OPPORTUNISTIC ORIGINALISM AND THE ESTABLISHMENT CLAUSE

Caroline Mala Corbin[*]

This Article argues that the Supreme Court's use of originalism is opportunistic because sometimes the Court relies on it, and sometimes it does not. This inconsistency is evident in two recent decisions with significant Establishment Clause consequences: Town of Greece v. Galloway *(2014) and* Trinity Lutheran Church v. Comer *(2017). In* Town of Greece*, the Supreme Court applied an originalist analysis to uphold the government's policy of sponsoring predominantly Christian prayers before town meetings. In* Trinity Lutheran Church*, the Supreme Court failed to conduct an originalist analysis of direct government funding to churches before ordering a state to award a cash grant to a Christian church. The Court's inconsistent application—even when dealing with a single clause—raises the possibility that the Court's use of originalism is based less on principle than on desired outcomes.*

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† Professor of Law and Dean's Distinguished Scholar, University of Miami School of Law; B.A., Harvard University; J.D., Columbia Law School. I would like to thank Chinmayi Sharma and the participants at the Ninth Annual Law & Religion Roundtable for helpful comments, particularly Nathaniel Berman, Andy Kopelmann, Chip Lupu, and Nelson Tebbe. I would also like to thank to my research assistants Keelin Bielski, Michael Habib, Kaitlyn Mannis, and Jean Phillip Shami.

I. INTRODUCTION

Originalism as a theory of constitutional interpretation leaves much to be desired.[1] This critique applies to both old and new versions of the theory.[2] However, I do not propose to add to the substantial literature enumerating the weaknesses of the theory.[3] Instead, my point is that the Supreme Court's use of originalism is opportunistic because sometimes the Court relies on it, and sometimes it does not. Although this reproach has been leveled against particular Justices' invocation of originalism in some areas of constitutional law but not in others,[4] my critique is that the Supreme

1. *See, e.g.*, Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 7 (2009) ("Over the years, originalism's critics have argued, among other things: that the target of the originalist search—be it intent, understanding, or public meaning—is undiscoverable or (in the case of intent) nonexistent; that originalism is self-refuting because the original intent or understanding was that the Constitution ought not to be interpreted in an originalist vein; and that originalism yields substantively bad outcomes.").

2. *See infra* notes 40–66 and accompanying text (comparing Old Originalism and New Originalism).

3. *See, e.g.*, Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721, 722 n.7 (2013) ("Much originalism takes the form of law office history. Such work is typically result-oriented, generally ignores recent scholarly developments in the relevant historiography, and approaches historical texts in an anachronistic manner."); Reva B. Siegel, *Heller & Originalism's Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1401 (2009) ("As originalism's jurisprudential critics have emphasized for decades now, the constitutional order that the theory of originalism produces is plagued by problems of dead hand control that vitiate its democratic authority."); Calvin TerBeek, *Originalism's Obituary*, 2015 UTAH L. REV. ONLAW 29, 30 (2015) ("[O]riginalism is a political project no matter what self-serving stories originalists want to tell themselves (and others). Lip service can be (and is) paid to originalism's ostensible objectivity, but this is only to give it the patina of dispassionate scholarship.").

4. *See, e.g.*, Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 13–15 (2006) (noting that Justice Scalia would sometimes adhere to originalism and sometimes would not, listing cases where he did not). Andrew Koppelman, meanwhile, has criticized the originalist analysis of the Establishment Clause by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas as "a remarkable congeries of historical error

Court as a whole has not adopted a consistent approach to originalism—even as to a single clause. In particular, the Supreme Court has been wildly inconsistent in two recent decisions with significant Establishment Clause consequences: *Town of Greece v. Galloway*[5] and *Trinity Lutheran Church of Columbia, Inc. v. Comer*.[6]

Town of Greece v. Galloway, decided in 2014, presented an Establishment Clause challenge to the town's practice of opening its town meetings with predominantly Christian prayers.[7] The Supreme Court applied an originalist analysis and deemed the prayer policy constitutional.[8] The Court upheld the sectarian prayers in large part by equating the town's prayers to the legislative prayers upheld in *Marsh v. Chambers*.[9] Rather than applying any existing Establishment Clause doctrinal test, *Marsh* essentially held that because the Congress that wrote and approved the Establishment Clause hired a government-paid chaplain to open its legislative sessions with prayer, the Establishment Clause allows legislative prayers.[10] Because the Town of Greece's prayer program was sufficiently similar to the one upheld in *Marsh*, it too survived a constitutional challenge.[11]

In contrast, three years later, the majority in *Trinity Lutheran Church, Inc. v. Comer* failed to examine the original understanding of taxpayer funding of churches.[12] Trinity Lutheran Church argued that Missouri's refusal to award the church a grant violated the Free Exercise Clause.[13] Missouri defended its denial on establishment grounds.[14] In rejecting the State's justification, the Court downplayed the Establishment Clause in general and disestablishment concerns regarding direct money payments to churches in particular.[15] The absence of any originalist exploration of direct cash payments to churches is especially surprising given that

and outright misrepresentation." Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U. L. REV. 727, 728 (2009) ("There is a serious originalist inquiry to be made into the meaning of the Establishment Clause, but none of the 'originalist' judges on the Court appear to have the slightest interest in undertaking that inquiry.").

5. 572 U.S. 565 (2014).

6. 137 S. Ct. 2012 (2017).

7. *Town of Greece*, 572 U.S. at 573 (acknowledging that "most of the prayer givers were Christian").

8. *See infra* Subpart III.A.

9. 463 U.S. 783 (1983); *see Town of Greece*, 572 U.S. at 566–67.

10. *See infra* notes 79–82 and accompanying text.

11. *See infra* notes 86–87, 90–94 and accompanying text.

12. *See infra* Subpart IV.A.

13. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2018 (2017).

14. *See id.* at 2017.

15. *See id.* at 2022.

Town of Greece seemed to urge a more originalist approach to all Establishment Clause questions.[16]

Although only three years and one Justice separates these two cases,[17] the Court's treatment of originalism in its Establishment Clause analyses is markedly different. The Court's inconsistent application of originalism—even when dealing with a single clause—raises the possibility that the Court's use of originalism is based less on principle than on results. Although the Court's originalism is not consistent, its approval of practices amicable to Christianity is.

Part I offers a very brief primer on the Establishment Clause and on the theory of originalism. Part II performs a close reading of *Town of Greece*. It first examines the originalist reasoning that led the Court to uphold a predominantly Christian prayer practice. It then considers how the case might have been decided had the Court relied on conventional doctrinal tests. Part III turns to *Trinity Lutheran Church*. It first reviews the Court's cursory treatment of the Establishment Clause question presented. It then considers what various originalist approaches might have made of the challenged funding.

II. BACKGROUND

A. The Establishment Clause

The Establishment Clause is the first clause in the First Amendment. It reads: "Congress shall make no law respecting an establishment of religion."[18] In an oft-quoted passage, the Supreme Court, when first applying the Establishment Clause to the states, wrote:[19]

16. *See infra* Subpart III.A.

17. Justice Gorsuch replaced Justice Scalia in between the two cases. Justice Scalia died in February 2016. Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html. Justice Gorsuch was confirmed in April 2017. Ariane de Vogue & Dan Berman, *Neil Gorsuch Confirmed to Supreme Court*, CNN (Apr. 7, 2017, 12:17 PM), https://www.cnn.com/2017/04/07/politics/neil-gorsuch-senate-vote/index.html.

18. U.S. CONST. amend. I.

19. The Bill of Rights originally applied only to the federal government. *See* Barron v. Mayor of Baltimore, 32 U.S. 243, 247 (1833). The process of applying amendments to the states is known as incorporation. The Supreme Court incorporates rights via the Due Process Clause of the Fourteenth Amendment. The Due Process Clause applies to the states and prohibits "any state" from depriving "any person of life, liberty of property without due process of law." U.S. CONST. amend. XIV, § 1. The argument is that the "liberty" of the Due Process Clause includes various rights enumerated in the Bill of Rights. *See* Everson v. Bd. of Educ., 330 U.S. 1, 13–15 (1947).

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.[20]

In another early Establishment Clause case, the Supreme Court emphasized that the Establishment Clause bars the government from favoring one religion over another and from favoring religion over its secular counterpart.[21] These principles have been regularly reinforced in Establishment Clause decisions over the years.[22]

With these restrictions, the Establishment Clause protects three interests: civil society, disfavored religions, and favored religions.[23] First, limiting government involvement with religion helps keep the peace because state-established religions have historically led to civil strife, if not war.[24] Second, Establishment Clause limits help religious minorities because the government's preference for some religions is often the first step toward religious persecution of other religions.[25] Moreover, as noted by James Madison (the primary author of the First Amendment), such favoritism creates second-class citizens of those who do not share the government-endorsed beliefs:

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20. *Everson*, 330 U.S. at 15–16.

21. Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.").

22. *See, e.g.*, McCreary County v. ACLU, 545 U.S. 844, 860 (2005) ("The touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'"); Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 703 (1994) ("[A] principle at the heart of the Establishment Clause [is] that government should not prefer one religion to another, or religion to irreligion."); Lee v. Weisman, 505 U.S. 577, 609–10 (1992) (Souter, J., concurring) ("Forty-five years ago, this Court announced a basic principle of constitutional law from which it has not strayed: the Establishment Clause forbids not only state practices that 'aid one religion . . . or prefer one religion over another,' but also those that 'aid all religions.'" (quoting *Everson*, 330 U.S. at 15)).

23. *See infra* notes 24–25, 27 and accompanying text.

24. McDaniel v. Paty, 435 U.S. 618, 640 (1978) ("[A] purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife."); Bd. of Educ. of Cent. Sch. Dist. No. 1. v. Allen, 392 U.S. 236, 254 (1968) (Black, J., dissenting) ("The First Amendment's prohibition against governmental establishment of religion was written on the assumption that state aid to religion and religious schools generates discord, disharmony, hatred, and strife among our people.").

25. *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 432 (1962) ("Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand.").

"[i]t degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority."[26] Third, the establishment constraints protect the favored religion from corruption and degradation.[27] In fact, Thomas Jefferson's famous description of the Establishment Clause as creating "a wall of separation between church and state"[28] originated with Puritan minister Roger Williams, who worried that a "gap in the hedge or wall of Separation between the Garden of the Church and the Wildernes [sic] of the world" would enable the "wild" world to sully the "garden" of the church.[29]

As for Establishment Clause doctrine, the Supreme Court has used multiple tests, including but not limited to the *Lemon* test, the endorsement test, a coercion test, and an originalist history-and-tradition test.[30] For a stretch of time, the Court relied on the *Lemon* test, which deemed unconstitutional any government action whose primary purpose or primary effect was the promotion or favoring of religion.[31] Under the endorsement test, state action runs afoul of the Establishment Clause if a reasonable person, aware of the context of

26. James Madison, *Memorial and Remonstrance Against Religious Assessments, [ca. 20 June] 1785*, NAT'L ARCHIVES ¶ 9, https://founders.archives.gov/documents/Madison/01-08-02-0163 (last visited Aug. 8, 2019).

27. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 804 (1983) (Brennan, J., dissenting) ("The third purpose of separation and neutrality is to prevent the trivialization and degradation of religion by too close an attachment to the organs of government.").

28. *Jefferson's Letter to the Danbury Baptists*, LIBR. OF CONG. (Jan. 1, 1802), https://www.loc.gov/loc/lcib/9806/danpre.html (last visited June 30, 2019).

29. ROGER WILLIAMS, MR. COTTON'S LETTER EXAMINED AND ANSWERED (Reuben Aldridge Guild, ed., 1644), *reprinted in* 1 THE COMPLETE WRITINGS OF ROGER WILLIAMS 313, 392 (1963) ("When they [the Church] have opened a gap in the hedge or wall of Separation between the Garden of the Church and the Wildernes of the world, God hath ever broke down the wall it selfe, removed the Candlestick, and made his Garden a Wildernesse, as at this day. And that therefore if he will ever please to restore his Garden and Paradice again, it must of necessitie be walled in peculiarly unto himselfe from the world, and that all that shall be saved out of the world are to be transplanted out of the Wildernes of the world . . . .").

30. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (describing the *Lemon* test); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring) (describing the endorsement test); Lee v. Weisman, 505 U.S. 577, 594 (1992) (describing the coercion test); *id.* at 632 (Scalia, J., dissenting) (describing the originalist history-and-tradition test).

