

# ORIGINAL MEANING AND THE ESTABLISHMENT CLAUSE: A CORPUS LINGUISTICS ANALYSIS

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*Debates about the original meaning of the Establishment Clause are gaining increased attention in light of the Supreme Court's recent decision in American Legion v. American Humanist Association and grant of certiorari in Espinoza v. Montana Department of Revenue. Scholars have long relied on a host of different methodologies to advance various theories about what the Establishment Clause means. But these methods, often relying on isolated historical examples or unrepresentative samples of language, provide limited insights about how language was understood by the greater population during the founding era. And some proponents of various historical interpretations declare that supporters of other theories have cherry-picked sources or misinterpreted them. Corpus linguistics provides another method of revealing important historical information about the Establishment Clause's original meaning, but in a systematic and data-driven way.*

*This Article provides the first corpus linguistics analysis of the Establishment Clause, using the tools of a corpus and a sufficiently large and representative body of data drawn from the relevant time period to provide additional information about probable founding-era meaning. This Article does not discount other methodologies or claim to definitively prove the meaning of the Establishment Clause. But it does*

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*add a piece to the Establishment Clause puzzle, providing information about the most salient characteristics of an established religion, or in other words, those characteristics implicated most often (or not at all) in founding-era mentions of established religion. This Article also provides a more rigorous and transparent method for investigating original public meaning than has been employed by other scholars. And by sifting through hundreds of results discussing establishment in a religious context, our Article is able to bring to light new historical sources that have been previously overlooked.*

*This Article's findings indicate that by far the most common characteristic discussed in the context of an establishment of religion involved legal or official designation of a specific church or faith. Beyond that, the most common characteristics of an establishment of religion involved: (1) government coercion of individuals involving prohibitions or mandates on religious practices enforced by legal penalties or government persecution of dissenters; (2) government interference with affairs of both established churches and non-established churches; (3) preferential public support of the established church (particularly in the form of direct taxes levied for the church); and (4) restrictions of civic or political participation to members of the established church. Our results are thus consistent with a modern constitutional theory that treats any one of these characteristics as a necessary condition for an Establishment Clause violation. On the other hand, our data did not reveal confirming evidence for a number of current theories regarding the original meaning of the Establishment Clause, including: (1) concerns about government display of religious symbols; (2) enactment of Sunday closing laws; (3) prayers or religious practices in public schools; (4) providing religious exemptions to religious believers in an even-handed way to protect conscience; or (5) providing preferential treatment to religion in general over nonreligion. Consistent with the Court's recent American Legion decision, our findings indicate that when concerns about such symbols or imagery did arise, they arose in the context of government suppressing or destroying symbols of dissenting churches. Of relevance to the pending Espinoza case, our results only indicated that public support of religious organizations was concerning historically in certain limited circumstances, such as when provided preferentially only to an established church. When a concern did arise regarding religious schools, it involved a law that only allowed members of an established church in England to teach in schools, and that prevented parents from sending their children to a religious school that was consistent with the parents' religious beliefs. Espinoza may provide an important vehicle for the Supreme Court to further revise much of its current jurisprudence that is out of step with a historical approach to the Establishment Clause.*

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## INTRODUCTION

Using a handful of comments in the First Annals of Congress and a few debates about religion in the colonies and founding-era states, many scholars and judges have set forth their theories of the original or historical meaning of the words at the beginning of the First Amendment to the Constitution: “Congress shall make no law respecting an establishment of religion.”<sup>1</sup> Yet these theories are incompatible and often mutually exclusive. Moreover, some proponents of a particular historical interpretation declare that those who support other theories have cherry-picked and misinterpreted sources to advance a particular view not accurately reflected by historical sources. Establishment Clause scholarship and jurisprudence is ripe with accusations of law-office history.<sup>2</sup> The historical record surrounding the adoption of

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1. See generally, e.g., DONALD L. DRAKEMAN, *CHURCH, STATE, AND ORIGINAL INTENT* (2010); PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002); MICHAEL J. MALBIN, *RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT* (1978); Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343 (2014); Douglas Laycock, “Nonpreferential” Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875 (1986); Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 940 (1986) [hereinafter *Coercion*]; Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105 (2003) [hereinafter *Establishment and Disestablishment*]; Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 625 (2006); Micah Schwartzman et al., *The Costs of Conscience*, 106 KY. L.J. 781 (2018).

2. See, e.g., DRAKEMAN, *supra* note 1, at 8 (“Perhaps the most common epithet is ‘law office history,’ the concept that lawyers will excavate the dry, cracked volumes of history comprising the constitutional foundation of a case for one, and only one, purpose: to unearth archival material supporting their clients’ cases. So if their clients seek a strong and

the amendment is scarce. Despite decades of debate, the meaning of the Establishment Clause remains murky at best. Given the Supreme Court's recent revision of its Establishment Clause jurisprudence in the *American Legion* case last term,<sup>3</sup> and its anticipated further revision in the upcoming *Espinoza* case,<sup>4</sup> historical questions about the original meaning of the Establishment Clause are gaining even more attention.

We offer new empirical insights to this important issue. Corpus linguistics is a data-driven method of studying language that has been used by linguists for decades, but which has only recently begun to emerge as a tool of legal interpretation both in legal scholarship<sup>5</sup> and in the courts.<sup>6</sup> Using large collections of texts known

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resolute division of church and state, they read the history through a 'strict separationist' lens and find Jefferson's wall of separation, whereas opposing counsel will dig up evidence that James Madison not only sat on a committee that appointed a congressional chaplain but, when he was President, also proclaimed national days of prayer."); *Coercion*, *supra* note 1, at 933 ("Few areas of the law have suffered so much from law office history as have the religion clauses of the First Amendment . . . I suggest that the damage wrought by the brief writers' law office histories pales into insignificance when compared to the law office history of the United States Supreme Court."); Laycock, *supra* note 1, at 877 ("The prominence and longevity of the nonpreferential aid theory is remarkable in light of the weak evidence supporting it and the quite strong evidence against it.").

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

4. *Espinoza v. Montana Department of Revenue*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/espinoza-v-montana-department-of-revenue/> (last visited July 10, 2019).

5. See, e.g., Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 830–31 (2018); Jennifer L. Mascott, *Who Are 'Officers of the United States'?*, 70 STAN. L. REV. 443 (2018) (performing a limited, corpus linguistic-like analysis as a portion of her analysis); Stephen C. Mouritsen, Note, *The Dictionary is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 BYU L. REV. 1915, 1919 (2010); Daniel M. Ortner, *The Merciful Corpus: The Rule of Lenity, Ambiguity and Corpus Linguistics*, 25 B.U. PUB. INT. L.J. 101, 105 (2016); James Cleith Phillips & Sara White, *The Meaning of the Three Emoluments Clauses in the U.S. Constitution: A Corpus Linguistic Analysis of American English From 1760-1799*, 59 S. TEX. L. REV. 181, 183 (2018) (citing James C. Phillips, Daniel M. Ortner & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool To Make Originalism More Empirical*, 126 YALE L.J.F. 20, 22–23 (2016); Lawrence M. Solan, *Can Corpus Linguistics Help Make Originalism Scientific?*, 126 YALE L.J.F. 57, 64 (2016)); 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, 1204 (2017).

