCYCLOPEDIA 346–48 (Paul Finkelman ed., 2000).

113. *See id.*; Torcaso v. Watkins, 367 U.S. 488, 496 (1961).

114. *See* Laycock, *supra* note 111, at 916.

115. *See* Barlow, *supra* note 112, at 347 (internal citation omitted).

116. *See* Cobb, *supra* note 110, at 516 (internal citation omitted).

117. *See id.* (emphasis added).

As the Establishment Clause did not apply to the states when it was enacted, and as many states engaged in conduct that egregiously violated the Clause when it was approved and long after, even Justices who have appeared favorably disposed to a historical-practice test have agreed that only actions of the federal government should be relevant. In his *Allegheny* opinion, where he proposed his historical-practice test, Justice Kennedy also wrote (joined by Justices Rehnquist, Scalia, and White):

> [T]he relevant historical practices are those conducted by governmental units which were subject to the constraints of the Establishment Clause. Acts . . . perpetrated in the 18th and 19th centuries by States and municipalities are of course irrelevant to this inquiry, but the practices of past Congresses and Presidents are highly informative.[118]

Similarly, in a concurring opinion in *Greece*, Justice Alito (joined by Justice Scalia) wrote that "what is important" in historical-practice analysis of legislative prayer "is . . . what happened before congressional sessions during the period leading up to the adoption of the First Amendment."[119]

2. What Time Frame is Relevant?

The second principal question about how to properly apply *Marsh/Greece*-style historical analysis is what time frame should be relevant? Recall that Congress agreed on the final language of the Bill of Rights on September 25, 1789.[120] How far past that date can federal-government actions colorably be considered presumptively consistent with the intent of the First Amendment's framers?

Before answering that question, we note that its very premise is shaky. The assumption that actions of the First Congress are necessarily consistent with constitutional intent is quite questionable (though we accept this assumption *arguendo* for purposes of this article). The First Amendment was not even ratified until December 1791,[121] after the First Congress had concluded,[122] so the Amendment technically was never even in force when the First Congress served. More importantly, as Justice Brennan wrote in his dissent in *Marsh*,

> Legislators, influenced by the passions and exigencies of the moment, the pressure of constituents and colleagues, and the press of business, do not always pass sober constitutional judgment on every piece of

118. County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 670 n.7 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

119. Town of Greece v. Galloway, 572 U.S. 565, 600 (2014) (Alito, J., concurring).

120. Marsh v. Chambers, 463 U.S. 783, 788 (1983).

121. *See* Katcoff v. Marsh, 755 F.2d 223, 225 (2d Cir. 1985).

122. *See Dates of Sessions of the Congress*, U.S. SENATE, https://www.senate.gov/reference/Sessions/sessionDates.htm (last visited Jan. 30, 2019).

> legislation they enact, and this must be assumed to be as true of the members of the First Congress as any other.[123]

To assume that members of the First Congress always acted consistently with constitutional intent is to put them on a pedestal that ignores that they were human politicians with the same flaws and weaknesses that have always affected people in power.

Keeping that starting point in mind, it must be the case that the further past the approval of the First Amendment one looks, the less likely it becomes that federal-government action would be consistent with the original understanding of the First Amendment. Memories fade as time passes, and the understanding of a constitutional provision's intent thus grows dimmer with the passage of time. As time ticks on, the importance of complying with a constitutional clause one may have voted for may also lessen. Thus, even those who served in the First Congress might have become more prone to vote for unconstitutional legislation when they served in later Congresses.

And there was substantial turnover from Congress to Congress in the 1790s, much more so than today.[124] The First Congress—the one that approved the Bill of Rights—met from March 1789 to March 1791.[125] Of a total of 103 members who served in the Second Congress, which met from March 1791 to March 1793,[126] 42 had not served in the First Congress.[127] By the Fifth Congress, which met from March 1797 to March 1799,[128] only 23 out of a total 162 members had served in the First.[129] Because Congress had fewer and fewer members, as the 1790s passed, who had served when the Bill of Rights was approved, congressional action became progressively less likely during that

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123. *Marsh*, 463 U.S. at 814–15 (Brennan, J., dissenting) (footnote omitted).

124. *See* WILLIAM T. EGAR, CONG. RES. SERV., R41545, CONGRESSIONAL CAREERS: SERVICE TENURE AND PATTERNS OF MEMBER SERVICE, 1789–2019 3–5 (2019).

125. *See Dates of Sessions of the Congress*, *supra* note 122.

126. *See id*.

127. *See Official Annotated Membership Roster by State with Vacancy and Special Election Information: First Congress*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, https://historycms2.house.gov/WorkArea/DownloadAsset.aspx?id=40186 (last visited Jan. 29, 2019); *Official Annotated Membership Roster by State with Vacancy and Special Election Information: Second Congress*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, https://historycms2.house.gov/WorkArea/DownloadAsset.aspx?id=40187 (last visited Jan. 29, 2019). These figures include members who were replaced during the congressional term and their replacements. Thus, while 103 individual members served in the Second Congress, there were fewer congressmen serving at any given time.

128. *See Dates of Sessions of the Congress*, *supra* note 122.

129. *See Official Annotated Membership Roster by State with Vacancy and Special Election Information: Fifth Congress*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, https://historycms2.house.gov/WorkArea/DownloadAsset.aspx?id=40191 (last visited Jan. 29, 2019). Again, these figures include all members who served in the Fifth Congress, including those who were replaced during the congressional term and their replacements.

decade to reflect an accurate understanding of the intent of constitutional protections.