31. *Lemon*, 403 U.S. at 612–13 ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."). The third prong was eventually folded into the second. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 668 (2002).

the challenged practice, would view it as endorsing religion.[32] In a coercion analysis, the state violates the Establishment Clause if it compels participation in a religious exercise—although Justices disagree on what amounts to coercion[33] and whether coercion is necessary or merely sufficient.[34] Finally, several Justices have argued that an originalist reliance upon history and tradition should be the main framework for determining constitutionality under the Establishment Clause.[35]

B. Originalism

"Congress shall make no law respecting an establishment of religion" is not a self-explanatory clause. It needs to be interpreted. Different approaches to constitutional interpretation argue for different interpretive guidelines.[36] Originalists believe that the meaning of the Constitution was fixed at the time of the Founding and that we should understand the Constitution in the same way as the founding generation.[37] According to Justice Scalia, who was one

32. *Capitol Square Review & Advisory Bd.*, 515 U.S. at 780 (O'Connor, J., concurring) ("[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears.").

33. *Compare Lee*, 505 U.S. at 594 (majority opinion) ("[T]he government may no more use social pressure to enforce orthodoxy than it may use more direct means."), *with id.* at 640 (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.").

34. In *Lee v. Weisman*, the Court struck down a graduation prayer given by a rabbi invited by the public school. *Id.* at 599 (majority opinion). Although Justice Kennedy was willing to define coercion broadly to include social pressure, he did not hold—as the concurrence did—that coercion was sufficient but not necessary. *Id.* at 604 (Blackmun, J., concurring) ("The Court repeatedly has recognized that a violation of the Establishment Clause is not predicated on coercion.").

35. *See infra* Subpart II.B.

36. Living Constitutionalism, for example, argues that while the constitutional text enshrines certain principles, how we understand and apply those principles changes over time as our world and our values evolve. *See, e.g.*, Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the "Living Constitution"*, 76 N.Y.U. L. REV. 1456, 1464 (2001) (describing how under a living constitution approach, "fidelity to original constitutional principles means that their scope of application must evolve with the underlying changes in society").

37. *See* Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 417 (2013) ("[T]he original meaning of the text provides the law that legal decisionmakers are bound by or *ought* to follow."); Robert J. Delahunty & John Yoo, *Saving Originalism*, 113 MICH. L. REV. 1081, 1103 (2015) ("Originalism in any form seems to depend on the core claims that original public meaning (or intent) was not only fixed at the time of textual adoption and is still recoverable but also that, once recovered, original meaning or intent has a normatively privileged place in constitutional adjudication."); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 459–60 (2013) ("[M]embers of the originalist family agree . . . meaning is fixed at

of originalism's main proponents on the Supreme Court,[38] "[t]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers."[39]

Rather than a single unified originalist theory, it is more accurate to speak of different types of originalism.[40] Scholars divide the schools of originalism into Old Originalism and New Originalism.[41] Old Originalists argue that the intent of the Framers (and later the Ratifiers) should guide constitutional interpretation.[42] Because this intent is fixed in the past (as opposed to changing with the times),[43] this approach will better curtail judicial discretion.[44] That is, by forcing judges to uncover the objective, fixed meaning of the Constitution, originalism prevents judges from infusing the Constitution with their own personal views.[45] "It would be difficult to overstate the extent to which the Old Originalism was characterized by its own proponents as a theory that could constrain judges and preclude them from reading their own policy preferences—

the time of origin" [and] "constitutional construction should be constrained by the original meaning of the constitutional text.").

38. *See* Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 443 (2007) (describing Justice Scalia as "the most prominent and public popularizer of original meaning originalism").

39. Lee v. Weisman, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting) (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)).

40. *See* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 244 (2009) ("[O]riginalism . . . [is] not a single, coherent, unified theory of constitutional interpretation, but rather a smorgasbord of distinct constitutional theories . . . ."); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599 (2004) ("A number of variations on this basic [originalism] theory are possible and have been advocated over time.").

41. *See* Whittington, *supra* note 40; *cf.* Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 719 (2011) ("[T]here is no magic line of demarcation between the New and Old Originalism.").

42. Whittington, *supra* note 40, at 603 ("A final aspect of originalism during this period was an emphasis on the subjective intentions of the founders.").

43. Colby & Smith, *supra* note 40, at 242 ("[D]efenses [of originalism] typically begin by noting that originalism, unlike other approaches to constitutional interpretation, accords to the Constitution fixed and determinate meaning.").

44. Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1845 (2016) ("Constraining judges through text and history was held out to be the theory's central virtue and objective."); Whittington, *supra* note 40, at 602 ("By rooting judges in the firm ground of text, history, well-accepted historical traditions, and the like, originalists hoped to discipline them.").

45. Colby & Smith, *supra* note 40, at 243 ("[O]riginalists further contend that the determinacy . . . is essential to constraining judges' ability to impose their own views under the guise of constitutional interpretation.").

most importantly, their own preferred unenumerated rights—into the Constitution."[46]

Detractors quickly highlighted the flaws in this initial version of originalism,[47] such as the impossibility of determining the subjective intent of a large group of people who died roughly two hundred years ago.[48] Subjective intent is not easily discerned,[49] and the challenge is even greater with a group whose members may have had different, or even contrary, intentions.[50] Moreover, because the Framers lived two centuries ago, the historical record can be scant, or at least incomplete[51] and often ambiguous.[52] This difficulty is exacerbated when the specific issue is beyond the experience or imagination of the

46. Colby, *supra* note 41, at 717; *see also* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) ("Now the main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law—is that the judges will mistake their own predilections for the law.").

47. Colby, *supra* note 41, at 718 ("Those outside of the [Old Originalism] movement buried it in a sea of devastating critiques—critiques that it could not withstand, at least not without substantially reformulating itself in order to deflect them.").

48. *Id.* at 740. This Article does not address the many normative—as opposed to practical—criticisms of originalism. For example, why should we be bound by a long-dead generation whose values are so different from ours? *See, e.g.*, Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 192 (2008) ("[T]he people whom the Constitution governs today played no role in its adoption. We were not alive. We were not consulted, did not participate, and did not consent.").

49. *See, e.g.*, Lorianne Updike Toler et al., *Pre-"Originalism"*, 36 HARV. J.L. & PUB. POL'Y 277, 292 (2013) ("Intentionalism, whether that of the Framers, Ratifiers, or both, was widely criticized as too difficult a science."); Delahunty & Yoo, *supra* note 37, at 1095 ("First, critics noted the extreme difficulty, or even in some cases the impossibility, of ascertaining what the original intent of the framers *was*. It was argued that evidence of their intentions can be fragmentary, incomplete, contradictory, or nonexistent.").

50. Barnett, *supra* note 37, at 412 (describing the "problem of collective intent" as "[h]ow do you systematically identify what a diverse group of people thought about any particular issue?"); Colby & Smith, *supra* note 40, at 248 ("[I]t is nearly impossible to ascertain a single collective intent of a large group of individuals, each of whom may have had different intentions.").

51. Steven K. Green, *Federalism and the Establishment Clause: A Reassessment*, 38 CREIGHTON L. REV. 761, 795 (2005) ("[T]he historical record of any period—the constitutional period being no exception—is always incomplete. We have only those documents that have survived the ravages of time and have been transcribed, compiled and published.").

52. *See, e.g.*, Suzanna Sherry, *The Indeterminacy of Historical Evidence*, 19 HARV. J.L. & PUB. POL'Y 437, 437 (1996) ("I view my task in this Article to be proving that history is indeterminate."). Moreover, most legal scholars are not trained in history. *See* Lee J. Strang, *How Big Data Can Increase Originalism's Methodological Rigor: Using Corpus Linguistics to Reveal Original Language Conventions*, 50 U.C. DAVIS L. REV. 1181, 1192 (2017) ("[T]he difficulty of historical recovery is further compounded by the lack of professional preparation of lawyers, and therefore of judges, for the necessary historical inquiry.").

founding generation.[53] All of this uncertainty undermines the Old Originalists' claim to determinacy—the raison d'être for their theory.[54] Instead, originalism allowed judges to claim objectivity while still imposing their own personal preferences onto constitutional law.[55]

As criticism of Old Originalism mounted, New Originalism developed.[56] A major shift from Old to New Originalism was to focus on original public understanding instead of original private intent.[57] However, this shift did not solve the indeterminacy problem (and possibly worsened it): "defining 'original meaning' as 'original understanding' did not avoid the subjectivity problem; it simply replaced one subjective inquiry (the intent of the Framers) with another one (the understanding . . . of the public)."[58] As a result,

53. H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 664–65 (1987) ("[T]he vast majority of contemporary constitutional disputes involve facts, practices, and problems that were not considered or even dreamt of by the founders.").

54. *See* Colby, *supra* note 41, at 714 ("Originalism was born of a desire to constrain judges. Judicial constraint was its heart and soul—its raison d'être."); *see also* Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917, 1919 (2012) ("But one of the central stated purposes of originalism, and perhaps its chief selling point in the popular press, is to produce unique and indisputable answers to legal questions in order to eliminate the possibility of judicial discretion.").

55. *See* Or Bassok, *The Sociological-Legitimacy Difficulty*, 26 J.L. & POL. 239, 264–65 (2011) ("Critics of originalism argue that this pretense of objectivity, determinacy, and constraint is unrealistic, considering the highly indeterminate and relativistic nature of history as a discipline, which exposes originalism to the same failing it set out to correct."); *see also* Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217, 279, 284 (2004) ("The results of the study suggest that one of the principal justifications for originalism—that it will constrain the ability of judges to impose their own views in the course of decisionmaking—might not be accurate as a descriptive matter . . . . [T]he results of the study suggest . . . also that originalism's advantage over other approaches to constitutional interpretation with respect to its ability to constrain judicial discretion is marginal.").

56. *See* Colby, *supra* note 41, at 719–20 ("[T]he theoretical moves from the Old to the New Originalism [include]: (a) the move from original intent to original meaning; (b) the move from subjective meaning to objective meaning; (c) the move from actual to hypothetical understanding; (d) the embrace of standards and general principles; (e) the embrace of broad levels of generality; (f) the move from original expected application to original objective principles; (g) the distinction between interpretation and construction; and (h) the distinction between normative and semantic originalism.").

57. *See* Barnett, *supra* note 37, at 412 ("New Originalism is about identifying the original public meaning of the Constitution and not the original Framers' intent.").

58. Colby, *supra* note 41, at 722–23; *see also* Delahunty & Yoo, *supra* note 37, at 1096 ("[A]lthough 'public meaning' originalism appeared to correct some of the defects of 'original intent' originalism, it was open to the objection that, even in the 1790s, there was great controversy about the public meaning of important constitutional terms and clauses.").

many (but not all) New Originalists have insisted on determining not the actual, original, understanding, but rather a hypothetical objective understanding of a reasonable person from the era.[59]

Another shift that many (but not all) New Originalists make is to move away from "original expected application"—which tries to pinpoint "how people living at the time the text was adopted would have expected it would be applied"[60]—to "original objective principle"—where the goal is to discern what principle was cemented in the Constitution.[61] For New Originalists, the point

> is not to ask Madison what he would do if he were a Justice on the Supreme Court hearing the case at issue. The point is to determine what principle Madison and his contemporaries adopted, and then to figure out whether and how that principle applies to the current case.[62]

For example, the original expected application of the Equal Protection Clause to segregated schools would find them constitutional,[63] while applying the original objective principle of racial equality would not.[64]

59. *See* Colby & Smith, *supra* note 40, at 254–55 ("[P]roponents do not concern themselves with how the words of the Constitution were *actually* understood by the Framers, the ratifiers, the public, or anyone else, but rather with how a hypothetical, reasonable person *should have* understood them."); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 398 (2002) ("Originalist analysis, at least as practiced by most contemporary originalists, is not a search for concrete historical understandings held by specific persons. Rather, it is a hypothetical inquiry that asks how a fully informed public audience, knowing all that there is to know about the Constitution and the surrounding world, would understand a particular provision.").

60. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 296 (2007); *see also* John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 379 (2007) ("Using expected applications is particularly important for modern interpreters, because usage may have changed in dramatic or subtle ways since the Framers' day. Expected applications are especially useful because they caution modern interpreters against substituting their own preferred glosses on meaning for those that would have been widely held at the Framing.").

61. *See* Whittington, *supra* note 40, at 610; *cf.* McGinnis & Rappaport, *supra* note 60, at 379 ("Reliance on expected applications is even appropriate in cases when a constitutional provision is best understood as adopting a general understanding or principle.").

62. Whittington, *supra* note 40, at 611.

63. *See* Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1192 (2012) ("[R]acially segregated schools remained common throughout the country even after the ratification of the Fourteenth Amendment, and therefore were likely consistent with the framing-era understanding of the Fourteenth Amendment.").

64. *See id.* ("[T]he response of most originalists to *Brown* is to condemn reliance on original expected applications and argue that racial segregation is inconsistent with the original meaning of the Fourteenth Amendment's textual commitment to equality . . . .").