6. Justice Thomas recently relied on a corpus linguistics approach in his dissent in *Carpenter v. United States*. See Robert Ambrogi, *In His Carpenter Dissent, Thomas Gives Nod to Emerging Legal Technology*, ABOVE THE LAW (June 25, 2018), <https://abovethelaw.com/2018/06/in-his-carpenter-dissent-thomas-gives-nod-to-emerging-legal-technology/>. For examples of other courts applying this method, see, for example, *State v. Canton*, 308 P.3d. 517, 523 n.6 (Utah 2013), where the court relies on corpus linguistic data to support the court's interpretation of the phrase "out of the state" in a state statutory tolling provision for criminal statutes. See also *Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 306 F. Supp. 3d. 44, 68 n.5 (D.D.C. Mar. 29, 2018) ("The database, called the Corpus of Historical American English, is a giant repository of text that houses more than 400 million

as *corpora*, we can analyze how language was used by Americans in the late 1700s. Our Article does not claim to conclusively resolve historical debates about the original meaning of the Establishment Clause nor discount methodologies used by other scholars. But it does offer an important additional piece of the puzzle to determine the Clause's original meaning. As Professor Lawrence Solum has explained, corpus linguistics provides one of three key methods that allow originalists to "triangulate" on original public meaning.<sup>7</sup>

By classifying (or coding) characteristics that were historically discussed in the context of establishment of religion, and noting the frequency (or total absence) of certain characteristics, our Article provides probable answers to the question of what characteristics Americans in the late 1700s would have understood as being associated with an establishment of religion. And by sifting through hundreds of results discussing establishment in a religious context, our Article is able to bring to light new historical sources that have been previously overlooked.

This Article's findings indicate that by far the most common issue discussed in the context of an establishment of religion involved legal or official designation of a specific church or faith. Beyond that, the most common characteristics involved: (1) government coercion of individuals with respect to prohibitions or mandates on religious practices enforced by legal penalties or government persecution; (2) government interference with church affairs (including noncoercive interference); (3) preferential public support of the established church (particularly in the form of direct taxes levied for the church); and (4) restrictions of civic or political participation to members of the established church. Our results are thus consistent with a modern constitutional theory that treats any one of these characteristics as a necessary condition for an Establishment Clause violation.

On the other hand, our data did not reveal confirming evidence for a number of current theories regarding the original meaning of the Establishment Clause, including: (1) concerns about government display of religious symbols; (2) enactment of Sunday closing laws; (3) prayers or religious practices in public schools; (4) providing religious exemptions to religious believers in an even-handed way to protect conscience; or (5) providing preferential treatment to religion in general over nonreligion. Our results thus do not support a modern constitutional

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words collected from fiction, non-fiction, magazines, and newspapers published from 1810 to 2017. A search at corpus.byu.edu/coha for 'rural district' shows a dramatic decline in usage beginning around 1950."); *People v. Harris*, 885 N.W.2d 832, 838–39 n.29 (Mich. 2016) (relying on corpus linguistic data to interpret the term "information" in a Michigan statute); *Id.* at 850 n.14 (Markman, J., concurring in part and dissenting in part) (relying on corpus linguistic data, but reaching a different conclusion).

7. Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1624 (2018). Professor Solum describes three methods that each provide different inputs into the process of constitutional interpretation and construction. "Because each method can be checked against the others, the combination of the three methods results in what can be called 'triangulation.'" *Id.* at 1624–25. These three key originalist approaches for triangulation include the following: corpus linguistics, the originalist immersion method, and the method of studying the constitutional record. *Id.*

theory that treats any one of these characteristics as a sufficient condition for an Establishment Clause violation.

Regarding religious symbols, our findings indicate that government display of such symbols was not a particular concern discussed in the context of an establishment. One may argue that this is explained by religious homogeneity with regard to religious symbols at the time. But when concerns about religious symbols did arise, they arose in the context of government suppressing or destroying symbols or religious images of dissenting churches. That itself was a form of government interference in the affairs of dissenting churches. The Court's recent *American Legion* decision was consistent with this finding.

Additionally, although others have observed that religious organizations commonly performed civil functions,<sup>8</sup> this was not a characteristic historically discussed in the context of an established church in our findings. Rather, there may have simply been no other option than for churches to perform some of these civil functions, such as maintaining birth records or administering some social welfare practices like adoption. If, in fact, churches pervasively performed these functions historically, and they did so without causing alarm, this may be evidence that this practice was not viewed as a concerning characteristic of an establishment. Finally, our findings have particular relevance to the Court's pending *Espinoza* case, which raises questions about the constitutionality of government funding provided to religious schools.<sup>9</sup> Our results indicate that public support of religious organizations was only discussed as a characteristic of an established religion if done in a preferential way or as a means of leveraging government control over internal church affairs. When a concern did arise regarding religious schools, it involved a law that only allowed members of an established church in England to teach in schools, and that prevented parents from sending their children to a religious school that was consistent with the parents' religious beliefs. The *Espinoza* case may thus provide an important vehicle for the Supreme Court to revise much of its current jurisprudence that is out of step with a historical approach to analyzing the Establishment Clause.

Part I will discuss efforts by scholars and the courts to determine the meaning of the Establishment Clause. Part II will discuss corpus linguistics. Part III will describe our methodology. Part IV will present our results. Part V will discuss some caveats and areas of potential for future research, and Part VI will discuss some of the significant doctrinal implications of these results if the Court were to

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8. See *Establishment and Disestablishment*, *supra* note 1, at 2131 (historic hallmarks of an establishment included "use of church institutions for public functions"); see also Michael M. Maddigan, Comment, *The Establishment Clause, Civil Religion, and the Public Church*, 81 CAL. L. REV. 293 (1993); Yehudah Mirsky, *Civil Religion and the Establishment Clause*, 95 YALE L. J. 1237 (1986).

9. *Espinoza v. Montana Department of Revenue*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/espinoza-v-montana-department-of-revenue/> (last visited July 10, 2019).

bring its Establishment Clause jurisprudence more in line with a historical approach.<sup>10</sup>

## I. INCONCLUSIVE DEBATES OF COURTS AND COMMENTATORS

### A. A Brief History of the First Amendment

Prior to American independence, the Church of England was formally established by law in the five southern American colonies:<sup>11</sup> Georgia,<sup>12</sup> North Carolina,<sup>13</sup> South Carolina,<sup>14</sup> Virginia,<sup>15</sup> and Maryland.<sup>16</sup> In some of the northern colonies—Massachusetts, Connecticut, New Hampshire, what is now present-day Vermont, and New York—religious establishments were formed at the local or county level as opposed to at the state level.<sup>17</sup> Pennsylvania, Delaware, New Jersey, and Rhode Island did not have officially established churches, and they were relatively religiously tolerant and pluralistic compared to the other colonies.<sup>18</sup> The establishments of all of the colonies were created “by a web of legislation, common law, and longstanding practice.”<sup>19</sup> Professor Michael McConnell has argued that the historic hallmarks of an establishment included not only financial support, but “(1) control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church.”<sup>20</sup>

Assessment taxes to support established churches were common in the founding era.<sup>21</sup> The debate over a proposal for one such assessment, Patrick Henry’s Virginia Bill Establishing a Provision for Teachers of the Christian Religion,<sup>22</sup> has

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10. Luke Goodrich, *Will the Supreme Court Replace the Lemon Test?*, HARV. L. REV. BLOG (Mar. 11, 2019), [https://blog.harvardlawreview.org/will-the-supreme-court-replace-the\\_lemon\\_test/](https://blog.harvardlawreview.org/will-the-supreme-court-replace-the_lemon_test/).