So it is not surprising that in 1798, less than a decade after approving the First Amendment, Congress passed the Sedition Act.[130] The statute made it a crime, punishable by imprisonment, to criticize federal officials or the United States.[131] Though it expired in 1801 and therefore never reached the Supreme Court, the Sedition Act is roundly considered to have been unconstitutional.[132]

But one need not move forward a decade in time from the enactment of the Bill of Rights to find examples of congressional actions whose constitutionality was, at best, highly doubtful. Just seven months after approving the Bill of Rights, the First Congress itself passed "An Act for the Punishment of certain Crimes against the United States."[133] This law required that people convicted of certain theft crimes "be publicly whipped, not exceeding thirty-nine stripes."[134] The law is now considered to have been contrary to the intent of the Eighth Amendment's prohibition on cruel and unusual punishment.[135] Not long after, paying even less regard to the Eighth Amendment—which is now understood as barring capital punishment for crimes against individuals when the victim's life is not taken[136]—the Second Congress passed a law imposing the death penalty on any employee of the United States post office convicted of stealing mail with money or other financial instruments in it.[137]

What is more, the very first act struck down by the Supreme Court as unconstitutional was passed by the First Congress. In *Marbury v. Madison*, the Supreme Court held that a section of the Judiciary Act of 1789 that gave the Supreme Court power to issue writs of mandamus violated Section 2 of Article III of the Constitution.[138] And another provision of the Judiciary Act required the Supreme Court and district judges to say the words "So help me God" when taking their oath of office,[139] directly contravening the command of Article VI of the Constitution that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."[140] The

130. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273 (1964) (citing Sedition Act of 1798, ch. 74, 1 Stat. 596).

131. *See id.* at 273–74.

132. *See id.* at 276 & n.16; *id.* at 296 (Black, J., concurring).

133. Crimes Act of 1790, ch. 9, 1 Stat. 112.

134. *Id.* § 16.

135. *See* Ingraham v. Wright, 430 U.S. 651, 666 (1977).

136. *See* Kennedy v. Louisiana, 554 U.S. 407, 437, *opinion modified on denial of reh'g*, 554 U.S. 945 (2008).

137. *See* An Act to Establish the Post-Office and Post-Roads Within the United States, ch. 7, § 16, 1 Stat. 232, 236 (1792).

138. *See* Marbury v. Madison, 5 U.S. 137, 147, 176 (1803).

139. *See* Judiciary Act of 1789, ch. 20, § 8, 1 Stat. 73, 76.

140. U.S. CONST. art. VI; *see also* Torcaso v. Watkins, 367 U.S. 488, 491 (1961).

Judiciary Act was passed on September 24, 1789,[141] just two years after the U.S. Constitution was submitted to the states for ratification (September 17, 1787)[142] and barely a year after the Constitution was ratified by enough states to become effective (June 21, 1788).[143]

There are, unfortunately, darker and more recent examples than these of governmental bodies ignoring—soon after they were approved—constitutional provisions that governed them. The Fourteenth Amendment was approved by Congress on June 13, 1866, and it was ratified on July 9, 1868.[144] But barely a month after approving the Fourteenth Amendment, Congress passed a law affirming continued racial segregation of District of Columbia public schools,[145] conduct that our society has long recognized contravened the Amendment's Equal Protection Clause.[146] And by 1870, states had started to enact provisions requiring segregation.[147] By 1878, seven states—Tennessee, Alabama, Georgia, Missouri, North Carolina, Texas, and West Virginia—had amended their constitutions to require racially segregated schools, and at least two others had enacted statutes codifying the same.[148] Likewise, the same year that the Fifteenth Amendment—which guaranteed African Americans the right to vote—was enacted,[149] states started to pass measures, such as poll taxes, that were plainly intended to frustrate that Amendment's promise.[150]

This troublesome history makes it difficult to define the time frame for historical practices that might legitimately be looked at as evincing the Establishment Clause's intent. We will not attempt to set a specific time frame, but we can say that the history shows this: Any action beyond the immediate proximity of Congress's approval of the First Amendment on September 25, 1789[151] must be considered with some doubt. Any action after the conclusion of the term of the First Congress in March 1791[152] should be considered with

141. *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73.

142. NCC Staff, *The Day the Constitution Was Ratified*, NAT'L CONSTITUTION CENTER (June 21, 2018), https://constitutioncenter.org/blog/the-day-the-constitution-was-ratified.

143. *Id.*

144. U.S. CONST. amend. XIV.

145. Act of July 23, 1866, ch. 217, 14 Stat. 216.

146. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

147. *See, e.g.*, Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. 429, 462 (2014).

148. *See id*. at 486–87, 486 nn.233 & 236, 487 nn.240–41, 244–45 & 247.

149. *See* U.S. CONST. amend. XV.

150. *See* David Schultz & Sarah Clark, *Wealth v. Democracy: The Unfulfilled Promise of the Twenty-Fourth Amendment*, 29 QUINNIPIAC L. REV. 375, 388–89 (2011).

151. *See* Marsh v. Chambers, 463 U.S. 783, 788 (1983).

152. *See Dates of Sessions of the Congress*, *supra* note 122.

much greater doubt. And conduct that occurred by 1798—the year of the enactment of the Sedition Act[153]—should not be considered a reliable guide.

B. Lack of Sufficient Historical Examples of Governmental Actions that Might Legitimately Evince the Intent of the Establishment Clause's Framers

With these limitations on what conduct might legitimately be viewed as presumptively consistent with the intent of the Establishment Clause—federal governmental actions taken in 1789 or shortly thereafter—history leaves us with little to go on. To be sure, we assume that history can be a useful guide in the legislative-prayer arena itself, given the Supreme Court's reliance in *Marsh* on Congress's approval of public funding of congressional chaplains three days before Congress's approval of the language of the Bill of Rights, and on the unbroken continuation of legislative prayer in Congress since then.[154] But with respect to most other kinds of Establishment Clause cases, there are no relevant examples of federal-government conduct during the relevant time frame.[155] Most of the examples of historical conduct that advocates of a historical-practice test cite either were not taken by the federal government or did not occur during the proper time frame.[156] The few instances of federal governmental actions concerning religion that did occur during the appropriate time frame are not helpful to deciding the types of Establishment Clause controversies that presently predominate in the courts.[157]

1. Lack of Founding-Era Federal Involvement in Most Areas that Trigger Church-State Controversies Today

In the late eighteenth century, the federal government simply was not involved in most of the contexts that trigger Establishment Clause litigation today. Thus, there are no examples of federal actions that could legitimately provide courts with guidance under a historical-practice test in most kinds of Establishment Clause cases.