These distinctions reflect only some of the differences between Old Originalism and New Originalism.[65] Nevertheless, the multiple strands of originalism generally agree that there is a constitutional meaning fixed long ago that should guide judicial decision-making, even if that meaning cannot always provide definitive answers.[66] These foundational originalist beliefs drove the Supreme Court's decision in *Town of Greece v. Galloway*.

III. *TOWN OF GREECE V. GALLOWAY*

Once a month, Greece, a small town in upstate New York, holds board meetings for town officials and residents.[67] "Those meetings (so says the Board itself) are 'the most important part of Town government.'"[68] For years, the town had started these government meetings with a moment of silence.[69] A new supervisor changed the policy to begin meetings with a prayer given by a "chaplain for the month."[70] The town found these volunteer chaplains by calling the clergy of local congregations.[71] Almost all gave explicitly Christian

65. *See* Colby & Smith, *supra* note 40, at 250 ("The move from original intent to original meaning exponentially multiplied . . . internal disagreement among originalists."). New Originalists also part ways on: (1) the need for constitutional construction and not just constitutional interpretation, *see* Whittington, *supra* note 40, at 611 ("Constitutional meaning must be 'constructed' in the absence of a determinate meaning that we can reasonably discover."); (2) the role of precedent, *see* John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 803 (2009) ("Originalism is often thought, by both its advocates and its critics, to be inconsistent with precedent . . . . This Article challenges this common view of originalism and argues that nothing in the Constitution forbids judges from following precedent."); and even (3) the importance of curtailing judicial discretion, *see* William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2214 (2017) ("[O]riginalist scholars today are much more equivocal about the importance and nature of constraining judges.").

66. Some New Originalists acknowledge that the original public understanding, the result of constitutional interpretation, fails to decide specific questions, at which point constitutional construction comes into play. Barnett, *supra* note 37, at 419 ("By adopting the interpretation-construction distinction, the New Originalism frankly acknowledges that the text of 'this Constitution' does not provide definitive answers to all cases and controversies that come before Congress or the courts.").

67. Town of Greece v. Galloway, 572 U.S. 565, 624 (2014) (Kagan, J., dissenting) ("The Board . . . always provides an opportunity (called a Public Forum) for citizens to address local issues and ask for improved services or new policies . . . and it usually hears debate on individual applications from residents and local businesses to obtain special land-use permits, zoning variances, or other licenses.").

68. *Id.*

69. *Id.* at 570 (majority opinion).

70. *Id.* at 571.

71. *Id.* at 571–72.

prayers.[72] Although town residents Susan Galloway and Linda Stephens requested that these government-sponsored prayers be diversified, they remained predominantly Christian.[73] Nevertheless, relying on an originalist approach to the Establishment Clause, the Supreme Court upheld the town's prayer practice.[74] Had the Court employed any other Establishment Clause test, the decision would likely have been different.[75]

A. The Court's Originalist Analysis

The Court's originalist justification for upholding state-sponsored Christian prayers proceeded in two steps.[76] First, the Court reaffirmed *Marsh v. Chambers*, an earlier decision that used originalism to uphold legislative prayers.[77] Second, the Court held that the town's prayers were not different in any relevant respect from *Marsh*'s legislative prayers and therefore were also constitutional.[78]

The heart of *Marsh's* originalist argument, as summarized by *Town of Greece*, is that the same Congress responsible for the Establishment Clause also authorized legislative chaplains.[79] Because the First Congress saw no Establishment Clause problem

72. *Id.*; *see also id.* at 628 (Kagan, J., dissenting) ("[I]n the 18 months before the record closed, 85% included those references [to 'Jesus,' 'Christ,' 'Your Son,' or 'the Holy Spirit']. Many prayers contained elaborations of Christian doctrine or recitations of scripture."); *id.* at 611–12 (Breyer, J., dissenting) ("[D]uring the more than 120 monthly meetings at which prayers were delivered during the record period (from 1999 to 2010), only four prayers were delivered by non-Christians.").

73. The town invited a few non-Christians immediately after their complaint, but then reverted back to their all-Christian lineup. *See id.* at 611–12. (Breyer, J. dissenting).

74. As will be discussed, the Supreme Court's originalism is closer to Old Originalism than New. *See infra* notes 96–98 and accompanying text.

75. *See* discussion *infra* Subpart III.B.1–3.

76. While predominantly originalist, the Court did not rely solely on originalism. For example, the second step considers the coercive effect of the prayers. *See infra* Subpart III.B.3.

77. *Town of Greece*, 572 U.S. at 570, 575 (majority opinion). The very first paragraph of *Town of Greece* makes clear the decision's dependence on *Marsh*: "It must be concluded, consistent with the Court's opinion in *Marsh v. Chambers* (1983), that no violation of the Constitution has been shown." *Id.* at 570. The Court also invokes *Marsh* at the start of its legal analysis: "In *Marsh v. Chambers* . . . the Court found no First Amendment violation in the Nebraska Legislature's practice of opening its sessions with a prayer delivered by a chaplain paid from state funds." *Id.* at 575.

78. *See id.* at 577–85.

79. *Id.* at 575; *see also* Michael W. McConnell, *On Reading the Constitution*, 73 CORNELL L. REV. 359, 362 (1988) ("The interesting thing about the [*Marsh*] opinion is that it is based squarely and exclusively on the historical fact that the framers of the first amendment did not believe legislative chaplains to violate the establishment clause.").

with legislative prayers, neither should the Court.[80] "That the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society."[81] In fact, the *Town of Greece* Court twice pointed to the First Congress's appointment of chaplains as proof of the constitutionality of legislative prayers.[82]

Notably, the Court did not articulate the principle that justified the constitutionality of the prayers. Instead, the *Town of Greece* Court held that it is enough if a practice dates to the very framing of the First Amendment.[83] "[I]t is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted."[84] Consequently, "[i]n light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with a prayer has become part of the [constitutional] fabric of our society."[85]

Like the *Marsh* Court, the *Town of Greece* Court made two assumptions in its originalist analysis. First, it assumed that Congress would not have approved the chaplaincy program had it thought government-funded legislative prayers violated the Establishment Clause.[86] Second, the Court assumed it should

80. McConnell, *supra* note 79, at 362.

81. *Town of Greece*, 572 U.S. at 576.

82. *Id.*; *id.* at 575 ("[H]istory support[s] the conclusion that legislative invocations are compatible with the Establishment Clause. The First Congress made it an early item of business to appoint and pay official chaplains, and both the House and Senate have maintained the office virtually uninterrupted since that time.").

83. Note that the Supreme Court uses history in more than one way. Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 649 (2013) ("[Constitutional scholars] employ many different kinds of history—not just adoption history—and they use it in many different ways."). Adoption history is a necessary component of an originalist analysis. As the Court argued, if the generation that adopted the Establishment Clause understood it to allow legislative prayers, then the amendment cannot mean something that prohibits it. Longstanding history—invoking two hundred years of unbroken history—represents a different use of history. Rather than use history to uncover a constitutional meaning fixed at a particular time, it looks at the meaning as accepted over a long period of time, such as the Court's argument that a reasonable person would understand prayers as a historical tradition—part of the fabric of our society—rather than religious practice. *See Town of Greece*, 572 U.S. at 576. Nor is this an exhaustive use of history. *See generally* Balkin, *supra*, at 692–93 (arguing that history might be used for any of eleven different types of legal justification).

84. *Town of Greece*, 572 U.S. at 577.

85. *Id.* at 576 (quoting *Marsh*, 463 U.S. 783, 792 (1983)).

86. *Town of Greece*, 572 U.S. 575–76; *see also Marsh*, 463 U.S. at 814 (Brennan, J., dissenting). In response, the *Marsh* dissent first noted that not all of Congress did approve. *Id.* at 813 ("The Court cannot—and does not—purport to find a pattern of 'undeviating acceptance.'" (quoting Walz v. Tax Comm'n of

interpret the Establishment Clause vis-à-vis legislative prayers in exactly the same way as the First Congress did.[87] Although the *Marsh* dissent questioned both assumptions,[88] the *Town of Greece* Court did not revisit these challenges.[89]

After reaffirming *Marsh's* conclusion, the Court then found that the *Town of Greece* prayers were not different enough for that conclusion to change.[90] Even though virtually all of the prayers were Christian (unlike the nondenominational prayers in *Marsh*),[91] explicitly Christian prayers also date to the Founding.[92] And while the town's prayers swept in citizens about to make requests of the town government (as opposed to the *Marsh* prayers aimed at the legislators alone),[93] the Court held that these prayers would not

New York, 397 U.S. 664, 681 (1970))). The *Marsh* dissent then points out that politicians—even when they are also Founding Fathers—are not always mindful of constitutional limits. *Id.* at 814–15 ("Madison's later views [that legislative prayers were actually unconstitutional] may not have represented so much a change of mind as a change of role, from a member of Congress engaged in the hurley-burley of legislative activity to a detached observer engaged in unpressured reflection.").

87. Disagreeing, the *Marsh* dissent argued, "[T]he Court is misguided because the Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers." *Marsh*, 463 U.S. at 816; *cf.* McConnell, *supra* note 79, at 362 (paraphrasing the *Marsh v. Chambers* holding as, "If James Madison and the boys thought legislative chaplains were okay, who are we to disagree?").

88. *See supra* notes 86–87 (detailing critiques).

89. For example, although the *Town of Greece* Court acknowledged the country's increased religious diversity, it never responded to this change in the country's religious composition. Instead, the Court referenced the varied prayers offered in Congress without explaining how they justify the nonvaried prayers in the Town of Greece. *Town of Greece*, 572 U.S. at 579 ("The decidedly Christian nature of these prayers must not be dismissed as the relic of a time when our Nation was less pluralistic than it is today. Congress continues to permit its appointed and visiting chaplains to express themselves in a religious idiom. It acknowledges our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds.").

90. *Id.* at 577 ("The Court's inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures.").

91. *Id.* ("First, . . . [Respondents] argue that *Marsh* did not approve prayers containing sectarian language or themes, such as the prayers offered in Greece that referred to the 'death, resurrection, and ascension of the Savior Jesus Christ,' and the 'saving sacrifice of Jesus Christ on the cross.'"); *see also id.* at 578 ("[Respondents] fault the town for permitting guest chaplains to deliver prayers that 'use overtly Christian terms' or 'invoke specifics of Christian theology.'").

92. *Id.* ("The Congress that drafted the First Amendment would have been accustomed to invocations containing explicitly religious themes of the sort respondents find objectionable.").

93. *Id.* at 586 ("Respondents argue that the public may feel subtle pressure to participate in prayers that violate their beliefs in order to please the board members from whom they are about to seek a favorable ruling. In their view the

coerce any Greece resident into participating in a religious exercise.[94] After all, a reasonable citizen should understand that Christian prayers at public proceedings are simply part of our heritage and not an attempt to pressure them.[95]

Despite the many refinements of originalism in academic scholarship,[96] the *Town of Greece* Court leaned more toward Old Originalism than New Originalism. To start, the Court's evidence centered around the First Congress.[97] Because "the First Congress made it an early item of business to appoint and pay official chaplains," the Court found that "history support[s] the conclusion that legislative invocations are compatible with the Establishment Clause."[98] Thus, the Court primarily focused on the intent of the Congressional Framers rather than the general understanding of the public, or even the Ratifiers.

Moreover, in Old Originalism fashion, the Court examined the original expected application (e.g., legislative prayers with Christian content) rather than articulating the original underlying principle (e.g., nondivisive religious acknowledgments).[99] That is, the Court reasoned that since the First Congress countenanced legislative

fact that board members in small towns know many of their constituents by name only increases the pressure to conform.").

94. *Id.* at 587 ("On the record in this case the Court is not persuaded that the town of Greece, through the act of offering a brief, solemn, and respectful prayer to open its monthly meetings, compelled its citizens to engage in a religious observance.").

95. *Id.* ("The prayer opportunity in this case must be evaluated against the backdrop of historical practice. As a practice that has long endured, legislative prayer has become part of our heritage and tradition, part of our expressive idiom . . . . It is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews."). Of course, both may be true. State-sponsored public prayers may be simultaneously traditional and coercive so that part of our heritage is coercing non-Christians to conform.

96. *See, e.g.*, Colby, *supra* note 41, at 719–20 (describing the shift from Old Originalism to New Originalism).

97. *See, e.g.*, *Town of Greece*, 572 U.S. at 576 ("[T]hat the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society.").

98. *Id.* at 575.