11. *Establishment and Disestablishment*, *supra* note 1, at 2110.

12. JAMES H. HUTSON, *CHURCH AND STATE IN AMERICA: THE FIRST TWO CENTURIES* 60 (2008).

13. *Id.* at 64.

14. *Id.* at 62.

15. *Id.* at 12–14, 74–76.

16. *Id.* at 60–61; *Establishment and Disestablishment*, *supra* note 1, at 2110.

17. *Establishment and Disestablishment*, *supra* note 1, at 2110.

18. *Id.* at 2111 (“The remaining colonies—Pennsylvania, Delaware, New Jersey, Rhode Island, and non-metropolitan New York—had no official establishment of religion. Rhode Island, Pennsylvania, and Maryland were explicitly founded as havens for dissenters, though Maryland lost that status at the end of the 1600s. Although the laws of these colonies would not pass full muster under modern notions of the separation of church and state—they all had religious tests for office, blasphemy laws, and the like—they were, by the standards of the day, religiously tolerant and pluralistic.”); *see also* HUTSON, *supra* note 12, at 105.

19. *Establishment and Disestablishment*, *supra* note 1, at 2111.

20. *Id.* at 2131.

21. *See* HUTSON, *supra* note 12, at 60–62, 68–69.

22. Patrick Henry, *A Bill “Establishing a Provision for Teachers of the Christian Religion”* (1784), *reprinted in* MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C.

been used as support for various theories of the original meaning of establishment. Henry's proposal would have allowed citizens to choose which Christian church received their support, or the money could go to a general fund to be distributed by the state legislature. James Madison opposed the bill and responded with a *Memorial and Remonstrance Against Religious Assessments*.<sup>23</sup> In his response, he repeatedly referred to Henry's proposal as "the establishment."<sup>24</sup> He argued that the bill "violate[d] the equality which ought to be the basis of every law," that it would pollute religion, and that it was "not necessary for the support of Civil Government."<sup>25</sup> Scholars have debated at length what impact the Virginia assessment controversy ought to have on our understanding of the Establishment Clause.<sup>26</sup> We detail their arguments in the next section; for now, we describe only the history.

Prior to the Bill of Rights, the Constitution contained limited protections regarding religious freedom.<sup>27</sup> The Federalists and Anti-Federalists were divided on the necessity of a Bill of Rights protecting this and other liberties. Several states insisted that a Bill of Rights be added, and five states proposed religious freedom amendments to the new Constitution.<sup>28</sup> Virginia proposed the following amendment, and two other states proposed nearly identical amendments:

That Religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience.<sup>29</sup>

New Hampshire's proposed amendment read "Congress shall make no laws touching religion, or to infringe the rights of conscience."<sup>30</sup> James Madison proposed the following amendment: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established,

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BERG, RELIGION AND THE CONSTITUTION 49–50 (3d ed. 2011) [hereinafter RELIGION AND THE CONSTITUTION].

23. James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), reprinted in RELIGION AND THE CONSTITUTION, *supra* note 22, at 51.

24. *Id.*

25. *Id.* at 52–53.

26. See *infra* Section I.B.

27. The unamended Constitution did prohibit religious tests for holding office in the federal government and allowed affirmations instead of oaths. U.S. CONST. art. VI, cl. 3; *Id.* art. I, § 3 cl. 6; *Id.* art. II, § 1, cl. 8; *Id.* amend. IV; see AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 103–04, 177–78, 243–44 (2005) (discussing limited First Amendment protections in the original constitution in provisions such as Article I's speech clause); RELIGION AND THE CONSTITUTION, *supra* note 22, at 56 (discussing limited religious protections in the First Amendment).

28. RELIGION AND THE CONSTITUTION, *supra* note 22, at 58.

29. *Id.* (citing Amendments Proposed by the Virginia Convention (June 27, 1788)).

30. *Id.* (citing Amendments Proposed by the New Hampshire Convention (June 21, 1788)).

nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.”<sup>31</sup>

Madison’s proposed amendment was sent to a select committee, and then to the House and Senate as a whole.<sup>32</sup> Records of the debate are sparse and shed little light on the meaning of establishment.<sup>33</sup> The Senate met in secret and did not record its debates, leaving only the proposed amendments and votes on them as evidence of what the members of the Senate intended to enact by adopting the First Amendment.<sup>34</sup> And even in the House, only summaries of the drafting debates were recorded; the record available is incomplete and occasionally inaccurate.<sup>35</sup>

From the summary in the First Annals of Congress, a few comments suggest the views of a handful of members of the First Congress on the meaning of establishment.<sup>36</sup> Peter Sylvester of New York expressed concern that the Establishment Clause “might be thought to have a tendency to abolish religion altogether.”<sup>37</sup> Elbridge Gerry of Massachusetts thought the Amendment “would read better if it was, that no religious doctrine shall be established by law.”<sup>38</sup> Roger Sherman of Connecticut thought the amendment “altogether unnecessary” because Congress lacked the authority to make religious establishments.<sup>39</sup> James Madison said he understood the proposed amendment to mean “that Congress should not establish a religion and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.”<sup>40</sup> He did not, in that instance, take a position on whether, without an amendment prohibiting it, Congress had the power to establish a religion.<sup>41</sup> But he noted that several of the State Conventions had proposed such amendments out of fear that Congress would use its powers under the Necessary and Proper Clause “to make laws of such a nature as might infringe the rights of conscience, and establish a national religion.”<sup>42</sup>

Benjamin Huntington of Connecticut expressed a fear that “the words might be taken in such latitude as to be extremely hurtful to the cause of religion.”<sup>43</sup>

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31. *Id.* at 60 (citing Madison’s Resolution for Amendments to the Constitution (June 8, 1789)).

32. 1 ANNALS OF CONG. 757–59 (1789) (J. Gales ed., 1834) (ed. note).

33. *See* Laycock, *supra* note 1, at 885.

34. 1 ANNALS OF CONG., *supra* note 32, at 15.

35. *See* Laycock, *supra* note 1, at 885 n.53 (citing Marion Tinling, *Thomas Lloyd’s Reports of the First Federal Congress*, 18 WM. & MARY Q. 519, 532–33 (1961) (“Madison wrote that the notes gave ‘some idea of the discussion,’ but that they showed ‘the strongest evidences of mutilation & perversion, and of the illiteracy of the Editor.’”)).

36. 1 ANNALS OF CONG., *supra* note 32, at 757 (Aug. 15, 1789). Different editions of the Annals of Congress have different pagination; the date is the best way to find particular passages.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 758.

41. *Id.* at 757.

42. *Id.* at 758.