Take, for example, religion in public schools, a source of frequent Establishment Clause conflict in the courts today.[158] The federal government did not maintain public schools during the time period that can be legitimately considered under a historical-practice test. As Justice O'Connor has pointed out, "free public education was virtually nonexistent in the late 18th century."[159] The

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153. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273 (1964) (citing Sedition Act of 1798, ch. 74, 1 Stat. 596).

154. *See Marsh*, 463 U.S. at 788.

155. *See infra* text accompanying notes 158–90.

156. *See infra* text accompanying notes 191–237.

157. *See infra* text accompanying notes 238–51.

158. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294 (2000); Lee v. Weisman, 505 U.S. 577, 580 (1992).

159. Wallace v. Jaffree, 472 U.S. 38, 80 (1985) (O'Connor, J., concurring).

schools that did exist in the colonies and in the decades after the American Revolution were largely private and sectarian.[160] And to the extent that governmental bodies did provide for schooling, those bodies were state or local.[161] The public-school system that we know today did not begin to take root until the 1820s and 1830s.[162] The first public high school in the United States is generally said to have opened in Boston in 1821.[163] In the South, education remained principally private even at the time of the adoption of the Fourteenth Amendment.[164] And though the issue of prayer at high-school graduations is a common trigger for Establishment Clause lawsuits,[165] according to one source the first public-high-school graduation ceremony did not take place until 1868.[166]

Establishment Clause cases also often concern government-sponsored religious displays, such as crosses,[167] the Ten Commandments,[168] and holiday-season crèches.[169] But the first monument erected by the federal government is believed to be the Tripoli Monument, which commemorates American naval officers who died in battle.[170] That monument was erected in 1808.[171] And it contains no religious content, beyond an inscription stating that the naval officers had died in "the year of our Lord, 1804."[172] Further, as Justice Kennedy remarked in *Allegheny*, "for reasons quite unrelated to the First Amendment, displays commemorating religious holidays were not commonplace in 1791."[173] Indeed, beyond the brief date reference in the Tripoli Monument, court opinions and legal briefs that have attempted to find historical support for government-

160. *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 238 & n.7 (1963) (Brennan, J., concurring); Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 213–14 (1948) (Frankfurter, J., concurring in the judgment).

161. *See, e.g.*, *McCollum*, 333 U.S. at 214–15 (Frankfurter, J., concurring in the judgment); Walter H. Small, *The New England Grammar School, 1635–1700*, 10 SCH. REV. 513, 513–14 (1902).

162. *See Schempp*, 374 U.S. at 238 n.7 (Brennan, J., concurring).

163. *See* 1 A CYCLOPEDIA OF EDUCATION 418 (Paul Monroe ed., 1915).

164. *See Wallace*, 472 U.S. at 80 (O'Connor, J., concurring in the judgment).

165. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 580 (1992); Adler v. Duval Cty. Sch. Bd., 250 F.3d 1330, 1331 (11th Cir. 2001) (en banc); ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471, 1474–75 (3d Cir. 1996) (en banc).

166. *See Lee*, 505 U.S. at 635 (Scalia, J., dissenting).

167. *See, e.g.*, Salazar v. Buono, 559 U.S. 700, 705–06 (2010) (plurality opinion).

168. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 681 (2005) (plurality opinion).

169. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 670–71 (1984).

170. *Van Orden*, 545 U.S. at 689 n.9 (plurality opinion).

171. *See Tripoli Monument, (sculpture)*, ART INVENTORIES CATALOG, SMITHSONIAN AM. ART MUSEUM, https://s.si.edu/2Tr5x2F (last visited Jan. 29, 2019).

172. *Van Orden*, 545 U.S. at 689 n.9 (plurality opinion).

173. County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

sponsored religious displays have not identified any religious content in any displays that were erected by the federal government between 1789 and 1808.[174]

Another hotly contested issue today is the extent to which the Establishment Clause permits religious exemptions from employment-discrimination and public-accommodations laws.[175] Of course, in the eighteenth century, there were no federal laws barring discrimination by employers or businesses.[176] The relevant historical period simply offered no opportunity to speak to this quintessentially modern controversy.

Beyond legislative prayer and the areas discussed above, one other type of Establishment Clause controversy is common today: the extent to which government can permissibly fund religious educational institutions and social-service providers.[177] But this issue generally did not come up in the late eighteenth century either, because the federal government was not funding any general education or social-service programs then.[178] As Douglas Laycock has put it, "[t]here were no programs in which government broadly funded some private activity that both churches and secular organizations engaged in."[179]

There is, however, one series of federal actions that proponents of public funding of religious education raise in support of arguments that the Establishment Clause was intended to permit public funding of religious instruction under some circumstances: federal support for missionary efforts among Native Americans.[180] But this practice did not begin until the mid-1790s, and it took some time for it to evolve toward federal funding of church-operated schools for Native Americans: In 1795, President Washington signed a treaty with three tribes, promising payment to build a church.[181] In 1796, the Fourth Congress passed a law ceding land to a religious organization for missionary activities.[182] In 1803, President Jefferson entered into a treaty with the Kaskaskia Tribe promising that the government would pay for a church and a

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174. *See infra* text accompanying notes 191–231.

175. *See, e.g.*, Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 329–30 (1987); Fulton v. City of Philadelphia, 320 F. Supp. 3d 661, 685 & n.24 (E.D. Pa. 2018), *aff'd*, 922 F.3d 140 (3d Cir. 2019), *petition for cert. docketed*, No. 19-123 (July 25, 2019); Ockletree v. Franciscan Health Sys., No. 11-cv-05836 RBL, 2012 U.S. Dist. LEXIS 175515, at *2 (W.D. Wash. Dec. 11, 2012).