99. Andy Koppelman describes this failure to articulate any justifying principle as follows: "The argument is essentially, 'I have no idea what this provision means. But whatever it means, it can't prohibit this, because the Framers approved of it.' This is a distinctive kind of originalism, and it ought to have a name. Call it 'I Have No Idea Originalism.'" Koppelman, *supra* note 4, at 737.

prayers that invoke Jesus Christ, then we today must as well.[100] Under a New Originalist approach, this original expected application might be informative but would not be conclusive.[101] Instead, a New Originalism analysis would look for the principle that explained Congress's acceptance of Christian prayers, such as permitting invocations that included everyone. Had the Court done so, changes over time might in fact raise questions: while nondenominational Christian prayers may have been inclusive during the Founding era, they no longer are.[102] As the *Marsh* dissent noted, "our religious composition makes us a vastly more diverse people than were our forefathers . . . . In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons . . . ."[103]

Perhaps acknowledging that even the founding generation might pass unconstitutional laws,[104] the *Town of Greece* Court suggested that historical practices on their own should not guarantee constitutionality: "*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation."[105] But it is unclear whether the Court took this caveat seriously. After stating this limit, the Court immediately continued, "The case teaches instead that the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'"[106] Assuming the Court was not contradicting itself, it is not entirely clear what the Court meant when it argued that

100. *See Town of Greece*, 572 U.S. at 577 ("*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.").

101. Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1284 (1997) (arguing that "no reputable originalist . . . takes the view that the Framers' 'assumptions and expectation about the correct application' of their principles is controlling" (quoting RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 13 (1996)); *cf.* Balkin, *supra* note 60, at 338 ("The original expected application of the Fourteenth Amendment is not by itself controlling . . . .").

102. Although 70.6 percent of Americans identify as Christian, almost 30 percent do not. This means that significantly more than a quarter of Americans do not consider themselves Christians. *Religion & Public Life, America's Changing Religious Landscape*, PEW RES. CTR. (May 12, 2015), http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.

103. Marsh v. Chambers, 463 U.S. 783, 817 (1983) (Brennan, J., dissenting) (citation omitted).

104. *Id.* at 814–15 ("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 legislation they enact, and this must be assumed to be as true of the members of the First Congress as any other.").

105. Town of Greece v. Galloway, 572 U.S. 565, 576 (2014).

106. *Id.*

historical *practices* must be understood in conjunction with historical *understandings*. Might the Court have been advocating for a New Originalism search for original objective principles (historical understandings) rather than simply original expected applications (historical practices)? But then the Court's next sentence seems to make the Old Originalism point that because the First Congress appointed chaplains within days of finalizing the First Amendment, legislative prayers are constitutional.[107] In other words, the Court proceeded to essentially conflate practices and understandings by relying on original expected practices (Christian legislative prayers), to determine original objective understanding (these prayers do not violate the Establishment Clause).[108] Perhaps the Court meant to say that only the original practices of the Congress directly involved with drafting the Establishment Clause are relevant to uncovering original meaning. If so, then its reliance on the Framers' understandings more than anyone else's is still very much Old Originalism rather than New.

Regardless of the ambiguous caveat, what is clear is that the Court pushed for an originalist approach beyond the specific context of legislative prayers. The *Marsh* dissent characterized the legislative prayer ruling as "carving out an exception" from its usual Establishment Clause tests.[109] Although the *Town of Greece* Court recognized this characterization, it did not back it. On the contrary, its language suggests that all Establishment Clause analyses should be based on historical practices and understanding: "[*Marsh*] teaches . . . that the Establishment Clause"—not just legislative prayers—"must be interpreted 'by reference to historical practices and understandings.'"[110] Moreover, the *Town of Greece* Court insisted

107. *Id.* ("That the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society.").

108. *Cf.* Balkin, *supra* note 38, at 453 ("[T]o use original expected application to define the scope of constitutional principles so that they produce results that conform to the original expected application . . . is essentially to reinstitute a new form of expectations originalism under the guise of original meaning."); McGinnis & Rappaport, *supra* note 60, at 378 ("[W]hile the original meaning may not be defined by the expected applications, these applications will often be some of the best evidence of what that meaning is.").

109. Marsh v. Chambers, 463 U.S. 783, 813 (1983) (Brennan, J., dissenting); *Town of Greece*, 572 U.S. at 575 ("*Marsh* is sometimes described as 'carving out an exception' to the Court's Establishment Clause jurisprudence, because it sustained legislative prayer without subjecting the practice to any of the formal tests that have traditionally structured this inquiry.").

110. *Town of Greece*, 572 U.S. at 576 (quoting County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 670 (1989) (Kenney, J., concurring in part and dissenting in part)); *see also id.* at 577 ("[I]t is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted.").

that "[a]ny test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change."[111] In sum, the *Town of Greece* Court advocated an originalist approach to the Establishment Clause.

B. Establishment Clause Doctrine Analyses

In his *Marsh* dissent, Justice Brennan noted that "if the Court were to judge legislative prayer through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause."[112] The same holds true for the Town of Greece's prayers.

1. Lemon *Test*

Under the *Lemon* test, any state action with either a primarily religious purpose or a primarily religious effect violates the Establishment Clause.[113] To argue that the primary purpose or effect of praying is not religious both blinks at reality and cheapens prayer.

It strains credulity to characterize the primary purpose of praying to God as anything but religious. As Justice Brennan stated in his dissent in *Marsh*, "[t]hat the 'purpose' of legislative prayer is pre-eminently religious rather than secular seems to me to be self-evident."[114] Prayer is, after all, an inherently religious act. It is "fundamentally and necessarily religious."[115] In fact, its presence helps differentiate religious from nonreligious activity: "[i]t is prayer which distinguishes religious phenomena from all those which resemble them or lie near to them, from the moral sense, for example, or aesthetic feeling."[116] As the *Marsh* dissent argued, the clergy offering prayers "are not museum pieces, put on display . . . . Rather, they are engaged by the legislature to lead it—as a body—in an act of religious worship."[117]

Both the *Marsh* and *Town of Greece* Courts argued that the prayers serve secular functions, notably "formally opening the legislative session, getting the members of the body to quiet down, and imbuing them with a sense of seriousness and high purpose."[118]

111. *Id.* at 577; *see also id.* ("[T]he line we must draw between the permissible and impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers." (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 294 (1963) (Brennan, J., concurring))).

112. Marsh v. Chambers, 463 U.S. 783, 796 (1983) (Brennan, J., dissenting).

113. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

114. *Marsh*, 463 U.S. at 797 (Brennan, J., dissenting).

115. *Id.* at 810.

116. *Id.* at 810 (quoting A. SABATIER, OUTLINES OF A PHILOSOPHY OF RELIGION 25–26 (T. Seed trans., 1957 ed.)).

117. *Id.* at 811.

118. *Id.* at 797; *see also* Town of Greece v. Galloway, 572 U.S. 565, 575 (2014) ("[L]egislative prayer lends gravity to public business, reminds lawmakers to

Yet these goals could easily be accomplished without religion,[119] such as by reciting the Pledge of Allegiance or observing a moment of silence—the means used in the Town of Greece before Christian prayers were introduced. That the government instead chose religious means when secular ones were available further confirms that the purpose was religious.

Because "[p]rayer is religion *in act*,"[120] the primary effect is also religious.[121] Claiming otherwise insults religion.[122] As the *Marsh* dissent points out, upholding prayers on the ground that they are not first and foremost a form of worship is a pyrrhic victory.[123]

2. Endorsement Test

Developed by Justice O'Connor after *Marsh* was decided, the endorsement test asks whether a reasonable person, aware of the background and context of a challenged state action, would view it as endorsing religion.[124] If so, then the state action violates the Establishment Clause.[125] Such endorsement contravenes Establishment Clause principles by creating a caste system based on religion:[126] "government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community."[127]

transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society.").

119. *Cf. Marsh*, 463 U.S. at 797 (Brennan, J., dissenting). ("Moreover, whatever secular functions legislative prayer might play—formally opening the legislative session, getting the members of the body to quiet down, and imbuing them with a sense of seriousness and high purpose—could so plainly be performed in a purely nonreligious fashion.").

120. *Marsh*, 463 U.S. at 811 (Brennan, J., dissenting) (quoting SABATIER, *supra* note 116, at 25).

121. *Id.* at 798 ("The 'primary effect' of legislative prayer is also clearly religious.").

122. Legislative prayers risk "degrading religion by allowing a religious call to worship to be intermeshed with a secular call to order." *Id.* at 808.

123. *Id.* at 811 ("If upholding the practice requires denial of this fact [that prayers are an act of religious worship], I suspect that many supporters of legislative prayer would feel that they had been handed a pyrrhic victory.").

124. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring) ("[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears.").

125. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 594–95 (1989).

126. *Id.* at 625 (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.").

127. *Id.* at 627.

Because any reasonable person would understand that praying is primarily a religious act of worship, government sponsorship of prayer endorses religion.[128] Moreover, the Town of Greece did not just endorse religion in general but Christianity in particular.[129] As Justice Kagan noted, this endorsement violates the Establishment Clause's "norm[s] of religious equality."[130] If nothing else, the Establishment Clause bars favoring one religion over others.[131] Or to articulate it as Justice O'Connor might have, state-sponsored Christian prayers violate the Establishment Clause by sending a message to non-Christians that they are outsiders and less than full members of the Town of Greece community.[132]

The *Town of Greece* Court defended the pervasively Christian prayers on the ground that the town did not intentionally exclude other religions.[133] The implication is that a reasonable person would know that the town was mostly Christian and therefore would understand that the mostly Christian prayers were due to demographics and not endorsement (and certainly not animus).[134] But, if this background and context was known by the townspeople, it was known by the town government as well, meaning the Town of

128. *Cf. Marsh*, 463 U.S. at 798 (Brennan, J., dissenting) ("'To invoke Divine guidance on a public body entrusted with making the laws,' is nothing but a religious act.").

129. Town of Greece v. Galloway, 572 U.S. 565, 611–12 (Breyer, J., dissenting) ("[D]uring the more than 120 monthly meetings at which prayers were delivered during the record period (from 1999 to 2010), only four prayers were delivered by non-Christians.").

130. *Id.* at 615–16 (Kagan, J., dissenting); *see also id.* at 616 (arguing that the Christian prayers violate the "[Establishment Clause] promise that every citizen, irrespective of her religion, owns an equal share in her government").

131. Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

132. *Cf. County of Allegheny*, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.".

133. *Town of Greece*, 572 U.S. at 585–86 (majority opinion) ("That nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of town leaders against minority faiths. So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing.").

134. *Id.* at 573 ("Although most of the prayer givers were Christian, this fact reflected only the predominantly Christian identity of the town's congregations, rather than an official policy or practice of discriminating against minority faiths."); *id.* at 597 (Alito, J., concurring) (noting that failure to reach out to synagogues just over the town border "was not done with a discriminatory intent. (I would view this case very differently if the omission of these synagogues were intentional.)").

Greece decided to implement prayers while fully aware that they would virtually all be Christian.[135] In any event, even after it became obvious that Christianity dominated the prayers, and even after citizens who belonged to religious minorities complained, the town did not diversify its prayers. "[I]n a context where religious minorities exist and where more could easily have been done to include their participation, the town chose to do nothing."[136] Given this background and context, a reasonable observer could well conclude that the Town of Greece was endorsing Christianity.

3. Coercion Test

Under the coercion test, the government violates the Establishment Clause if it forces someone to participate in a religious exercise.[137] Although the *Town of Greece* Court did not use the *Lemon* test or the endorsement test, the Court did apply the coercion test—albeit in a limited way. Rather than evaluate whether state-sponsored prayers were unconstitutionally coercive, the Court assumed legislative prayers like those in *Marsh* were not coercive and then considered whether anything about the prayers in the Town of Greece would lead to a contrary conclusion.

In finding that the Christian prayers were not coercive, the *Town of Greece* Court downplayed their religious nature, emphasizing their secular purposes[138] and arguing that the prayers were merely "part of our heritage and tradition"[139]—echoing arguments made by the *Marsh* Court. It also rejected the claim that the prayers were more coercive than those in *Marsh* because they were directed at citizens

135. To quote Douglas Laycock from another context, the Court argues that "[Christians] benefitted from demography rather than law. But the demography was perfectly understood when the law was enacted . . . ." Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 911 (1986).

136. *Town of Greece*, 572 U.S. at 613 (Breyer, J., dissenting). "It could, for example, have posted its policy of permitting anyone to give an invocation on its website, greeceny.gov . . . . It could have announced inclusive policies at the beginning of its board meetings . . . . It could have provided information to those houses of worship of all faiths that lie just outside its borders and include citizens of Greece among their members. Given that the town could easily have made these or similar efforts but chose not to, the fact that all of the prayers (aside from the 2008 outliers) were given by adherents of a single religion reflects a lack of effort to include others." *Id.*

137. *Id.* at 586 (majority opinion) ("It is an elemental First Amendment principle that government may not coerce its citizens 'to support or participate in any religion or its exercise.'" (quoting County of Allegheny v. ACLU, 492 U.S. 473, 659 (1989) (Kennedy, J., concurring))).