43. *Id.*

While he agreed with Madison's interpretation of the proposed amendment, Huntington believed others might interpret it so as to limit the federal courts' powers to enforce bylaws that provided for the support of ministers by members of their community.<sup>44</sup> He referenced Rhode Island's prohibition on religious establishments and, almost certainly sarcastically, said "the people were now enjoying the blessed fruits of it."<sup>45</sup> He therefore expressed a desire for an amendment that would secure free exercise but that would not "patronize those who professed no religion at all."<sup>46</sup>

Madison then suggested that they insert the word "national" before religion:<sup>47</sup> "He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform."<sup>48</sup> To use the words "national religion" would, in Madison's view, "point the amendment directly to the object it was intended to prevent."<sup>49</sup> But Gerry protested, because in the Anti-Federalist view, the new government was a federal one, not a national one.<sup>50</sup> Madison promptly withdrew his motion.<sup>51</sup> Samuel Livermore of New Hampshire proposed that the amendment be altered to read "Congress shall make no laws touching religion, or infringing the rights of conscience."<sup>52</sup> This amendment passed in the House with 31 in favor, and 20 against.<sup>53</sup> The record of the debate then falls silent.

Five days later, the House adopted a motion by Fisher Ames of Massachusetts to change the amendment to read, "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."<sup>54</sup> The version the Senate received from the House was slightly different. It read, "Congress shall make no law establishing Religion, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."<sup>55</sup>

The Senate took up consideration of the amendment and proposed various alterations. Notably, a change that would have caused the amendment to read, "Congress shall make no law establishing one religious sect or society in preference to others" was rejected.<sup>56</sup> The Senate also rejected proposals that included, "nor shall

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44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 758–59.

50. *See id.* at 759.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 796.

55. *See* RELIGION AND THE CONSTITUTION, *supra* note 22, at 62 (citing House Resolution and Articles of Amendments (August 24, 1789)).

56. JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES OF AMERICA 217–18 (Sept. 3, 1789), *cited in* Lauren Davis, Nick Williford, Sebastian Bates & Lusiana Castiglione, *United States Bill of Rights 1789*, QUILL PROJECT, at Session 2655, [https://www.quillproject.net/session\\_visualize/2655](https://www.quillproject.net/session_visualize/2655) (last visited Aug. 8, 2019); *see also* RELIGION AND THE CONSTITUTION, *supra* note 22, at 62 (reprinting the same).

the rights of conscience be infringed.”<sup>57</sup> They would end the day settling on the wording, “Congress shall make no law establishing religion, or prohibiting the free exercise thereof.”<sup>58</sup> However, when the Senate returned to this proposed amendment just six days later, they incorporated “articles of faith or mode of worship” to replace the word “religion” and the entirety of the Free Exercise Clause.<sup>59</sup> In addition to this, the Senate also added the other freedoms now found in the First Amendment today so that the amendment read as follows: “Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and petition the government for the redress of grievances.”<sup>60</sup>

This proposal was approved in the Senate and sent to the House. Besides the third amendment, the House agreed to the Senate’s other proposals.<sup>61</sup> A conference committee was appointed to address the differences between the House and Senate.<sup>62</sup> The committee returned with the amendment proposal reading as follows: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the government for a redress of grievances.”<sup>63</sup>

The Amendment was approved by both houses and sent to the states for ratification.<sup>64</sup> It was ratified on December 15, 1791.<sup>65</sup>

The state ratification debates shed little direct light on the original intent of the Establishment Clause, other than the desire to avoid an official federal religion and to prevent the federal government from breaking up state established religions.<sup>66</sup>

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57. Davis et al., *supra* note 56, at Session 2655.

58. *Id.*

59. *Id.* at Session 2659 (citing SENATE JOURNAL at 243).

60. *Id.*

61. *Id.* at Session 2912 (citing SENATE JOURNAL at 265–66).

62. *Id.* (citing SENATE JOURNAL at 266).

63. *Id.* at Session 2660 (citing SENATE JOURNAL at 272–73).

64. *Id.* (citing SENATE JOURNAL at 282–83).

65. See RELIGION AND THE CONSTITUTION, *supra* note 22, at 63.

66. See AKHIL AMAR, BILL OF RIGHTS: CREATION AND RECONSTRUCTION 33, 247 (1998) (“[T]hese debates focused overwhelmingly on the ways in which an upstart Congress might displace the powers of existing state governments, governments that had century-deep roots.”); CHESTER JAMES ANTIEAU, ARTHUR T. DOWNEY & EDWARD C. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES, 143–58 (1964); DRAKEMAN, *supra* note 1, at 198; Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 398, 400 (2002); Muñoz, *supra* note 1, at 604 (“When the Constitution was proposed to form a new national government, fears emerged that the new Congress would impose one form of church-state relations throughout the nation. Anti-Federalists both articulated and exacerbated this fear in their arguments against the Constitution’s ratification. The Establishment Clause was crafted by Federalists to quell these concerns and to silence their Anti-Federalist critics.”); Robert Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS. J. 73, 77 (2005) (“The records of state ratification of the Bill of Rights are scanty.”).

### *B. Scholarship on the Meaning of the Establishment Clause*

From the scant historical record, volumes have been written about the original meaning of the Establishment Clause. Scholars have argued that the events and debates of the founding support a variety of interpretations of the First Amendment, including noncoercion,<sup>67</sup> nonpreferentialism,<sup>68</sup> neutrality,<sup>69</sup> federalism,<sup>70</sup> prohibitions on harm to third-parties caused by religious protections,<sup>71</sup> and a prohibition on a national church.<sup>72</sup>

McConnell defines establishment as “the promotion and inculcation of a common set of beliefs through governmental authority.”<sup>73</sup> One hallmark of an establishment, McConnell previously argued, is coercion.<sup>74</sup> Under his noncoercion theory of the Establishment Clause, government may endorse and aid any or all religious activity as long as it does not exercise coercion over citizens’ beliefs and

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67. *Coercion*, *supra* note 1, at 933; *Establishment and Disestablishment*, *supra* note 1, at 2110.

68. The theory here is that the Establishment Clause permits governmental aid to religion as long as it is neutral between sects. For a discussion of this theory, see ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982); MALBIN, *supra* note 1, at 7; Robert L. Cord, *Church-State Separation: Restoring the “No Preference” Doctrine of the First Amendment*, 9 HARV. J.L. & PUB. POL’Y 129 (1986).

69. The theory here is that the Establishment Clause requires government to abstain from any activity that encourages or discourages religion. For a discussion of this theory, see Laycock, *supra* note 1.

70. Specifically, the theory here is that the Establishment Clause required only that Congress could not constrain free exercise or establish a church, but the states could continue to legislate in religious matters. See, e.g., Muñoz, *supra* note 1, at 625.