176. *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 184–85 (2012); Civil Rights Cases, 109 U.S. 3, 10 (1883).

177. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 801 (2000) (plurality opinion); Agostini v. Felton, 521 U.S. 203, 208–09 (1997); Bowen v. Kendrick, 487 U.S. 589, 593 (1988).

178. *See* Douglas Laycock, *Churches, Playgrounds, Government Dollars—And Schools?*, 131 HARV. L. REV. 133, 142–44 (2017).

179. *Id.* at 143–44.

180. *See id.* at 144 n.90 (citing with disapproval ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 57–80, 261–70 (1988)).

181. Cord, *supra* note 180, at 58.

182. *Id.* at 42–43.

Catholic priest "who will engage to perform for the said tribe the duties of his office and also to instruct as many of their children as possible in the rudiments of literature."[183] By the 1820s, missionaries and other religious groups on tribal lands were operating schools with government funding, and this practice continued until the late nineteenth century.[184]

Public funding for missionary efforts among Native Americans is, like the plainly unconstitutional 1798 Sedition Act,[185] better viewed as an example of governmental action contrary to the intent of the First Amendment than as evidence of the Amendment's intent. It commenced closer in time to the enactment of the Sedition Act than to the approval of the First Amendment. What is more, James Madison, "the leading architect of the religion clauses of the First Amendment," [186] understood the Establishment Clause to strictly prohibit public funding for the support of religion. In 1811, as president, Madison vetoed a bill that would have granted a parcel of federal land to a church, "[b]ecause the bill . . . comprises a principle and precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that 'Congress shall make no law respecting a religious establishment.'" [187] Madison's views against public funding of religious training were set forth at length in his famous 1785 Memorial and Remonstrance Against Religious Assessments,[188] which was written in opposition to a bill Patrick Henry had proposed in the Virginia Legislature that would have provided tax funding for "learned teachers" of "Christian knowledge," among other aspects of religious ministries.[189] The Supreme Court has long recognized the Memorial and Remonstrance as a cornerstone document explaining the Establishment Clause's intent.[190]

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183. *Id.* at 38; *see also* Laycock, *supra* note 111, at 915; J. Clifford Wallace, *The Framers' Establishment Clause: How High the Wall?*, 2001 B.Y.U. L. REV. 755, 766–67 (2001).

184. *See* Cord, *supra* note 180, at 63, 80; Laycock, *supra* note 178, at 144.

185. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273–74 (1964) (citing Sedition Act of 1798, ch. 74, 1 Stat. 596).

186. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 184 (2012) (quoting Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 141 (2011)).

187. JAMES MADISON, VETO MESSAGES (Feb. 28, 1811), *reprinted in* 8 THE WRITINGS OF JAMES MADISON, 1808–1819 132 (Gaillard Hunt ed., 1908).

188. *See* James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785) ¶¶ 12–13, 15, *reprinted in* Everson v. Bd. of Educ., 330 U.S. 1, app. at 63–72 (1947).

189. *See* PATRICK HENRY, A BILL ESTABLISHING A PROVISION FOR TEACHERS OF THE CHRISTIAN RELIGION (1784); Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison's Memorial and Remonstrance*, 87 CORNELL L. REV. 783, 783–84, 783 n.3 (2002).

190. *See Ariz. Christian Sch. Tuition Org.*, 563 U.S. at 140–41; Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 770 n.28 (1973); *Everson*, 330 U.S. at 11–13.

2. Irrelevance of Most Historical Events Relied on by Proponents of a Historical-Practice Test

Like the funding of missionary work directed at Native Americans, the vast majority of the historical actions on which proponents of a historical-practice test rely are not legitimate indicators of the Establishment Clause's intent. The actions either were not taken by the federal government or did not occur close enough in time to Congress's 1789 approval of the Bill of Rights. Indeed, most of the cited actions took place long after 1789, some occurred before 1789, some were taken by state or local governments, and some were taken by private citizens on land that was not even part of the United States at the time.

For example, in his opinion in *Allegheny*, the historical events Justice Kennedy cited included the Supreme Court's practice of opening its sessions with "God save the United States and this honorable Court,"[191] a practice that is not known to date back earlier than 1827;[192] Congress's creation of a prayer room in the Capitol,[193] in 1954;[194] a statute that directs the president to annually declare a National Day of Prayer,[195] which was enacted in 1952;[196] the words "under God" in the Pledge of Allegiance,[197] which were added in 1954;[198] and the use of "In God we trust"[199] as our national motto, which dates back only to 1956,[200] and on U.S. currency, which dates back to 1864.[201]

Similarly, the historical examples cited by the plurality opinion in *Van Orden v. Perry*—which addressed the constitutionality of a Ten Commandments display[202]—included various depictions of the Ten Commandments in the

191. County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 672 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

192. *See* Michael I. Meyerson, *The Original Meaning of "God": Using the Language of the Framing Generation to Create a Coherent Establishment Clause Jurisprudence*, 98 MARQ. L. REV. 1035, 1042–43 (2015).

193. *County of Allegheny*, 492 U.S. at 672 (Kennedy, J., concurring in the judgment in part and dissenting in part).

194. *Congressional Prayer Room*, THE OFFICE OF THE CHAPLAIN, U.S. HOUSE OF REPRESENTATIVES, https://chaplain.house.gov/religion/prayer_room.html (last visited Jan. 29, 2019).

195. *County of Allegheny*, 492 U.S. at 672 (Kennedy, J., concurring in the judgment in part and dissenting in part).

196. *See* Joint Resolution of Apr. 17, 1952, Pub. L. No. 82-324, 66 Stat. 64.

197. *County of Allegheny*, 492 U.S. at 672 (Kennedy, J., concurring in the judgment in part and dissenting in part).

198. Joint Resolution of June 14, 1954, Pub. L. No. 83-396, 68 Stat. 249.

199. *County of Allegheny*, 492 U.S. at 673 (Kennedy, J., concurring in the judgment in part and dissenting in part).