138. *Id.* at 587 ("It is presumed that the reasonable person . . . understands that its purposes are to lend gravity to public proceedings . . . .").

139. *Id.*

about to request a favor from their government.[140] First, the Court claimed that citizens were not pressured because the prayers were primarily for the benefit of members of the town government.[141] Second, the Court argued there was no coercion because the government never punished anyone for refusing to join in the prayers.[142] "Nothing in the record indicates that town leaders allocated benefits and burdens based on participation in the prayer."[143]

The analysis could have, and perhaps should have, easily come out the other way. As discussed earlier, prayers to God are more accurately described as an act of worship rather than a solemnizing nod to tradition. Nor is it correct to say they were aimed at the town board members when the clergy faced the public, not the board.[144] In fact, the chaplain of the month "typically addresses those people, as even the majority observes, as though he is 'directing [his] congregation.'"[145]

In addition, the Court adopted a highly narrow view of coercion, especially compared to *Lee v. Weisman*,[146] which held that an invited clergy's nondenominational invocations at a school graduation violated the Establishment Clause.[147] In *Lee*, the Court held that the government could unconstitutionally coerce people not just by "force of law or threat of penalty,"[148] but by mobilizing peer pressure.[149] "[T]he government may no more use social pressure to enforce

140. *Id.* at 577 ("Second, . . . [Respondents] argue that the setting and conduct of the town board meetings create social pressures that force nonadherents to remain in the room or even feign participation in order to avoid offending the representatives who sponsor the prayer and will vote on matters citizens bring before the board.").

141. *Id.* at 587 ("The principal audience for these invocations is not, indeed, the public but lawmakers themselves."); *see also id.* at 588 ("To be sure, many members of the public find these prayers meaningful and wish to join them. But their purpose is largely to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers.").

142. *Id.* at 589 ("Respondents suggest that constituents might feel pressure to join the prayers to avoid irritating the officials who would be ruling on their petitions, but this argument has no evidentiary support.").

143. *Id.*

144. *Id.* at 627 (Kagan, J., dissenting) ("Contrary to the majority's characterization, . . . the prayers there are directed squarely at the citizens. Remember that the chaplain of the month stands with his back to the Town Board; his real audience is the group he is facing—the 10 or so members of the public, perhaps including children.").

145. *Id.*

146. 505 U.S. 577 (1992).

147. *Id.* at 593.

148. *See id.* at 640 (Scalia, J., dissenting). This was the position favored by the *Lee* dissenters. *Id.* ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.").

149. *See id.* at 593–94 (majority opinion).

orthodoxy than it may use more direct means."[150] The *Lee* Court understood that social pressure from friends and neighbors can be as strong as legal pressure.[151] This is especially true in small gatherings where people may know each other.[152] The *Town of Greece* Court, however, dismissed this possibility when it concluded that "mature adults . . . [are] 'presumably' . . . 'not readily susceptible to religious indoctrination or peer pressure.'"[153] In fact, social science has found just the opposite.[154]

For the *Town of Greece* Court, not only must coercion come via state penalty, but the penalty must actually be imposed.[155] In rejecting any finding of coercion, the Court repeatedly emphasized that the town board had never retaliated against anyone who declined to join the prayers.[156] Yet because many citizens attend town meetings in order to seek a benefit from the government,[157] some may have felt compelled to join the prayer rather than object and risk

150. *Id.* at 594.

151. *Id.* at 593 ("This pressure, though subtle and indirect, can be as real as any overt compulsion.").

152. *Id.* at 624 (Kagan, J., dissenting) (noting that the setting is intimate, with only "10 or so citizens in attendance").

153. *Id.* at 590 (majority opinion) (quoting Marsh v. Chambers, 463 U.S. 783, 792 (1983)). Despite continually pointing out that plaintiffs offered no evidence that people were pressured to participate, the Court offered no evidence that adults are completely immune to social pressure.

154. For example, in a classic experiment on conformity, subjects were shown three lines and asked which best matched a fourth line. When asked with no one present, 99 percent answered correctly. When asked after several people gave the wrong answer, 70 percent of the subjects went along with the group at least once and also gave the wrong answer. SOLOMON E. ASCH, SOCIAL PSYCHOLOGY 450–59 (1952); *see also* Solomon E. Asch, *Studies of Independence and Conformity*, 70 PSYCHOL. MONOGRAPHS: GEN. & APPLIED 1, 1, 9–24 (1956); Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 182–83 (2002) ("The influence of the behavior of others can be so great that people end up responding in a way that every bone in their body is telling them is wrong, but they do it anyway.").

155. *Town of Greece*, 572 U.S. at 588–90.

156. *Id.* at 589 ("In no instance did town leaders signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished."); *id.* at 588 ("The analysis would be different if town board members . . . singled out dissidents for opprobrium."). In fact, some of the dissidents were subject to criticism by the state-sponsored clergy. *See id.* at 629 (Kagan, J., dissenting) ("[W]hen the plaintiffs here began to voice concern over prayers that excluded some Town residents, one pastor pointedly thanked the Board '[o]n behalf of all God-fearing people' for holding fast, and another declared the objectors 'in the minority and . . . ignorant of the history of our country.'").

157. *Id.* at 586 (majority opinion) ("Citizens attend town meetings . . . [to] petition the board for action that may affect their economic interests, such as the granting of permits, business licenses, and zoning variance.").

government retaliation.[158] This government compulsion was not recognized. In short, those who participated in the prayers in fear of reprisal (versus those who objected and were punished) seem to fall outside of the Court's view of coercion.

To summarize, the Supreme Court failed to subject the Town of Greece's prayer practice to the *Lemon* test or the endorsement test. And while it considered coercion, its analysis started with the premise that government-sponsored legislative prayers like those in *Marsh* were not coercive. A thorough application of any of these tests might have led to the invalidation of the prayers sponsored by the Town of Greece.

IV. *TRINITY LUTHERAN CHURCH, INC. V. COMER*

In contrast to the key role that originalism played in analyzing the Establishment Clause challenge in *Town of Greece*, the Supreme Court made little effort to delve into the original understanding of taxpayer funding of churches in *Trinity Lutheran*. Had it done so, the decision may well have come out differently.

A. The Court's (Perfunctory) Establishment Clause Analysis

Although Trinity Lutheran Church brought a Free Exercise Clause claim, the government's defense was establishment-based. The State of Missouri provided cash reimbursements for playground improvements.[159] While Trinity Lutheran's application for this competitive grant scored well on many factors,[160] it did not receive a grant because the Missouri Constitution banned financial aid to houses of worship.[161] The church sued, arguing that the State's refusal to give it money violated its Free Exercise Clause rights.[162] The Supreme Court agreed with the church, rejecting Missouri's disestablishment justifications.[163]

Despite the centrality of the Establishment Clause and establishment principles to Missouri's defense,[164] the Court's

158. *Id.* ("Respondents argue that the public may feel subtle pressure to participate in prayers that violate their beliefs in order to please the board members from whom they are about to seek a favorable ruling.").

159. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017 (2017) ("The Missouri Department of Natural Resources offers state grants to help public and private schools, nonprofit daycare centers, and other nonprofit entities purchase rubber playground surfaces made from recycled tires.").

160. *Id.* at 2018 ("The Center ranked fifth among the 44 applicants in the 2012 Scrap Tire Program.").

161. *Id.*; *see also* MO. CONST. art. I, § 7 ("[N]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion.").

162. *Trinity Lutheran*, 137 S. Ct. at 2018.

163. *Id.* at 2022–24.

164. *See id.* at 2018–20.

establishment analysis was perfunctory.[165] Without any discussion, the Court accepted as true the parties' stipulation that the Establishment Clause would allow the grant.[166] Nonetheless, as Justice Sotomayor noted in her dissent, "[c]onstitutional questions are decided by this Court, not the parties' concessions."[167]

Moreover, when evaluating Missouri's justification for its exclusion, the *Trinity Lutheran* majority barely mentioned original practices or original understandings.[168] Missouri's reluctance to directly fund churches has a long lineage, as described in *Locke v. Davey*,[169] another case involving a free exercise challenge to a state that declined to fund religion.[170] In *Locke*, Washington State offered scholarship grants to college students[171] but denied them to otherwise-qualified applicants who wanted to train for the ministry.[172] Like Missouri, Washington had a constitutional provision barring financial aid to religious institutions.[173]

In upholding Washington's decision, the *Locke* Court looked to historical understandings, noting that Washington's establishment concerns were "scarcely novel"[174] and that "we can think of few areas in which a State's antiestablishment interests come more into play. Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion."[175] The *Locke* Court then described how "[m]ost States that sought to avoid an establishment of religion around the time of the founding placed in

165. *See id.* at 2019–21.

166. *Id.* at 2019 ("The parties agree that the Establishment Clause of that Amendment does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program.").

167. *Id.* at 2028 (Sotomayor, J., dissenting).

168. *See generally id.* at 2017–25 (majority opinion).

169. 540 U.S. 712 (2004).

170. *Id.* at 718.

171. *Id.* at 715 ("The State of Washington established the Promise Scholarship Program to assist academically gifted students with postsecondary education expenses.").

172. *Id.* ("In accordance with the State Constitution, students may not use the scholarship at an institution where they are pursuing a degree in devotional theology."); *id.* at 716 ("A 'degree in theology' is not defined in the statute, but, as both parties concede, the statute simply codifies the State's constitutional prohibition on providing funds to students to pursue degrees that are 'devotional in nature or designed to induce religious faith.'").

173. WASH. CONST. art. I, § 11 ("No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.").

174. *Locke*, 540 U.S. at 722.

175. *Id.*

their constitutions formal prohibitions against using tax funds to support the ministry"[176] and listed each constitutional provision.[177]

The *Trinity Lutheran* Court's engagement with this originalist analysis is minimal. It acknowledged *Locke's* reliance on the historical "antiestablishment interest in not using taxpayer funds to pay for the training of clergy."[178] But it distinguished *Locke* by arguing that *Locke* was about funding clergy, while *Trinity Lutheran* was about funding playgrounds.[179] The *Trinity Lutheran* Court did not ask what original practices or original understandings might suggest about direct funding to churches, church schools, or even church playgrounds. Instead, the Court characterized the State's disestablishment principles as "nothing more" than a "policy preference."[180]

Indeed, not only did the *Trinity Lutheran* Court mostly ignore religion clause history, it sometimes seemed to reject an originalist approach altogether. Under an originalist approach, a law with roots deep in the founding era should start with a presumption of approval if not constitutionality.[181] Yet the *Trinity Lutheran* Court ratified a Free Exercise Clause decision that invalidated a Tennessee law dating to the Founding.[182] The Court noted that "Tennessee had disqualified ministers from serving as legislators since the adoption of its first Constitution in 1796, and . . . a number of early States had

176. *Id.* at 723.

177. *Id.* ("*E.g.*, GA. CONST., art. IV, § 5 (1789), reprinted in 2 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 789 (F. Thorpe ed. 1909) (reprinted 1993) ('All persons shall have the free exercise of religion, without being obliged to contribute to the support of any religious profession but their own'); PA. CONST., art. II (1776), in 5 *id.*, at 3082 ('[N]o man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent'); N.J. CONST., art. XVIII (1776), in *id.*, at 2597 (similar); DEL. CONST., art. I, § 1 (1792), in 1 *id.*, at 568 (similar); KY. CONST., art. XII, § 3 (1792), in 3 *id.*, at 1274 (similar); VT. CONST., Ch. I, art. 3 (1793), in 6 *id.*, at 3762 (similar); TENN. CONST., art. XI, § 3 (1796), in *id.*, at 3422 (similar); OHIO CONST., art. VIII, § 3 (1802), in 5 *id.*, at 2910 (similar).").

178. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2023 (2017).

179. *Id.* (describing funding in *Locke* as "funding to support church leaders," which "lay at the historic core of the Religion Clauses" while funding here is funding "to use recycled tires to resurface playgrounds").

180. *Id.* ("[O]nly a state interest 'of the highest order' can justify the Department's discriminatory policy. Yet the Department offers nothing more than Missouri's policy preference for skating as far as possible from religious establishment concerns." (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978))).

181. *See* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 378 (2013).

182. *Trinity Lutheran*, 137 S. Ct. at 2020 ("[T]he [*McDaniel*] Court struck down under the Free Exercise Clause a Tennessee statute disqualifying ministers from serving as delegates to the State's constitutional convention.").

also disqualified ministers from legislative office."[183] These founding era laws suggest that barring ministers from office was consistent with the original understanding of free exercise. Nevertheless, despite the longstanding history behind these laws, the *Trinity Lutheran* Court supported their rejection.[184] To explain its position, the Court could have, for example, argued that states' original practices and understandings did not inform the understanding of the Federal Constitution—an originalist rebuttal.[185] But it did not. Instead, the Court concluded, "[*t*]*his historical tradition, however, did not change the fact that the statute discriminated* against McDaniel by denying him a benefit solely because of his '*status* as a "minister.'"[186] What mattered was not the historical pedigree of the practice, but the discrimination that resulted.[187] Whatever the merit of the Court's conclusion, it was not originalist.