71. For discussions of this Establishment Clause theory, see, for example, NELSON TEBBE, *RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 49–70* (2017); Frederick Mark Gedicks & Rebecca G. Van Tassell, *Of Burdens and Baselines: Hobby Lobby’s Puzzling Footnote 37*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 323–41 (Micah Schwartzman, et al. eds., 2016); Gedicks & Van Tassell, *supra* note 1; Andrew Koppelman & Frederick Mark Gedicks, *Is Hobby Lobby Worse for Religious Liberty Than Smith?*, 9 U. ST. THOMAS J.L. & PUB. POL’Y 223 (2015); Micah Schwartzman et al., *The Costs of Conscience*, 106 KY. L.J. 881 (2018); Nelson Tebbe, Micah Schwartzman & Richard Schragger, *How Much May Religious Accommodations Burden Others?*, in *LAW, RELIGION, AND HEALTH IN THE UNITED STATES* 215–29 (Holly Fernandez Lynch, et al. eds., 2017); Nelson Tebbe, Micah Schwartzman & Richard Schragger, *When Do Religious Accommodations Burden Others?*, in *THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY* 328–46 (Susanna Mancini & Michel Rosenfeld eds., 2018).

72. Scholars have observed that there is “broad consensus that, whatever else it was originally understood to accomplish, the Establishment Clause was meant to prohibit the federal government from setting up any ‘establishment of religion’ that resembled the eighteenth-century Church of England.” ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* 82 (2013); STEVEN D. SMITH, *FOREORDAINED FAILURE* 23 (1995); JOHN WITTE, JR. & JOEL A. NICHOLS, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 89 (3d ed. 2011); Feldman, *supra* note 66, at 388–89; Gedicks & Van Tassell, *supra* note 1, at 362; Kent Greenawalt, *Common Sense About Original and Subsequent Understandings of the Religion Clauses*, 8 U. PA. J. CONST. L. 479, 488, 491 (2006).

73. *Establishment and Disestablishment*, *supra* note 1, at 2131.

74. *Id.*

practices.<sup>75</sup> That is not to say that the government may set out to aid religion, but rather that government “can pursue its legitimate purposes even if to do so incidentally assists the various religions.”<sup>76</sup> Noncoercion is not the same as mere neutrality.<sup>77</sup> Under the noncoercion theory, “aid to religion must not be structured to influence or distort religious choice,”<sup>78</sup> and believers and nonbelievers alike are protected from government coercion in religious matters.<sup>79</sup>

McConnell argues that his theory is supported by Madison’s remarks to the First Congress “that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.”<sup>80</sup> McConnell criticizes judges and scholars who focus on writings from other periods of Madison’s life while ignoring the remarks he made when the amendment he drafted was being debated.<sup>81</sup>

McConnell further argues that Madison’s *Memorial and Remonstrance* also supports the idea that coercion is central to establishment.<sup>82</sup> He additionally cites “the appointment of congressional chaplains, the provision in the Northwest Ordinance for religious education, the resolutions calling upon the President to proclaim days of prayer and thanksgiving, [and] the Indian treaties under which

75. *Id.*

76. *Coercion*, *supra* note 1, at 940.

77. *Id.* (“Merely because aid may be neutral among religions does not mean that it is consistent with the noncoercion standard.”).

78. *Id.*

79. *Id.* (“A noncoercion standard protects nonbelievers and those indifferent to religion no less than it protects believers.”). Mark Storslee has similarly argued that “the Establishment Clause prohibits accommodations that provide exceptionally powerful incentives to adopt the religion being accommodated.” Mark Storslee, *Religious Accommodations, The Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. 871, 877 (2019).

80. *Coercion*, *supra* note 1, at 936–37.

81. *Id.* at 937 (“Curiously, in all the pages of the United States Reports canvassing the history of the period for clues as to the meaning of the religion clauses, no majority or concurring opinion ever has relied on these words by Madison . . . This is not because history was deemed irrelevant, because during much of that time the Court had purported to be judging in accordance with original intent. Nor is it because Madison’s views were deemed unimportant. Madison’s opinions concerning church-state questions propounded before the amendment, after the amendment, at every time except when he was explaining the meaning of the amendment to the First Congress, have been treated as key to an understanding of the amendment. Under ordinary principles of legislative history, Madison’s statements on the floor of Congress are of the greatest weight.”).

82. *Id.* at 938 (citations omitted). To support his claim, he cites to the following passages: (1) that the proposed bill for the support of teachers of the Christian religion would be a “dangerous abuse” if “armed with the sanctions of a law;” (2) that religion “can be directed only by reason and conviction, not by force or violence;” (3) that government should not be able to “force a citizen to contribute” even so much as three pence to the support of a church; (4) that such a government would be able to “force him to conform to any other establishment in all cases whatsoever;” (5) that “compulsive support” of religion is “unnecessary and unwarrantable;” and (6) that “attempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens, tend to enervate the laws in general.” *Id.*

Congress paid the salaries of priests and clergy”<sup>83</sup> as evidence that those of the founding era understood the Establishment Clause not to require strict separation of church and state, but only a prohibition on coercion in religious matters. “These examples,” he concludes, “demonstrate that noncoercive supports for religion were not within the contemporary understanding of an establishment of religion.”<sup>84</sup>

According to McConnell, “[a]lmost lost in the Supreme Court’s analysis is the issue of government control over religion, which is arguably the most salient aspect of the historical establishment.”<sup>85</sup> He claims the Court has used history selectively in its Establishment Clause jurisprudence. In *Everson*, he says, the Court ignored the many “books, essays, sermons, speeches, or judicial opinions setting forth the philosophical and political arguments in favor of an establishment of religion.”<sup>86</sup> Instead, the Court supported its analysis with the rejection of Patrick Henry’s Assessment Bill in Virginia and the adoption of Thomas Jefferson’s Bill for Establishing Religious Liberty, which was the “only one, perhaps unrepresentative, example from among the hundreds of arguments made against the establishment.”<sup>87</sup>

Alternatively, Professor Michael Malbin argues that the drafting debates of the First Congress show that the Framers wanted the federal government to be prohibited from establishing an official state church while allowing incidental aid to religion in the pursuit of secular purposes, so long as the government did not prefer one religious sect over another.<sup>88</sup> He suggests that when Peter Sylvester, who represented New York in the First Congress, expressed his fear that the amendment would “abolish religion altogether,” it meant that he was concerned about the prohibition of direct or indirect governmental assistance to religion.<sup>89</sup> Malbin posits that “[u]nless these premises are assumed, it is difficult to see how Sylvester could have seen the establishment clause as a threat to religion,”<sup>90</sup> though he does acknowledge that the reading needs further corroboration.<sup>91</sup> Malbin also argues that Madison’s speeches in favor of the amendment in which he added “a” before religion lend support to the nonpreferentialist theory.<sup>92</sup> He additionally cites Connecticut Representative Benjamin Huntington’s desire that the amendment not “patronize those who professed no religion at all” as evidence in his theory’s favor.<sup>93</sup> Until the proposal of the Livermore amendment, Malbin argues, the members of the House all “seemed to agree that the Bill of Rights should not prevent the federal government from giving nondiscriminatory assistance to religion, as long as the assistance is incidental to the performance of a power delegated to the

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83. *Id.* at 939.

84. *Id.*

85. *Establishment and Disestablishment*, *supra* note 1, at 2207.

86. *Id.* at 2108 (discussing *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1 (1947)).

87. *Id.*

88. MALBIN, *supra* note 1, at 7.

89. *Id.*

90. *Id.*

91. *Id.* at 9.