200. Joint Resolution of July 30, 1956, Pub. L. 84-851, 70 Stat. 732.

201. *See* New Doe Child #1 v. United States, 901 F.3d 1015, 1021 (8th Cir. 2018).

202. Van Orden v. Perry, 545 U.S. 677, 681 (2005) (plurality opinion).

Supreme Court building,[203] which was constructed in 1935;[204] a Ten Commandments display in the Library of Congress that dates back to 1897;[205] a depiction of the Ten Commandments in the National Archives Building,[206] which was constructed in the mid-1930s;[207] a depiction of the Ten Commandments in a 1936 statue in the Department of Justice building;[208] a 1947 statue in front of the Ronald Reagan Building that contains a depiction of the Ten Commandments;[209] a sculpture containing the Ten Commandments and a cross outside the federal courthouse in Washington, D.C.,[210] which opened in 1952;[211] a 1950 statue depicting Moses in the Chamber of the U.S. House of Representatives;[212] religious references in inscriptions on or in the Washington Monument,[213] which was completed in 1884,[214] the Jefferson Memorial,[215] which was dedicated in 1943,[216] and the Lincoln Memorial,[217] which was

203. *Id.* at 688 (plurality opinion).

204. *The Supreme Court Building*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/courtbuilding.aspx (last visited Jan. 29, 2019).

205. *See Van Orden*, 545 U.S. at 689 (plurality opinion).

206. *Id.* (plurality opinion).

207. *See A History of the National Archives Building, Washington, DC*, NAT'L ARCHIVES, https://www.archives.gov/about/history/building.html (last visited Jan. 29, 2019).

208. *See Van Orden*, 545 U.S. at 689 (plurality opinion); *The Robert F. Kennedy Building: Celebrating Art and Architecture on the 75th Anniversary* 50, DEP'T OF JUSTICE (2009), https://www.justice.gov/sites/default/files/jmd/legacy/2014/06/30/75RFKBuilding.pdf.

209. *See Van Orden*, 545 U.S. at 689 (plurality opinion); *American Architectural Foundation Sponsors Public Art in the Federal Triangle Symposium*, U.S. GEN. SERVS. ADMIN. (Apr. 23, 1998), https://www.gsa.gov/node/80869; *International Religious Freedom Report: 2005 Introduction*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, https://www.state.gov/j/drl/rls/irf/2005/51385.htm (last visited Jan. 29, 2019).

210. *See Van Orden*, 545 U.S. at 689 (plurality opinion).

211. *See Courthouse History*, U.S. DISTRICT COURT FOR D.C., https://www.dcd.uscourts.gov/courthouse-history (last visited Jan. 29, 2019).

212. *See Van Orden*, 545 U.S. at 689 (plurality opinion); *Moses*, ARCHITECT OF THE CAPITOL, *https://www.aoc.gov/art/relief-portrait-plaques-lawgivers/moses* (last visited Mar. 17, 2019).

213. *See Van Orden*, 545 U.S. at 689 n.9 (plurality opinion).

214. *See Washington Monument: History & Culture*, NAT'L PARK SERV., https://www.nps.gov/wamo/learn/historyculture/index.htm (last visited Jan. 29, 2019).

215. *See Van Orden*, 545 U.S. at 689 n.9 (plurality opinion).

216. *See Thomas Jefferson Memorial Construction*, NAT'L PARK SERV., https://www.nps.gov/thje/learn/historyculture/memorialconstruction.htm (last visited Jan. 29, 2019).

217. *See Van Orden*, 545 U.S. at 689 n.9 (plurality opinion).

dedicated in 1922;[218] and the reference discussed above to "the year of our Lord, 1804," in the 1808 Tripoli Monument.[219]

The recent concurring opinion in *Kondrat'yev v. City of Pensacola*—which advocated for a historical-practice test while addressing the constitutionality of a cross display[220]—relied on a cross erected by a Jesuit priest in upstate New York in 1688 "when the territory was under French control";[221] a cross erected by a Spanish missionary in 1782 in California,[222] which did not become part of the United States until 1848;[223] a cross erected by settlers of a Texas town in 1847,[224] the year before the United States acquired Texas;[225] a cross erected in 1858 on top of a chapel in a U.S. military fort in Virginia;[226] a cross erected in 1888 in Gettysburg National Military Park in Pennsylvania;[227] a cross erected in 1890 in the Naval Academy cemetery in Maryland;[228] a cross erected in the City of Lancaster, Pennsylvania, in 1898;[229] a cross donated to the City of Monterey, California, in 1905;[230] and a cross erected in New Canaan, Connecticut, in 1923.[231]

The defendants in *Kondrat'yev* relied on these and similar examples in their brief.[232] They also cited religious references in state constitutions during our Founding Era, as well as religious symbolism in the national seal—which was adopted in 1782, seven years before Congress's submission of the First Amendment.[233] Likewise, the majority of the divided panel in *New Doe Child #1 v. United States*—which used a historical-practice analysis in upholding the placement of "In God We Trust" on currency—relied on the statement in the

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218. *See Construction of the Lincoln Memorial*, NAT'L PARK SERV., https://www.nps.gov/linc/learn/historyculture/lincoln-memorial-construction.htm (last visited Jan. 29, 2019).

219. *See Van Orden*, 545 U.S. at 689 n.9 (plurality opinion); *Tripoli Monument, (sculpture)*, *supra* note 171; *supra* text accompanying notes 170–72.

220. Kondrat'yev v. City of Pensacola, 903 F.3d 1169, 1174, 1179 (11th Cir. 2018) (Newsom, J., concurring in the judgment), *vacated and remanded*, 139 S. Ct. 2772 (2019).

221. *Id.* at 1180 (Newsom, J., concurring in the judgment).

222. *Id.*

223. *See* The Editors of Encyclopaedia Britannica, *Treaty of Guadalupe Hidalgo*, ENCYCLOPAEDIA BRITANNICA (Jan. 26, 2019), https://www.britannica.com/event/Treaty-of-Guadalupe-Hidalgo.