The dismissive treatment of the original understanding of cash payments to churches is surprising for at least two reasons. First, the *Trinity Lutheran* decision "discounts centuries of history."[188] Second, this "judicial brush aside"[189] runs contrary to the Court's repeated assertions in *Town of Greece* that the Establishment Clause must be interpreted in light of original understandings and practices.

B. Originalist Analyses

What a more complete originalist analysis would look like may well depend on the strand of originalism employed. The focus might be on the intent of the Framers, such as James Madison, who was pivotal in both early establishment debates and the drafting of the Establishment Clause itself.[190] Or the focus might be on the understanding of the Ratifiers as a whole or perhaps a hypothetical reasonable citizen at the Founding.[191] Alternatively, perhaps the Founding era is the wrong period, and the focus should be on the Reconstruction period[192] when the Fourteenth Amendment (which incorporated the religion clauses) was adopted.[193] The question may

183. *Id.*
184. *Id.*
185. Of course, one could also argue that the state constitutions from the Founding reflect the general understanding of what free exercise did and did not require.
186. *Trinity Lutheran*, 137 S. Ct. at 2020 (first emphasis added) (quoting McDaniel v. Paty, 435 U.S. 618, 627 (1978)).
187. *See id.*
188. *Id.* at 2041 (Sotomayor, J., dissenting).
189. *Id.*
190. *See supra* Subpart II.B.
191. *See supra* Subpart II.B.
192. *See supra* Subpart III.B.3.
193. *See supra* note 19 (explaining the incorporation of the Establishment Clause via the Due Process Clause of the Fourteenth Amendment).

also be framed at different levels of generality: is it funding for church playgrounds (which did not always exist), or funding for churches in general, or perhaps funding for the structural upkeep of churches? These, of course, are just some of the options.

A thorough investigation is beyond the scope of this Article, but I will very briefly sketch out a few possible analyses below. They are not conclusive, and indeed I doubt they ever could be when the exact same materials have been interpreted differently even by those employing a similar methodology.[194] Rather, this Subpart is meant to provide a glimpse into the type of originalist historical examination that has been brought to the question in cases and scholarship—and that the *Trinity Lutheran* Court ignored.

1. Original Intent of Framers and James Madison

I will start with an Old Originalism analysis of the intent of the Framers of the U.S. Constitution. This approach probably best approximates the one actually used by the Supreme Court in *Town of Greece* and so represents the one providing the greatest consistency across decisions.

Although a Federalist who did not believe constitutional amendments were necessary, James Madison authored what eventually became the Bill of Rights.[195] Madison was a prominent figure in establishment controversies and known as the "Architect" or

194. Frank Guliuzza III, *The Practical Perils of an Original Intent-Based Judicial Philosophy: Originalism and the Church-State Test Case*, 42 DRAKE L. REV. 343, 381 (1993) (concluding that even scholars who consider themselves originalists and looked at the same historical evidence surrounding the Establishment Clause reach very different conclusions about original intent); *cf.* Alan Brownstein, *The Reasons Why Originalism Provides A Weak Foundation for Interpreting Constitutional Provisions Relating to Religion*, 2009 CARDOZO L. REV. DE NOVO 196, 197 (2009) (noting the wildly different conclusions reached by "highly reputable scholars" on the original understanding of the religion clauses); *id.* at 198 ("When there is this level of dissonance as to the nature of the original understanding, choosing one historical account over another to resolve a religion clause dispute does little to legitimate the conclusion being asserted.").

195. Federalists argued that amendments were unnecessary because Congress had only the powers the Constitution granted it, and the Constitution did not grant Congress the power to regulate religion. Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1090 (1995) ("According to Madison in the Virginia ratification debates, 'there is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation.'"). Nevertheless, Madison helped draft the first ten amendments because several states would not ratify the new Constitution without them. Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1161 (1987) ("[W]hen Rhode Island and North Carolina refused to ratify, and Virginia and then New York submitted calls for a second convention, the Federalists were forced to take seriously the demands for a bill of rights, and James Madison took on the task of pushing a bill of rights through Congress.").

"Father" of the Bill of Rights,[196] and his influence on the First Amendment is undeniable.[197] Madison presumably would not draft a clause that contravened his beliefs.[198] So what were his beliefs?

Madison set forth his views on church-state relations in his *Memorial and Remonstrance Against Religious Assessments* ("*Memorial and Remonstrance*").[199] "The *Memorial and Remonstrance* has rightly been termed 'probably the fullest and most thoughtful exposition of the disestablishmentarian thinking at the time of the Founding, as well as the reasoning of the principal author of the Bill of Rights.'"[200] The polemic was in response to a 1784 Virginia bill proposing a religious assessment that would be directed to a church of the taxpayer's choosing.[201] Churches could use the money "to pay for the salaries of their clergy, to provide places of divine worship, and to 'none other use whatsoever.'"[202] The assessment bill was defeated, in part due the *Memorial and*

196. *See, e.g.*, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977) (describing James Madison as "Father of the Bill of Rights"); Joyce A. McCray Pearson, *The Federal and State Bills of Rights: A Historical Look at the Relationship Between America's Documents of Individual Freedom*, 36 HOW. L.J. 43, 58 (1993) (describing Madison as "James Madison—Chief Architect of the Federal Bill of Rights").

197. *See, e.g.*, David Reiss, *Jefferson and Madison as Icons in Judicial History: A Study of Religion Clause Jurisprudence*, 61 MD. L. REV. 94, 175 (2002) (noting "the key role played by Madison, who had an immense and independent influence on the history of religious liberty and the enactment of the Constitution and the Religion Clause of the First Amendment in particular").

198. Of course, there is no guarantee that the Establishment Clause perfectly embodies Madison's beliefs either.

199. Madison, *supra* note 26.

200. Andy G. Olree, *James Madison and Legislative Chaplains*, 102 NW. U. L. REV. 145, 164 (2008) (quoting MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 51 (3d ed. 2011)); *see also* Vincent Blasi, *School Vouchers and Religious Liberty: Seven Questions from Madison's* Memorial and Remonstrance, 87 CORNELL L. REV. 783, 785 (2002) (describing the *Memorial and Remonstrance* as "the most powerful and influential statement of Madison's views on the subject of religious liberty").

201. Patrick Henry, *Transcript For: A Bill Establishing a Provision for Teachers of the Christian Religion*, MONTICELLO DIGITAL CLASSROOM, https://classroom.monticello.org/view/72279/ (last visited Aug. 2, 2018). A reprint of the Bill also appears as an appendix in *Everson v. Board of Education*, 330 U.S. 1, 72–74 (1947) (Rutledge, J., dissenting). The taxpayer could also direct their assessment to a school fund for, as stated in the bill, "the encouragement of seminaries of learning within the Counties whence such sums shall arise." *Id.* at 74.

202. Blasi, *supra* note 200, at 784 (quoting THOMAS E. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776–1787 189 (1977)); *see also id.* at 819 ("[T]he money to be raised by virtue of this Act, shall be by the Vestries, Elders, or Directors of each religious society, appropriated to a provision for a Minister or Teacher of the Gospel of their denomination, or the providing place of divine worship, and to none other use whatsoever.").

Remonstrance.[203] Instead, with Madison's guidance, Virginia passed the Virginia Bill for Religious Liberty,[204] which guaranteed that no one would be forced to attend or financially support any religious entity.[205]

In his *Memorial and Remonstrance*, Madison lambasted taxpayer subsidies to churches. Indeed, he argued that even three pence would be too much.[206] He feared that a religious assessment would upset the civil peace.[207] In fact, "[t]he very appearance of the Bill has transformed that Christian forbearance, love and charity, which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased."[208]

Madison also viewed religious assessments as a first step toward the persecution and subordination of religious minorities.[209] In his mind, the Spanish Inquisition differed only in degree, not in kind.[210] "The one is the first step, the other the last in the career of intolerance."[211] Moreover, as mentioned earlier, even if government support of some religions did not lead to the persecution of nonadherents, it certainly made them second-class citizens.[212]

203. Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 854 (1986) ("Madison helped to defeat Patrick Henry's bill, largely through his famous *Memorial and Remonstrance Against Religious Assessments*.").

204. *Id.* ("Madison steered Jefferson's bill into law. Madison had to carry the whole load, because Jefferson was in Paris in 1785.").

205. *82. A Bill for Establishing Religious Freedom, June 18, 1779*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082 (last visited Aug. 2, 2018) ("[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever."); *see also id.* ("[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical.").

206. Madison, *supra* note 26, at ¶ 3 ("[I]t is proper to take alarm at the first experiment on our liberties . . . the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever . . . .").

207. *Id.* at ¶ 11 ("[I]t will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion has produced among its several sects.").

208. *Id.*; *see also id.* ("What mischiefs may not be dreaded, should this enemy to the public quiet be armed with the force of a law?").

209. *Cf.* Blasi, *supra* note 200, at 802 ("No fewer than five of the fifteen paragraphs of the *Memorial and Remonstrance* make explicit appeals to equality.").

210. Madison, *supra* note 26, at ¶ 9 ("Distant as it may be in its present form from the Inquisition, it differs from it only in degree.").

211. *Id.*

212. *Id.* ("It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority."). This thinking may also explain why Madison wrote that legislative prayers violated the Establishment Clause.

Finally, Madison thought government-supported religion would corrupt and degrade its beneficiaries: "experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation."[213] In particular, religious establishments have led to "pride and indolence in the Clergy" and "ignorance and servility in the laity."[214]

In short, Madison was no fan of state-funded churches and would thus oppose, perhaps even vehemently, the *Trinity Lutheran* ruling. At the same time, despite his preeminent role, Madison represents only one Framer.[215] Moreover, one could argue his *Memorial and Remonstrance* does not address exactly the same situation.[216] Madison was protesting funding to both clergy and churches (despite the *Trinity Lutheran* Court's attempt to suggest otherwise), not funding to the playgrounds of church schools. Still, since the playground is ultimately part of the church (and therefore "any religious . . . place"), odds are Madison would oppose its funding as well. Would Madison still insist on his separationist principles if the funding was also made available to secular school playgrounds?[217] The tenor of the *Memorial and Remonstrance*, plus the fact that the

213. *Id.* at ¶ 7.

214. *Id.* ("During almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution."). This view was shared by Evangelical Christians. John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 382 (1996) ("The evangelicals feared state benevolence towards religion and religious bodies almost as much as they feared state repression. For those religious bodies that received state benefits would invariably become beholden to the state, and distracted from their divine mandates.").

215. *See* Carl H. Esbeck, *Protestant Dissent and the Virginia Disestablishment, 1776–1786*, 7 GEO. J.L. & PUB. POL'Y 51, 64 (2009) ("Although Madison was certainly in the thick of things in New York City [where the First Congress debated the Establishment Clause], his influence on others in the House and Senate was not without bounds.").

216. The overwhelmingly Christian prayers in the Town of Greece did not match up perfectly with the generally nonsectarian prayers of the Founding era, yet this mismatch did not prevent the Supreme Court from equating them. One could do the same here and claim that funding for churches and funding for church school playgrounds are likewise similar enough to draw the same conclusion.

217. Again, the context surrounding the *Town of Greece* prayers differed from the context of the original prayers, yet the *Town of Greece* Court mostly ignored it. *See supra* notes 91, 100–01 and accompanying text.

assessments Madison fought against could be allocated to churches or schools,[218] suggests he would.[219] But no one can say for sure.[220]

2. Original Public Understanding of Founding Generation

For New Originalists, the proper originalist project is not to uncover the Framers' or Ratifiers' subjective understanding of the Establishment Clause.[221] Rather, it is to reconstruct the objective understanding of the reasonable citizen at the time of the clause's framing.[222] The Framers'/Ratifiers' views may help inform this inquiry,[223] but so would the everyday meaning of words as revealed by contemporaneous dictionaries, public debates, correspondence, treatises, cases, and other written material of the day.[224]

218. *See* Madison, *supra* note 26.

219. *Cf.* Blasi, *supra* note 200, at 792 ("At no juncture in [Madison's] sustained campaign against the General Assessment did he so much as imply that the proper remedy might be a broadening of the class of beneficiaries.").

220. Brownstein, *supra* note 194, at 206 ("There is no way to faithfully and accurately determine what the polity would have thought about either subsidies or exemptions in a world transformed from a minimal state to a modern [regulatory and welfare] government.").