92. *Id.* at 8.

93. *Id.* at 9.

government.”<sup>94</sup> In Malbin’s view, even the Livermore amendment should not be read to reject nonpreferentialism, given Livermore’s silence on “the agreement between Sylvester, Huntington, and Madison.”<sup>95</sup>

Malbin then turns to the proposed alterations to the amendment, including the proposal that it read “Congress shall make no law establishing one religious sect or society in preference to others” as evidence that the framers intended to permit nonpreferential aid.<sup>96</sup> He also argues that choosing “an establishment” over “the establishment” indicates that the framers did not intend to prohibit such aid.<sup>97</sup> He squares Madison’s other views on establishment and nonpreferential aid with his theory by suggesting that Madison made a political calculation to compromise on nonpreferential aid.<sup>98</sup> He concludes that while “[t]he framers of the Constitution and Bill of Rights wanted to create a secular liberal democracy,”<sup>99</sup> they also wanted to promote religion: “The desire to encourage religion also led them to accept nondiscriminatory aid to religion.”<sup>100</sup>

Professor Douglas Laycock, however, rejects nonpreferentialism, claiming that the theory lacks historical evidence and that the Framers accepted “that aid to religion is not saved by making it nonpreferential.”<sup>101</sup> Rather, he says:

The principle that best makes sense of the establishment clause is the principle of the most nearly perfect neutrality toward religion and among religions. I do not mean neutrality in the formal sense of a ban on religious classifications, but in the substantive sense of government conduct that insofar as possible neither encourages nor discourages religious belief or practice. This is the principle that maximizes religious liberty in a pluralistic society, and this is the principle that the Framers identified in the context of tax support for churches.<sup>102</sup>

Laycock focuses on the First Congress’s repeated rejection of versions of the Establishment Clause that would have permitted nonpreferential aid. Instead, he says, the Establishment Clause is one of the broadest versions considered by either the House or the Senate.<sup>103</sup> Instead of prohibiting establishment of “‘a religion,’ ‘a national religion,’ ‘one sect or society,’ or ‘any particular denomination of religion[,]’” he writes, “[i]t is religion generically that may not be established.”<sup>104</sup>

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94. *Id.*

95. *Id.* at 10.

96. *Id.* at 12.

97. *Id.* at 14.

98. *Id.* at 16.

99. *Id.* at 39.

100. *Id.*

101. Douglas Laycock, “*Nonpreferential*” Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 919 (1986).

102. *Id.* at 922.

103. *Id.* at 881.

104. *Id.*

Laycock provides detailed analysis of the drafting debates in the First Congress to support his neutrality theory. In his view, if the members of the House had that distinction in mind the House's adoption of the Livermore amendment was a vote to reject nonpreferential aid.<sup>105</sup> He rejects Massachusetts representative Elbridge Gerry's comment that it "would read better if it was, that no religious doctrine shall be established by law," as evidence of nonpreferentialism, because none of the other members of the House supported the comment and the suggested change was not adopted.<sup>106</sup> He further rejects the nonpreferentialist view of history because it so often relies on statements from those who opposed the Establishment Clause.<sup>107</sup> Of Madison's remarks during the debate, he states, "Madison plainly did not describe a ban on preferential aid."<sup>108</sup> But Madison withdrew his amendment and, according to Laycock, the debate "ended a lot further from the 'no preference' position than it began."<sup>109</sup>

He cites votes against nonpreferential aid in Virginia and Maryland as further evidence that in the founding era, establishment was understood to include nonpreferential aid and dismisses nonpreferentialist scholars' arguments that Madison objected to the Virginia assessment bill because it was not nonpreferential at all.<sup>110</sup> In 1786, Laycock argues, aid to all denominations of Christians would have been viewed as nonpreferential.<sup>111</sup> Because members of the founding era rejected nonpreferential taxes, he concludes, the most appropriate interpretation of the Establishment Clause is that it requires government neutrality in matters of religion.<sup>112</sup>

Professor Vincent Phillip Muñoz argues that the Establishment Clause was really about federalism. In his view, the Founders were primarily concerned with Congress establishing one faith nationally and interfering with the then-existent state establishments. According to Muñoz, Madison's proposed amendment was designed to address prominent Anti-Federalist arguments, such as concern over a uniform national religion.<sup>113</sup> Muñoz suggests that Madison did not adopt Virginia's nonpreferential approach because he believed that Congress lacked the power to aid religion.<sup>114</sup> Muñoz cites Madison's remarks clarifying his understanding of the text as more evidence that the amendment was really about restricting federal, not state, power.<sup>115</sup>

Muñoz further argues that the words "respecting an," adopted by the joint committee, meant to specify that Congress could neither create a national

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105. *Id.* at 888.  
106. *Id.* at 889.  
107. *Id.* at 894.  
108. *Id.* at 893.  
109. *Id.* at 894.  
110. *Id.* at 895–99.  
111. *Id.* at 898.  
112. *Id.* at 922–23.  
113. Muñoz, *supra* note 1, at 625.  
114. *Id.* at 625–26.  
115. *Id.* at 627.

establishment nor interfere with the existing state establishments.<sup>116</sup> “Then, as now,” he wrote, “the present participle ‘respecting’ means ‘with reference to, [or] with regard to.’ The added words reveal a precise intention—to indicate that Congress lacked power with reference or regard to a religious establishment.”<sup>117</sup>

Professor Akhil Amar has similarly observed that states feared the federal government would break up established religions.<sup>118</sup> He notes that New Hampshire, for example, proposed an amendment to the Constitution stipulating that “Congress shall make no laws *touching* religion.”<sup>119</sup> And the federal Establishment Clause came to “most closely track[]” this proposal.<sup>120</sup>

Scholars have observed that there is “broad consensus that, whatever else it was originally understood to accomplish, the Establishment Clause was meant to prohibit the federal government from setting up any ‘establishment of religion’ that resembled the eighteenth century Church of England.”<sup>121</sup> Donald Drakeman suggests that that is also where the Founders’ understanding of the clause ends. In his view:

[T]he establishment clause represented, at most, broad, noncontroversial language on which a majority of the First Congress (and the ratifiers) could agree: As is evident from the limited records of the debates in the ratifying conventions and the First Congress, a few people expressed the concern that Congress might someday create a national religion, and, there being no support for such a federal ecclesiastical enterprise, it was prohibited by the establishment clause. Any further substantive content, or any more detailed understanding of what “establishment” meant, cannot be derived from the original legislative materials and, as we have seen, is not available from a study of how Americans of that era thought about church-state relationships.<sup>122</sup>

Drakeman suggests that Sylvester and Huntington’s remarks expressing fear that the amendment would harm religion may have arisen from a fear that the amendment would prohibit establishment in the states.<sup>123</sup> He also argues that the Livermore amendment was seeking to achieve Madison’s stated goal of prohibiting

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116. *Id.* at 630.