224. *Kondrat'yev*, 903 F.3d at 1181 (Newsom, J., concurring in the judgment).

225. *See* The Editors of Encyclopaedia Britannica, *supra* note 223.

226. *Kondrat'yev*, 903 F.3d at 1181 (Newsom, J., concurring in the judgment).

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *See* Appellants' Opening Brief at 54–57 and Addendum 2, *Kondrat'yev*, 903 F.3d 1169 (No. 17-13025), 2017 WL 4325013.

233. *See id.* at *53.

Declaration of Independence, which was issued thirteen years before Congress's approval of the First Amendment, "that all men are . . . endowed by their Creator with certain unalienable Rights."[234] Additionally, both the *New Doe Child* majority opinion and the plurality opinion in *American Legion* relied on the statement in the Northwest Territory Ordinance, which was adopted in 1787, two years before approval of the First Amendment, that "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[235] Both opinions asserted that the First Congress reenacted the Northwest Territory Ordinance,[236] but Douglas Laycock has explained that this "claim is false," because the First Congress actually enacted only "two technical amendments" to the Ordinance, which did not include the religious references.[237]

3. Impotence of the Few Historical Events that Could Properly be Considered Under a Historical-Practice Test

Proponents of a historical-practice test have, to our knowledge, identified only two actions—and arguably a third—that are legitimate candidates for serving as evidence of the intent of the First Amendment's framers because they were taken by the federal government sufficiently close in time to the Amendment's enactment. The first is Congress's approval of funding of congressional chaplains three days before approval of the language of the Bill of Rights.[238] The second is Congress's passage the day after the First Amendment was proposed of a resolution that asked the president to proclaim "a day of public thanksgiving and prayer, to be observed, by acknowledging, with grateful hearts, the many signal favours of Almighty God."[239] The third—and this one is more tenuous because it was approved on March 3, 1791, nearly a year and a half after Congress's approval of the First Amendment (but still before the Amendment was ratified by the States in December 1791)—is Congress's authorization of the appointment of a chaplain for the U.S. Army.[240]

Before discussing whether these examples are useful to the adjudication of Establishment Clause controversies that relate to different issues, we emphasize

234. *See* New Doe Child #1 v. United States, 901 F.3d 1015, 1021–22 (8th Cir. 2018) (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).

235. *See id.* at 1022 (quoting NORTHWEST TERRITORY ORDINANCE OF 1787, Article III) (internal citation omitted); *accord* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019) (plurality opinion).

236. *See Am. Legion*, 139 S. Ct. at 2087 (plurality opinion); *New Doe Child*, 901 F.3d at 1022.

237. *See* Laycock, *supra* note 111, at 915 & n.209.

238. Marsh v. Chambers, 463 U.S. 783, 787–88 (1983).

239. *See* McCreary County v. ACLU of Ky., 545 U.S. 844, 886 (2005) (Scalia, J., dissenting) (citing H.R. JOURNAL, 1st Cong., 1st Sess. 123 (1826 ed.); SEN. JOURNAL, 1st Cong., 1st Sess. 88 (1820 ed.)).

240. Katcoff v. Marsh, 755 F.2d 223, 225 (2d Cir. 1985) (citing Act of March 3, 1791, Ch. 28, § 5, 1 Stat. 222).

that it is highly questionable whether these actions in fact were consistent with the Establishment Clause's intent. The Supreme Court has regularly looked to the views on religious liberty of James Madison and Thomas Jefferson—the First Amendment's leading architects—in ascertaining the Amendment's intent.[241] But after he completed his service as president, Madison wrote that the congressional chaplaincies violated the Establishment Clause, explaining, "[t]he law appointing Chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes."[242] Madison similarly concluded that the military chaplaincies were unconstitutional, even though he thought that "[t]he object of this establishment is seducing; the motive to it is laudable."[243] And, as president, Jefferson refused to issue Thanksgiving prayer proclamations because he thought that they were unconstitutional: "I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises."[244] Despite issuing Thanksgiving proclamations during wartime as president, Madison also subsequently agreed that they were contrary to the Establishment Clause.[245] What is more, unlike opening prayers in Congress, which have continued since their inception,[246] presidential prayer proclamations were issued only six times before 1862: in 1789 and 1795 by George Washington, in 1798 and 1799 by John Adams (these two were not on Thanksgiving), and in 1814 and 1815 by Madison.[247]

Even if these three practices are, for the sake of argument, treated as consistent with the intent of the First Amendment, they shed little light on how to decide church-state controversies about other matters. Legislative prayer is a ceremonial practice that is principally directed at legislators themselves, not the public.[248] The Thanksgiving proclamations issued by early presidents were

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241. *See, e.g.*, Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 214 (1963); *id.* at 234 (Brennan, J., concurring); McGowan v. Maryland, 366 U.S. 420, 437 (1961); Everson v. Bd. of Educ., 330 U.S. 1, 13 (1947).

242. Elizabeth Fleet, *Madison's "Detached Memoranda"*, 3 WM. & MARY Q. 534, 558 (1946).

243. *Id.* at 559.

244. *See* Leo Pfeffer, CHURCH, STATE, AND FREEDOM 266 (rev. ed. 1967) (quoting 11 THE WRITINGS OF THOMAS JEFFERSON 428–30 (Andrew A. Lipscomb et al. eds., 1903)).

245. *See* Laycock, *supra* note 111, at 914.

246. *See* Marsh v. Chambers, 463 U.S. 783, 792 (1983).

247. *See Thanksgiving Day Proclamations 1789–Present*, WHAT SO PROUDLY WE HAIL, https://www.whatsoproudlywehail.org/curriculum/the-american-calendar/thanksgiving-day-proclamations-1789-present (last visited Jan. 29, 2019); *Presidential Thanksgiving Proclamations 1789–1815: George Washington, John Adams, James Madison*, PILGRIM HALL MUSEUM, http://www.pilgrimhallmuseum.org/pdf/TG_Presidential_Thanksgiving_Proclamations_1789_1815.pdf (last visited Jan. 29, 2019).