221. *See* Colby, *supra* note 41, at 723–24 ("Thus, over time, the focus of the originalist inquiry began to evolve again. Originalists began to speak of the 'original meaning' project in more objective terms: as a search for the original, *objective* meaning of the text, thereby ostensibly evading the various subjectivity-based objections.").

222. *See supra* note 59 and accompanying text.

223. Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529, 537 (1998) ("[W]hy do originalists extensively quote the founding fathers? An originalist who draws conclusions from such statements is not making claims about what all the framers or ratifiers thought. Rather, she seeks to make sense of the text by surveying how its words were used in common parlance. Indeed, the framers' or ratifiers' comments about a particular phrase or provision are often a fairly good reflection of what that phrase or provision commonly was understood to mean.").

224. *Id.* ("Likewise, other writings and contemporaneous dictionaries furnish clues as to meanings.").

As originally understood, the Establishment Clause arguably had two components.[225] First, there was the federalism component.[226] The Establishment Clause confirmed that the federal government had no authority over religion and guaranteed that the federal government would not interfere with each state's religion policy.[227] This constraint would, for example, prevent the federal government from dismantling state establishments.[228] Ultimately, however, this federalism limit was superseded by the Fourteenth Amendment, which fundamentally changed the relationship between the federal government and the states.[229]

Second, the Establishment Clause was also understood to contain a substantive component.[230] The Establishment Clause was not, after all, only about keeping the federal "nose" out of the states' business. It also set a bar on establishing religion at the federal level.[231] It was what prevented Congress from "establishing" a national church in

225. Frederick Mark Gedicks, *Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account*, 88 IND. L.J. 669, 696 (2013) ("This disability generated two immunities, one held by the states against federal interference in state decisions to establish or disestablish religion, and one held by the people against the adverse legal consequences that would flow from federal establishment of a national church."); Kent Greenawalt, *Common Sense About Original and Subsequent Understandings of the Religion Clauses*, 8 U. PA. J. CONST. L. 479, 480 (2006) ("More particularly, the Establishment Clause was, at its origins, both jurisdictional and substantive."). Scholars disagree as to which is the primary purpose, some favoring the federalism component and some the substantive one. Steven D. Smith, *The Jurisdictional Establishment Clause: A Reappraisal*, 81 NOTRE DAME L. REV. 1843, 1844 (2006) ("The jurisdictional interpretation of the Establishment Clause has been advocated in one or another version by prominent scholars including Akhil Amar and Philip Hamburger and also, recently, by Justice Clarence Thomas. But it has been opposed by other prominent scholars, including Douglas Laycock, Kent Greenawalt, Noah Feldman, and Steven Green.").

226. *See* Greenawalt, *supra* note 225, at 483 (noting that the Establishment Clause has a jurisdictional component).

227. Smith, *supra* note 225, at 1843 ("The basic idea is that the Framers of the Establishment Clause . . . intended simply to reconfirm in writing the jurisdictional arrangement that preexisted the Constitution and that no one wanted to alter: this was an arrangement in which religion was a subject within the domain of the states, not the national government.").

228. *See id.* at 1858 ("The basic idea . . . is that Congress and the states added the Establishment Clause to the Constitution to confirm in writing the federalist arrangement in which religion was within the jurisdiction of the states, not of the national government.").

229. *See supra* Part III.B.3.

230. *See* Greenawalt, *supra* note 225 (noting that the Establishment Clause also has a substantive component).

231. *Id.* at 498 ("[T]he notion that the First Amendment had no application to territorial governance—that Congress could, in other words, gravely suppress freedom of speech, the press, and religion in the territories without constitutional qualm—is intrinsically much less plausible than the alternative.").

federal territories.[232] The real question, then, is what amounts to federal establishment of religion prohibited by the Establishment Clause? In particular, what did a reasonable, informed person from the time period understand the Establishment Clause to mean vis-à-vis federal funding of churches?

The answer may turn on whether the question is about "original expected applications" or "original objective principles."[233] The goal of an original expected application approach is to discover how the Founding generation expected the Establishment Clause to apply to government funding of churches and their playgrounds. An original expected application analysis might consider whether the federal government at the Founding in fact funded churches or church playgrounds, on the assumption that actual practices reflected general constitutional understandings. (Then again, relying on historical practices assumes that politicians are always mindful of constitutional limits, whereas experience has taught us otherwise.)[234] In any event, the historical record cannot answer this precise question. The federal government did not fund any churches, let alone church playgrounds. On the other hand, the First Congress did fund a chaplain for itself, as well as missionaries to convert Native Americans.[235] In short, the historical record is inconclusive.

Examining how the word "establishment" was used may be more helpful in an original expected application analysis of whether taxpayer subsidies to churches and their school playgrounds was understood to violate the Establishment Clause.[236] As it happens, at the Founding era, "establishment" was associated with religious taxes.[237] For example, Virginia's proposed religious assessment was

232. *Id.* at 486; *see also id.* at 489 ("[N]othing in the clauses themselves indicates that they are irrelevant for federal domains.").

233. *See supra* notes 59–63 and accompanying text.

234. Laycock, *supra* note 135, at 913 ("The argument cannot be merely that anything the Framers did is constitutional. The unstated premise of that argument is that the Framers fully thought through everything they did and had every constitutional principle constantly in mind, so that all their acts fit together in a great mosaic that is absolutely consistent, even if modern observers cannot understand the organizing principle. That is not a plausible premise."); Greenawalt, *supra* note 225, at 497 ("[E]ven legislation passed by Congress after adoption did not necessarily reflect a considered view of its members about what the religion clauses permitted.").

235. Witte, *supra* note 214, at 406–07 (noting that federal subsidies "were given to Christian missionaries who proselytized among the native American Indians").

236. At least it avoids "assum[ing] a degree of government attention and fidelity to constitutional principles that is probably unwarranted." Brownstein, *supra* note 194, at 204; *see also id.* ("Government officials are not always focusing on the constitutional implications of their decisions. Moreover, they do not always live up to their highest ideals, constitutional or otherwise.").

237. *See* Laycock, *supra* note 135, at 913 ("The state debates concerning establishment centered on financial aid.").

referred to as an "establishment."[238] Perhaps, then, the state-funded chaplain and missionaries were the anomaly, not the other way around, so that to ban establishment was to ban taxing people in support of churches (including church playgrounds). Then again, "[t]he term 'establishment of religion' was a decidedly ambiguous phrase—in the eighteenth century, as much as today."[239]

The "original objective principles" approach would try to uncover the original principles behind the Establishment Clause and then see how those principles play out with government grants to churches.[240] A main principle accepted by all in the late eighteenth century was liberty of conscience.[241] "Congregationalists, evangelicals, Anglicans, and enlightened Deists alike asserted a belief in the liberty of conscience . . . [and] the idea of liberty of conscience formed the intellectual and theoretical underpinning of all discussions of free exercise and establishment in the colonies and then the states."[242]

Freedom of conscience had many interrelated aspects in the young republic, including voluntarism and disestablishment. Voluntarism meant that religion ought to be a voluntary endeavor,[243] which naturally led to support for disestablishment.[244] "With respect

238. *Id.* at 904–05 ("[T]he word 'establishment' often was used in debates over general assessments. Madison used 'establish,' 'established,' or 'establishment' thirteen times in the *Memorial and Remonstrance*, and he described the general assessment bill as 'the proposed establishment.'").

239. Witte, *supra* note 214, at 401. For example, for some people establishment included any government scheme that imposed taxes for churches, while for others it did not reach schemes that allowed taxpayers to choose their church or opt out. *See* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 397–98 (2002) ("There was also a live disagreement about whether nonpreferential funding of religion necessarily violated liberty of conscience.").

240. *See* Whittington, *supra* note 40, at 611 ("The point [of originalist inquiry] is to determine what principle . . . [the founders] adopted, and then to figure out whether and how that principle applies to the current case.").

241. Witte, *supra* note 214, at 389 ("Liberty of conscience . . . was universally embraced in the young republic."); *see also* Feldman, *supra* note 239, at 374 ("[B]y the late eighteenth century it was broadly agreed in the colonies that there was a basic, indeed natural, right called 'liberty of conscience.'").

242. Feldman, *supra* note 239, at 379.

243. Smith, *supra* note 225, at 1865 ("[T]here was consensus, at some level of abstraction . . . about the voluntary character of religion."); *see also* Witte, *supra* note 214, at 390 ("First, liberty of conscience protected voluntarism—'the right of private judgment in matters of religion,' the unencumbered ability to choose and to change one's religious beliefs and adherences.").

244. Thomas C. Berg, *The Voluntary Principle and Church Autonomy, Then and Now*, 2004 B.Y.U. L. REV. 1593, 1594–95 (2004) ("In every state liberty of conscience and liberty of worship is complete. The government extends protection to all. . . . The proper civil authorities have nothing to do with the creed of those who open a place of worship. . . . On the other hand, . . . neither the general government nor that of the States does anything directly for the maintenance of public worship. . . . [Religion relies] upon the efforts of its friends, acting from their own free will." (alterations in original) (quoting ROBERT BAIRD,

to money, religion was to be wholly voluntary. Churches either would support themselves or they would not, but the government would neither help nor interfere. That is what disestablishment meant to the Framers in the context in which they thought about it."[245]

The reverse—forcing people to financially support a religion not their own—amounted to establishment.[246] Though people disagreed about the outer limits of establishment,[247] they all agreed that "[e]stablishment of religion . . . often had the effect of compelling conscience. Going beyond compulsory church attendance or required forms of worship, the Framers' generation worried that conscience would be violated if citizens were required to pay taxes to support religious institutions with whose beliefs they disagreed."[248] In short, no reasonable person of that era would dispute that it violated freedom of conscience to be conscripted into financially supporting a religion not one's own.[249]

RELIGION IN THE UNITED STATES OF AMERICA 287–88 (Edwin S. Gaustad ed., Arno Press & The New York Times 1969) (1844))).

245. Laycock, *supra* note 135, at 923.

246. Feldman, *supra* note 239, at 352 ("[T]he Framers cared mostly about dissenters' liberty of conscience from paying taxes.").

247. Scholars also disagree about the extent of the disagreement. *Compare* Green, *supra* note 51, at 776 ("Finally, most early Americans believed that enforced tax support of one religion or of religion generally violated rights of conscience."), *with* Feldman, *supra* note 239, at 416 ("There was broad agreement that coercive taxes for religious purposes would, in principle, violate liberty of conscience. But there was no agreement about whether it was coercive to collect such taxes when the law provided for everyone to designate the religion of his choice as the recipient of his taxes.").

248. Feldman, *supra* note 239, at 351; *see also id.* at 412 ("Establishment was understood to be incompatible with liberty of conscience because it compelled support for a church with which dissenters disagreed.").

249. Greenawalt, *supra* note 225, at 493 ("[T]he common belief in liberty of conscience, including a right not to be forced to contribute to religion, underlies the Establishment Clause."). How could this understanding be reconciled with the fact that several states still had official religious establishments? Different scholars have suggested different answers. One is that states could support limits on federal establishments without endangering their own. *See, e.g.*, *id.* ("Even they might well have wished that the federal government not undertake an establishment in federal domains, given the risk that such a federal establishment would not be to their liking."). Another is that state policy does not inform the Federal Constitution. Laycock, *supra* note 135, at 878 ("Some of the New England states provided financial aid to more than one church, but these systems were preferential in practice and were the source of bitter religious strife. There is no evidence that those schemes were the model for the establishment clause."). Yet another is that only a few remained, and they were not considered establishments because people could direct their payments to their own church: "By the time of the drafting of the First Amendment, therefore, compelled assessments for the support of religion existed in only three states and, in each case, in the form of nonpreferential, multiple establishments." Green, *supra* note 51, at 780.

How does this original public understanding of the Establishment Clause as barring coerced financial support of churches square with the government's funding of Trinity Lutheran Church and its church playground? Does it violate the principles of the Establishment Clause? One could argue no, it is part of a broader funding scheme to support playgrounds and the benefit to religion is incidental. On the other hand, one could argue yes, it exemplifies the type of establishment the Establishment Clause meant to prohibit: people of all different religions are coerced into providing tax dollars that are used to support a church not their own.[250] Moreover, this funding scheme differs from the few remaining establishments of the Founding era, which ensured that taxpayers were able to donate to their own church or opt out.[251] Once again, a definitive answer is elusive.[252]

3. Original Public Understanding of Reconstruction Generation

Some scholars have argued that the Founding era is the wrong time period to examine, especially for challenges to state laws.[253] After all, the Establishment Clause, like all of the protections listed in the Bill of Rights, originally constrained only the federal government. It is the Fourteenth Amendment, ratified in 1868, that

250. Feldman, *supra* note 239, at 412 ("The history equally lends credence to the view that government should not provide financial support to religious institutions, either directly or indirectly, because doing so would require coercing the conscience of dissenting taxpayers."); *id.* at 417–18 ("Even those Framers who favored taxation in support of religion did so on the understanding that such arrangements made provisions for dissenters to designate their taxes for a recipient of their choice.").