117. *Id.*

118. AKHIL AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 33 (1998).

119. *Id.*

120. *Id.*

121. ANDREW KOPPELMAN, *DEFENDING AMERICAN RELIGIOUS NEUTRALITY* 82 (2013); STEVEN D. SMITH, *FOREORDAINED FAILURE* 23 (1995); JOHN WITTE, JR. & JOEL A. NICHOLS, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 89 (3d ed. 2011); Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 388–89 (2002); Gedicks & Van Tassell, *supra* note 1, at 362 (citing AKHIL REED AMAR, *THE BILL OF RIGHTS* 32 (1998)); Kent Greenawalt, *Common Sense About Original and Subsequent Understandings of the Religion Clauses*, 8 U. PA. J. CONST. L. 479, 488, 491 (2006).

122. DRAKEMAN, *supra* note 1, at 262.

123. *Id.* at 205.

a national religion without causing unintended consequences such as those raised by Huntington.<sup>124</sup> Drakeman rejects other scholars' use of history to support strict separationism<sup>125</sup> or nonpreferentialism, concluding that "there is simply no convincing evidence that the First Congress came anywhere near giving any of these matters that level of thought."<sup>126</sup> Rather, he argues the Establishment Clause was a "milk and water amendment[]" meant to appease those who were concerned that the new national government would use its powers under the Necessary and Proper Clause to establish a national religion.<sup>127</sup> He concludes: "It was a proposal that made no changes." Rather, he states:

it seemed merely to confirm what some of the legislators (perhaps all of them) already believed: that the Congress was, in fact, powerless to create a national church, and its primary goal was to complete the process of constitution making and to let Congress get on with the task of governing.<sup>128</sup>

He further argues that there is little evidence that members of the founding era enjoyed widespread agreement on the proper relationship between religion and government.<sup>129</sup> Rejecting the various theories of the Establishment Clause presented by other scholars, he concludes that the "milk and water" Establishment Clause simply does not contain any recipe for the future of church-state relations.<sup>130</sup>

Each of the scholars' views presented here uses historical information to support a theory, but each reaches vastly different conclusions based on the same sources. As Muñoz wrote, "The more historical research devoted to the subject, it seems, the more contentious the debate becomes."<sup>131</sup>

### *C. The Establishment Clause in the Courts*

The Supreme Court's Establishment Clause jurisprudence presents an even less clear picture of the meaning of the clause than the scholarship discussed above.

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124. *Id.* at 207.

125. Philip Hamburger also argues that history should lead one to reject strict separationism. While he acknowledges that Madison's *Memorial and Remonstrance* favored strict separation, he argues that what Madison proposed and what Congress ultimately adopted did not. PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 105 (2002).

126. DRAKEMAN, *supra* note 1, at 212.

127. *Id.* at 213.

128. *Id.*

129. *Id.* at 255.

130. *Id.* at 262.

131. Muñoz, *supra* note 1, at 586.

It has been criticized by trial judges,<sup>132</sup> circuit judges,<sup>133</sup> and some of the justices themselves.<sup>134</sup>

In some of the earliest Establishment Clause cases, the Supreme Court purported to be attempting to divine the original meaning of the Establishment Clause. In the 1947 case of *Everson v. Board of Education*,<sup>135</sup> the Court addressed whether it was a violation of the Establishment Clause for a local school board to reimburse the costs of private school transportation where 96% of those schools were Catholic. Justice Black wrote a majority opinion that observed, “Whether this New Jersey law is one respecting an ‘establishment of religion’ requires an understanding of the meaning of that language.”<sup>136</sup> Justice Black then went on to briefly “review the background and environment of the period in which that constitutional language was fashioned and adopted.”<sup>137</sup> He described the “large proportion of the early settlers of this country” that “came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches.”<sup>138</sup> He described religious persecution of dissenting religious groups “by established sects,” including situations where “men and women had been fined, cast in jail, cruelly tortured, and killed,” as well as “efforts to force loyalty to

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132. *Am. Humanist Ass’n v. Md. National Capital Park & Planning Comm’n*, 147 F. Supp. 3d 373, 381 (D. Md. 2015) (“Establishment Clause jurisprudence is a law professor’s dream, and a trial judge’s nightmare.”).

133. *Smith v. Jefferson Cty. Bd. of Sch. Comm’rs*, 788 F.3d 580, 599 (6th Cir. 2015) (Batchelder, J., concurring in part) (“Often it is not entirely clear precisely what test the Court applies, or how the Court’s approach should be characterized.”); *Freethought Soc. of Greater Phila. v. Chester Cty.*, 334 F.3d 247, 256 (3d Cir. 2003) (process for determining which test applies is “somewhat murky”); *Bauchman v. W. High Sch.*, 132 F.3d 542, 551 (10th Cir. 1997) (struggling to glean “an appropriate standard” from the Supreme Court’s “muddled Establishment Clause precedent.”).

134. *Mount Soledad Mem’l Ass’n v. Trunk*, 567 U.S. 944, 944 (2012) (Alito, J., concurring in denial of certiorari) (“This Court’s Establishment Clause jurisprudence is undoubtedly in need of clarity”); *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 565 U.S. 994, 994 (2011) (Thomas, J., dissenting) (“Today the Court rejects an opportunity to provide clarity to an Establishment Clause jurisprudence in shambles.”); *McCreary Cty. V. ACLU of Ky.*, 545 U.S. 844, 890 (2005) (Scalia, J., dissenting) (“[A] majority of the Justices on the current Court . . . have, in separate opinions, repudiated the brain-spun ‘Lemon test’”); *Cty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part) (“[T]he endorsement test is flawed in its fundamentals and unworkable in practice.”); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 346 (1987) (O’Connor, J., concurring in judgment) (“[T]his action once again illustrates certain difficulties inherent in the Court’s use of the test articulated in *Lemon v. Kurtzman*.”); *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (calling attempts “to patch together the ‘blurred, indistinct, and variable barrier’ described in *Lemon v. Kurtzman*” a “sisyphian task.”).

135. 330 U.S. 1, 8 (1947) (incorporating the Establishment Clause against the states for the first time).

136. *Id.*

137. *Id.*

138. *Id.*

whatever religious group happened to be on top and in league with the government.”<sup>139</sup>

Justice Black observed how some of these practices were “transplanted” and began to “thrive in the soil of the new America,” including the erection of “religious establishments which all, whether believers or non-believers, would be required to support and attend.”<sup>140</sup> Justice Black discussed Madison’s *Memorial and Remonstrance*, and argued that the “imposition of taxes to pay ministers’ salaries and to build and maintain churches and church property aroused the [colonists’] indignation,” and it was “these feelings which found expression in the First Amendment.”<sup>141</sup> Based on this historical analysis, the Court described the meaning of the Establishment Clause as follows:

The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’<sup>142</sup>

While some of the conclusions Justice Black drew about the historical evidence of the Establishment Clause are questioned by some modern scholars, undoubtedly the historical context was the driving force of Justice Black’s opinion.

In its *Lemon v. Kurtzman* decision in 1971,<sup>143</sup> the Court distanced itself from Justice Black’s analysis in *Everson*, stating that candor compelled the acknowledgment that the Court “could only dimly perceive the lines of demarcation” in this area of constitutional law, where the “language of the Religion Clauses of the First Amendment is at best opaque.”<sup>144</sup> Instead of purporting to follow a textual or historical approach, the Court created a three-pronged test for Establishment Clause claims by focusing on “the cumulative criteria developed by the Court over many years”:<sup>145</sup> “First, the statute must have a secular legislative

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139. *Id.* at 8–9.