248. *See* Town of Greece v. Galloway, 572 U.S. 565, 584 (2014); *id.* at 587–88 (plurality opinion).

nonsectarian, ecumenical, isolated written statements that were not presented in coercive environments.[249] And military chaplains have been upheld as constitutional on the ground that they are necessary to protect the right to free exercise of religion of soldiers whom the government stations at places where religious services would otherwise be unavailable;[250] to the extent that military chaplains are provided to military office personnel stationed in urban areas or to retired military personnel, their constitutionality is in doubt, because the chaplains are not needed to enable these personnel to exercise their religions.[251]

None of these three practices is helpful to determining how the Establishment Clause should be applied in the coercive environment of public schools, to permanent and prominent sectarian displays on public property, to requests on religious grounds for exemptions from anti-discrimination laws, or to the provision of substantial sums of public funds to private religious institutions. Thus, with respect to the Establishment Clause cases that typically confront courts today (other than legislative-prayer cases), there is simply not enough relevant history for a historical-practice analysis to be workable.

And even if there were more relevant examples of early federal-government conduct that might legitimately be treated as consistent with the Establishment Clause's intent, a historical-practice test would still give little guidance in cases that do not address specific practices that go back to our country's Founding Era. As formulated by Justice Kennedy in *Allegheny*, a historical-practice test apparently would ask whether a challenged practice has a "greater potential for an establishment of religion" than "legitimate practices two centuries old."[252] How is a court to assess whether one practice has a "greater potential for an establishment of religion" than another? Such a "standard" would provide much less guidance to courts—and would be much more susceptible to capricious "we know it when we see it" application—than the purpose, effect, and entanglement prohibitions of the oft-criticized[253] *Lemon* test.

IV. PROPER USE OF HISTORY IN ESTABLISHMENT CLAUSE ANALYSIS

Though governmental actions that followed the adoption of the First Amendment are generally not the right events to consider, we do not contend that there should be no role for history in Establishment Clause analysis. The

249. *See Presidential Thanksgiving Proclamations*, *supra* note 247; Ron Soodalter, *In These Divisive Times, This Story of American Thanksgiving Bears Lessons Worth Heeding*, AIRFORCETIMES (Nov. 22, 2018), https://www.airforcetimes.com/off-duty/2018/11/22/in-these-divisive-times-this-story-of-american-thanksgiving-bears-lessons-worth-heeding/.

250. Katcoff v. Marsh, 755 F.2d 223, 234 (2d Cir. 1985).

251. *Id.* at 237–38.

252. County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

253. *See, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398–400 (1993) (Scalia, J., concurring), and citations therein.

historical guides courts should look at instead are the events that triggered the Establishment Clause's creation, and the writings of the leading thinkers behind the Clause—Madison and Jefferson.[254] And such historical analysis does not require wholesale changes in Establishment Clause jurisprudence. Far from it. For the Supreme Court has already used such analysis to derive existing Establishment Clause rules.

Indeed, the Court did so in its 1947 decision *Everson v. Board of Education*,[255] the first case that applied the Establishment Clause to the states,[256] which considered the constitutionality of a township's practice of paying for bus transportation to private, religious schools. The Court "review[ed] the background and environment of the period in which [the Establishment Clause] was fashioned and adopted," describing the "conditions and practices which [the early Americans] fervently wished to stamp out in order to preserve liberty for themselves and for their posterity," and the "evils, fears, and political problems that caused [the Establishment Clause] to be written into our Bill of Rights."[257] The Court detailed the religious strife that led American colonists to leave Europe, how that strife persisted in the colonies, and how it ultimately fostered among the colonists the belief that "individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group."[258]

The Court focused particularly on the writings of James Madison and Thomas Jefferson in opposition to continued taxation for the support of religion in Virginia, exemplified by Patrick Henry's 1784 proposal of a bill for that purpose.[259] Madison wrote in response his landmark Memorial and Remonstrance Against Religious Assessments, which

> eloquently argued that a true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that

254. *See, e.g.*, Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 214 (1963); *id.* at 234 (Brennan, J., concurring); McGowan v. Maryland, 366 U.S. 420, 437–38 (1961); Everson v. Bd. of Educ., 330 U.S. 1, 13 (1947).

255. *Everson*, 330 U.S. at 8–16.

256. *See, e.g.*, Douglas E. Stewart, Jr., *Going Back in Time: How the Kansas Board of Education's Removal of Evolution from the State Curriculum Violates the First Amendment's Establishment Clause*, 20 REV. LITIG. 549, 565 (2001).

257. *Everson*, 330 U.S. at 8.

258. *Id.* at 8–11.

259. *See id.* at 11–12; PATRICK HENRY, A BILL ESTABLISHING A PROVISION FOR TEACHERS OF THE CHRISTIAN RELIGION (1784).

> cruel persecutions were the inevitable result of government-established religions.[260]

And Jefferson wrote the Virginia Statute for Religious Freedom, which likewise powerfully advocated against governmental support for, coercion of, discrimination based on, and other involvement with religion.[261] The Court explained that "the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute."[262]

Then, drawing on this history, the Court listed a set of fundamental Establishment Clause rules:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.[263]

"In the words of Jefferson," concluded the Court, "the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'"[264]

Fifteen years later, in *Engel v. Vitale*, the Court again rested its analysis in a foundational Establishment Clause case on an examination of the historical abuses that the Clause's framers meant to prevent.[265] In that decision, the Court struck down a public school district's policy of requiring the recitation of a prayer, composed by state officials, at the beginning of each school day.[266] Most of the Court's opinion was devoted to discussion of European and colonial practices that the Establishment Clause was intended to prohibit.[267] The Court

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260. *Everson*, 330 U.S. at 12 (citing 2 THE WRITINGS OF JAMES MADISON 183 (Gaillard Hunt ed., 1901)).