251. *Id.* at 351 ("Even those who advocated government funding of religion proposed that taxpayers be permitted to designate the denomination of their choice to receive their taxes, or else opt out of paying those taxes altogether.").

252. *See id.* at 417 ("The point is that an accurate account of the intellectual origins of the Establishment Clause does not, and cannot, provide a definitive answer to the question of what exactly the Establishment Clause prohibited then or prohibits now. The historical analysis does not get us all the way to a doctrinal answer."). Note too that when the principles do not cleanly point to one answer, as here, the analysis has arguably moved into constitutional "construction."

253. Greenawalt, *supra* note 225, at 503–04 ("If what should count in interpretation is original understanding, we cannot ignore understanding at the time of the Fourteenth Amendment . . . . In light of suggestions by Lash and Amar, among others, that the prevailing views of both free exercise and nonestablishment were more expansive in the mid-nineteenth century than in the late eighteenth century, any serious originalist must grapple with how free exercise and nonestablishment were regarded in the mid-nineteenth century."); Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 984 (2012) ("[F]or an originalist who believes *Barron v. Baltimore* was correctly decided, it is difficult to understand why the original understanding of the Bill of Rights ever should, in itself, control a constitutional case involving state and local action.").

applies establishment limits to state governments.[254] Therefore, the (New Originalism) question ought to be: What did the Establishment Clause mean to the reasonable person of the Reconstruction era?[255]

Even if the Establishment Clause had been primarily motivated by federalism concerns (as some scholars argue), by the Reconstruction era, the Establishment Clause had evolved from its federalism roots to cover individual freedoms—namely freedom from religion.[256] In other words, by Reconstruction, people interpreted the Establishment Clause to express the principle of nonestablishment at both the state and federal level.[257]

That the Establishment Clause was generally understood to guarantee federal and state disestablishment does not answer the question of whether disestablishment barred state funding of churches or church school playgrounds. However, unlike the Founding era, the Reconstruction era saw debate regarding the funding of church schools, which presumably would include their playgrounds. In particular, a constitutional amendment proposed in Congress would have specifically barred government funding of sectarian schools.[258]

254. *See supra* note 19 (explaining incorporation). It is beyond the scope of this Article to address the claim that the Establishment Clause cannot be incorporated. Justice Thomas, for example, argues that because the original point of the Establishment Clause was to provide protection *for* the states against federal meddling, it cannot logically be applied *against* the states. *See, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 50 (2004) (Thomas, J., concurring) ("[T]he Establishment Clause . . . protects state establishments from federal interference but does not protect any individual right. These two features independently make incorporation of the Clause difficult to understand."). Even if it were true, "[t]he problem with this argument is that it assumes that the Establishment Clause meant the same thing in 1868 that it did in 1789." Lash, *supra* note 195, at 1099.

255. Greene, *supra* note 253, at 979 ("An originalist who believes that the Fourteenth Amendment incorporated against state governments some or all of the rights protected by the Bill of Rights should, in adjudicating cases under incorporated provisions, be concerned primarily (if not exclusively) with determining how the generation that ratified that amendment understood the scope and substance of the rights at issue.").

256. Lash, *supra* note 195, at 1135 ("In this way, the Establishment Clause came to represent a personal freedom. Over time, popular interpretation of the Clause focused not on the principle of federalism, but on the principle of 'nonestablishment.'").

257. *Id.* ("[B]y Reconstruction most people interpreted the Establishment Clause to express the principle of nonestablishment."); *id.* at 1141 (noting "the reinterpretation of the Establishment Clause at both a state and federal level to express a principle of personal freedom—the immunity from government power of the subject of religion.").

258. H.R.J. Res. 1, 44th Cong., 1st Sess., 4 CONG. REC. 205 (1875).

The Blaine Amendment was introduced by Representative James Blaine of Maine in 1875, six years after the Fourteenth Amendment was ratified.[259] It stated:

> No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.[260]

The proposed amendment thus did two things: it explicitly applied the religion clauses to the states, and it expressly barred state funding to any religious institution.[261] While the Blaine Amendment ultimately failed at the federal level,[262] at least three quarters of the states (including Missouri[263]) have similar limits in their own constitutions.[264]

Unfortunately, it is not clear how the proposal and defeat of the Blaine Amendment illuminate the Reconstruction understanding of the Establishment Clause.[265] On the one hand, it could be argued that if the Establishment Clause were already understood to prohibit funding for religious schools, then the Blaine Amendment would be unnecessary.[266] On the other hand, it could be argued that the Blaine Amendment embodied the contemporaneous understanding of

259. Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 556 (2003).

260. *Id.* (quoting H.R.J. Res. 1).

261. H.R.J. Res. 1.

262. DeForrest, *supra* note 259, at 573 ("[The Blaine Amendment vote] was short of the necessary two-thirds majority for passage and submission to the states, killing the proposed amendment to the federal Constitution.").

263. Missouri's no-aid provisions precedes the Blaine Amendment. *Id.* at 327–28 ("Forty-five percent of the state no-funding provisions were drafted before the debate over the Blaine Amendment.").

264. Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 B.Y.U. L. REV. 295, 327 (2008) ("Counts may vary, but thirty-eight states have express provisions limiting or prohibiting public funding to religious schools (by whatever name) and/or prohibiting control of the education fund by a religious entity.").

265. Indeed, different conclusions might be drawn from both its proposal and its defeat.

266. Noah Feldman argues that the Blaine Amendment was politically motivated and was meant to serve a wedge issue against Democrats. Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & POL. 65, 97 (2002) ("By proposing a national constitutional amendment to prohibit states from funding 'sectarian' schools, Republicans would put Democrats in a tight spot."). However, the motives of the Amendment's sponsors may or may not influence how a reasonable Reconstruction era person would construe the Establishment Clause.

disestablishment[267] and was meant to ensure that it was both memorialized in writing[268] and applied to the states.[269]

Many critics have argued that the latter understanding should be discredited because it was primarily motivated by nativist animus toward Catholic immigrants.[270] The Supreme Court itself has previously argued that "hostility to aid to pervasively sectarian schools has a shameful pedigree"[271] arising from the era's "pervasive hostility to the Catholic Church and Catholics in general,"[272] and accordingly the Court "[did] not hesitate to disavow it."[273]

There are two problems with this argument. First, the claim may not be accurate.[274] While scholars do not deny the era's anti-Catholic

267. Green, *supra* note 264, at 324 (concluding, after multiple cites to the Congressional Record, that "the Blaine Amendment was not proposed to refine or expand a constitutional principle"); *cf. id.* at 310 ("Funding of religious education violated nonestablishment in three ways, according to contemporaries: it violated rights of conscience to force one person to pay for another's religious instruction; it would bring about religious dissension over the competition for funds; and it would result in ecclesiastical control over public monies." (citing William T. Harris, *The Division of School Funds for Religious Purposes*, 38 ATLANTIC MONTHLY 171, 173–74 (1876)).

268. *Id.* at 326 ("Although most states lacked express no-funding provisions as of 1876, the consensus already was that such funding violated constitutional principles. Chiefly, the Blaine Amendment would have constitutionalized the status quo."). The original Ten Amendments arguably did much the same thing.

269. Even if the Blaine Amendment merely articulated the Reconstruction understanding of disestablishment, the 1873 *Slaughterhouse Cases*' evisceration of the privileges and immunities clause (meant to incorporate the Bill of Rights) raised questions about its application to the states. *See generally* Slaughter-House Cases, 83 U.S. 36, 78 (1872) ("Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and not by this article placed under the special care of the Federal government . . . .").

270. Green, *supra* note 264, at 296 ("Critics have used the religious bigotry associated with the Blaine Amendment to discredit these state facsimiles and the no-funding principle they represent.").

271. Mitchell v. Helms, 530 U.S. 793, 828 (2000).

272. *Id.*; *see also* Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 FORDHAM L. REV. 493, 504 (2003) (noting that the numerous and poor Catholic immigrants were "easy targets for discrimination by the 'nativist' Protestant population").

273. *Mitchell*, 530 U.S. at 828.

274. *See, e.g.*, Steven G. Gey, *More or Less Bunk: The Establishment Clause Answers That History Doesn't Provide*, 2004 B.Y.U. L. REV. 1617, 1618 (2004) ("As for Justice Thomas's citation to anti-Catholic discrimination as the impetus for resistance to government financing of religion, he failed to note the abundant evidence of nondiscriminatory opposition to such financing."); Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 54 n.103 (1992) ("Evidence exists to substantiate Blaine's lack of personal animosity toward Catholics. His mother was Catholic and his daughters were educated in Catholic boarding schools."); Mary Jane Morrison, *Dictionaries, Newspapers, and "Blaine Amendments" in State Constitutions in the 21st Century*, 7 U. ST. THOMAS J.L. &

sentiments, they do contest its determinative role in opposing government appropriations to religious institutions.[275] "[A]longside the very real, politically charged anti-Catholicism of the Blaine Amendment movement, that movement also represented an attempt to institutionalize and constitutionalize a principled nonsectarian model for separation of church and state."[276] In fact, many state versions of the Blaine Amendment—like Missouri's, which was readopted in 1945—are free of taint.[277] Second, anti-Catholic sentiment may not be relevant for an originalist interpretation. It is generally not a tenet of originalism to apply only those original understandings we approve.[278] Quite the contrary: "[p]ractices and understandings that were 'born of bigotry' are just as relevant and binding as those that reflect more noble sentiments."[279] Accordingly, even if the fixed meaning was informed by values our society no longer holds, the meaning is nevertheless still fixed.[280]

This brief review brings us no closer to a definite answer, but it does leave open the possibility that the Establishment Clause, as understood in Reconstruction, forbids government subsidies (whether state or federal) to religious schools, as there could be no guarantee that the government is not forcing taxpayers to subsidize religions not their own. In short, as with the original understanding of the

PUB. POL'Y 204, 219 (2013) ("The best evidence of what the drafters and ratifiers of Blaine clauses meant is what they said; in all but five state constitutions, they used words that apply to all religious schools or all private schools [not just Catholic or 'sectarian' ones].").

275. Green, *supra* note 264, at 296 ("The Blaine Amendment had as much to do with the partisan climate of the post-Reconstruction era and related concerns about federal power over education as it did with Catholic animus. Included in the mix was a sincere effort to make public education available for children of all faiths and races, while respecting Jeffersonian notions of church-state separation. Those who characterize the Blaine Amendment as a singular exercise in Catholic bigotry thus give short shrift to the historical record and the dynamics of the times.").

276. Feldman, *supra* note 266, at 68; *see also id.* ("This ideal was certainly informed by Protestants' fear and hatred of what they believed was official Catholic doctrine on church and state, but the non-sectarian ideal was also associated with a positive commitment to voluntarism in religious organization.").

277. *See* Aaron E. Schwartz, *Dusting off the Blaine Amendment: Two Challenges to Missouri's Anti-Establishment Tradition*, 73 MO. L. REV. 129, 157–67 (2008); *see also id.* at 131–32 ("Little evidence links the 1875 Missouri Blaine Amendment with the anti-Catholic bigotry often associated with the failed National Blaine Amendment and Blaine Amendments in other states. Even less evidence of religious bigotry is available for the Blaine Amendment readopted in Missouri's 1945 constitution.").

278. If originalism did screen for unsuitable motives, I wonder what investigation of Congress's willingness to have almost exclusively Protestant chaplains would turn up?

279. Brownstein, *supra* note 194, at 204.

280. *See id.*

Founding era, the original public understanding of the Reconstruction era Establishment Clause might dictate a different outcome in *Trinity Lutheran Church*.

V. CONCLUSION

The Supreme Court is a fair-weather originalist. Sometimes it insists on an originalist approach, as it did in *Town of Greece*. Sometimes it more or less ignores an originalist approach, as it did in *Trinity Lutheran Church*. This disparate treatment cannot be explained by the longevity of the practice, since both decisions addressed practices that date to the Founding. In *Town of Greece*, just about any nonoriginalist approach to the Establishment Clause would have resulted in a contrary outcome. It is harder to confidently make a parallel assertion—that an originalist approach would have resulted in a contrary outcome—regarding *Trinity Lutheran Church*, given the scholarly disagreement. But chances are, it too would have come out differently had the Court applied the same kind of originalism as it did in *Town of Greece*. Given that the use of originalism—or the failure to use it—may dictate the outcome of the case, this inconsistency is suspect.