261. *See id.* at 12–13; Thomas Jefferson, *Virginia Statute for Religious Freedom* (1786), https://www.monticello.org/site/research-and-collections/virginia-statute-religious-freedom.

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

263. *Id.* at 15–16.

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

265. Engel v. Vitale, 370 U.S. 421, 425–36 (1962).

266. *Id.* at 422–24, 436.

267. *See id.* at 425–36.

recounted how the government of England established a church and prescribed particular prayers and religious exercises, how early colonists came to America to escape such practices, how some colonies established similar practices themselves, the persecution and division that resulted, how Madison and Jefferson led opposition in Virginia against governmental support of or involvement with religion in response, and how the Establishment Clause was intended to prevent these kinds of practices.[268] Looking to this history, the Court concluded that the "first and most immediate purpose" of the Establishment Clause "rested on the belief that a union of government and religion tends to destroy government and to degrade religion."[269] And, added the Court, "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[270]

The following year, in *School District of Abington Township v. Schempp*, the Court struck down enactments requiring that public-school days begin with Bible readings or prayer recitations.[271] The Court again discussed the history of religious strife in Europe and the colonies, more briefly than in *Everson* and *Engel*, but pointing to those decisions as providing additional detail.[272] The Court summed up that history thus: "Nothing but the most telling of personal experiences in religious persecution suffered by our forebears . . . could have planted our belief in liberty of religious opinion any more deeply in our heritage."[273] As a result, noted the Court, "the views of Madison and Jefferson"—leading supporters of that liberty—"came to be incorporated . . . in the Federal Constitution."[274] The Establishment Clause mandates governmental neutrality toward religion, the Court added, based on

> a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies.[275]

Drawing on this history, the Court described two familiar Establishment Clause principles:

> The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of

268. *Id.* at 425–33.

269. *Id.* at 431.

270. *Id.*

271. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 224–27 (1963).

272. *Id.* at 212–14 (citing Everson v. Bd. of Educ, 330 U.S. 1, 8–11 (1947); *Engel*, 370 U.S. at 428 n.10, 434).

273. *Id.* at 214.

274. *Id.*

275. *Id.* at 222.

> religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[276]

These purpose and effect rules, together with the prohibition against religious entanglement discussed in *Engel*, serve as the core of the well-known *Lemon* test.[277]

In numerous subsequent cases, the Supreme Court relied on pre-Revolution history and the writings of Madison and Jefferson to interpret the Establishment Clause. In *Flast v. Cohen*, for example, citing Madison and noting that "[o]ur history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general," the Court explained that "[t]he Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power."[278] In *Committee for Public Education & Religious Liberty v. Nyquist*, the Court relied on Madison's rebuke of Patrick Henry's proposal to fund religious ministries in Virginia to support a conclusion that public funding of religious education is prohibited even when it partially aids secular goals.[279] In *Larson v. Valente*, the Court looked to European and colonial historical abuses and the writings of Madison to derive the principle that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[280] In his majority opinion in *Lee v. Weisman*, Justice Kennedy cited Madison's writings in explaining that the Establishment Clause, among other purposes, "exist[s] to protect religion from government interference."[281]

More recently, in its 2005 decision *McCreary County v. ACLU of Kentucky*, the Supreme Court cited the history of religious conflict in England and the colonies as support for reaffirming the principle that "the government may not favor one religion over another, or religion over irreligion."[282] In his 2011 majority opinion in *Arizona Christian School Tuition Organization v. Winn*, Justice Kennedy looked to Madison's writings to describe the injury taxpayers

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276. *Id.*

277. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

278. Flast v. Cohen, 392 U.S. 83, 103–04 (1968) (citing 2 THE WRITINGS OF JAMES MADISON 183, 186 (Gaillard Hunt ed., 1901)).

279. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 770 n.28, 783 n.39 (1973).

280. Larson v. Valente, 456 U.S. 228, 244–45 (1982).

281. Lee v. Weisman, 505 U.S. 577, 589–90 (1992).

282. McCreary County v. ACLU of Ky., 545 U.S. 844, 875–76 (2005).

suffer when their money is taken to aid religious institutions.[283] And in his 2012 opinion for a unanimous court in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, Chief Justice Roberts examined English and colonial history and the writings of Madison to support a holding that government must not become involved in the selection of ministers.[284]

V. CONCLUSION

As the foregoing cases illustrate, by considering the historical abuses that the Establishment Clause was meant to prevent, and the writings of the leading thinkers behind the Clause, the Supreme Court has formulated a host of clear and specific rules for interpreting it. These rules protect values and principles at the heart of the Clause, which—in today's pluralistic society—are even more important than they were in 1789: the government must not discriminate against anyone based on their religion or lack of faith; the government must not pressure or influence anyone to take part in religious activities; the government must not fund religious education or ministry; the government must not interfere with or become involved in the affairs of religious institutions; the government must not permit its power to be wielded in the service of theological goals.[285]

Replacing existing Establishment Clause jurisprudence with a test that measures challenged practices against post-1789 historical practices not only would provide courts with wholly insufficient guidance but also would put these core Establishment Clause values at great risk. The few Founding Era historical practices that might—at least arguably—be legitimately viewed as consistent with the intent of the Clause's framers provide little guidance in most Establishment Clause areas, and thus little protection for the rights that the Clause was intended to guard. And other historical actions that proponents of a historical-practice test rely on—non-federal actions and actions insufficiently close to 1789—can easily reflect conduct by politicians who ignored the Clause or were never bound by it, instead of validly evincing the Clause's intent. Relying on such actions could eviscerate Establishing Clause values instead of vindicating them. And that use of history would betray—and risk repeating—the very history that resulted in the Establishment Clause's creation.

283. Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 140–42 (2011).

284. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 182–85 (2012).

285. *See supra* text accompanying notes 255–84; Madison, *supra* note 188; Jefferson, *supra* note 261.