140. *Id.* at 9.

141. *Id.* at 11–12.

142. *Id.* at 15–16.

143. 403 U.S. 602 (1971).

144. *Id.* at 612.

145. *Id.*

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.’”<sup>146</sup>

Almost immediately after writing it, the Supreme Court said that the prongs of *Lemon* were “no more than helpful signposts.”<sup>147</sup> For over four decades, Establishment Clause jurisprudence has been dominated by applications of and retreats from the *Lemon* test. The Court often has considered Establishment Clause challenges but, without explanation, has not applied *Lemon*.<sup>148</sup> In other cases, the test has been used to remove religious acts and symbols from the public square.<sup>149</sup>

In the fractured *Van Orden v. Perry* decision in 2005, the plurality stated that *Lemon* is “not useful in dealing with . . . passive monument[s]” noting ominously that “[w]hatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence,”<sup>150</sup> it was not applicable in that case. Yet despite repeated criticism by scholars and Supreme Court justices,<sup>151</sup> the *Lemon* test continued to loom over Establishment Clause cases for years.

The Supreme Court further distanced itself from the *Lemon* test in *Town of Greece v. Galloway*.<sup>152</sup> The Court reversed the Second Circuit’s use of the *Lemon* test and held that “the Establishment Clause must be interpreted ‘by reference to historical practices and understandings.’”<sup>153</sup> “[T]he line we must draw between the permissible and the impermissible,” the Court held, “is one which accords with history and faithfully reflects the understanding of the Founding Fathers.”<sup>154</sup>

The courts of appeals’ response to the Supreme Court’s muddled Establishment Clause jurisprudence has been mixed. Some circuits have continued

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146. *Id.* (citations omitted).

147. *Hunt v. McNair*, 413 U.S. 734, 741 (1973).

148. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002); *Good News Club v. Milford Cent. School*, 533 U.S. 98, 102 (2001).

149. *See, e.g., McCreary Cty. v. ACLU*, 545 U.S. 844, 850–51 (2005).

150. 545 U.S. 677, 686 (2005).

151. *See, e.g., Cty. of Allegheny v. ACLU*, 492 U.S. 573, 655–57 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 346–49 (1987) (O’Connor, J., concurring in judgment); *Wallace v. Jaffree*, 472 U.S. 38, 107–13 (1985) (Rehnquist, J., dissenting); *Id.* at 90–91 (White, J., dissenting); *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 400 (1985) (White, J., dissenting); *Widmar v. Vincent*, 454 U.S. 263, 282 (1981) (White, J., dissenting); *N.Y. v. Cathedral Acad.*, 434 U.S. 125, 134–35 (1977) (White, J., dissenting); *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 768 (1976) (White, J., concurring in judgment); *Comm. for Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 820 (1973) (White, J., dissenting).

152. 572 U.S. 565 (2014).

153. *Id.* at 576 (quoting *Cty. of Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in judgment in part and dissenting in part)).

154. *Id.* at 577 (quoting *Sch. Dist. Of Abington Twp. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)) (alteration in original).

to apply *Lemon*,<sup>155</sup> while others have applied the framework set forth in *Van Orden* or the historical approach embraced by *Town of Greece*.<sup>156</sup> Even within circuits, opinions on the continued appropriateness of the *Lemon* test have been divided.<sup>157</sup> In two instances, district courts have written that they would have upheld religious displays under *Town of Greece*'s focus on historical analysis, but felt constrained by *Lemon* to declare them unconstitutional.<sup>158</sup>

In the Supreme Court's recent decision in *American Legion*, addressing the constitutionality of a peace cross dedicated as a war memorial, the Court again had a fractured decision—splintering into seven different opinions.<sup>159</sup> But the majority of the justices seem to be in favor of rejecting the *Lemon* test to some extent. Justice Alito, joined by Chief Justice Roberts and Justice Breyer, criticized *Lemon* in the context of symbol cases,<sup>160</sup> Justices Gorsuch and Kavanaugh argued that *Lemon* should no longer be good law,<sup>161</sup> and Justice Thomas favored expressly overruling *Lemon*.<sup>162</sup> However, the Court gave little guidance as to what precise test should replace *Lemon*. The majority opinion, joined by seven Justices, stated that “the Establishment Clause must be interpreted ‘by reference to historical practices and

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155. See, e.g., *Freedom from Religion Found., Inc. v. Concord Cmty. Schs.*, 885 F.3d 1038, 1045 n.1 (7th Cir. 2018) (“[w]e do not feel free to jettison [the *Lemon*] test altogether”); *Felix v. City of Bloomfield*, 841 F.3d 848, 856 (10th Cir. 2016); *ACLU of Ky. v. Mercer Cty.*, 432 F.3d 624, 636 (6th Cir. 2005).

156. See, e.g., *Doe v. United States*, 901 F.3d 1015, 1020 (8th Cir. 2018) (“In *Galloway*, the Supreme Court offered an unequivocal directive: ‘[T]he Establishment Clause must be interpreted by reference to historical practices and understandings.’”); *Red River Freethinkers v. City of Fargo*, 764 F.3d 948, 949 (8th Cir. 2014) (“A passive display of the Ten Commandments on public land is evaluated by the standard in *Van Orden v. Perry*, which found *Lemon v. Kurtzman* ‘not useful in dealing with [a] passive monument.’”); *Pelphrey v. Cobb Cty.*, 547 F.3d 1263, 1276–77 (11th Cir. 2008); *Card v. City of Everett*, 520 F.3d 1009, 1021 (9th Cir. 2008); *ACLU v. City of Plattsmouth*, 419 F.3d 772, 776, 778 n.8 (8th Cir. 2005).

157. See *Freedom from Religion Found.*, 885 F.3d at 1053 (Easterbrook, J., concurring); *Felix v. City of Bloomfield*, 847 F.3d 1214, 1215 (10th Cir. 2017) (Kelly, J., dissenting) (“This decision continues the error of our Establishment Clause cases. It does not align with the historical understanding of an ‘establishment of religion’ and thus with what the First Amendment actually prohibits.”); *Smith v. Jefferson Cty. Bd. of Sch. Comm’rs*, 788 F.3d 580, 596 (6th Cir. 2015) (Batchelder, J., concurring in part and concurring in the judgment) (“The endorsement test applies here, but only because we are constrained to follow it at the present time.”).

158. *Freedom From Religion Found., Inc. v. Cty. of Lehigh*, No. 16-4504, 2017 WL 4310247 (E.D. Pa. Sept. 28, 2017); *Kondrat’yev v. City of Pensacola*, No. 3:16-cv-195, 2017 WL 4334248, at 1 (N.D. Fla. June 19, 2017).

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

160. *Id.* at 2085 (longstanding religious displays have a “strong presumption of constitutionality”); *Id.* at 2084–85 (“A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion.”).

161. *Id.* at 2092 (Kavanaugh, J., concurring); *Id.* at 2098 (Gorsuch, J., concurring).

162. *Id.* at 2095 (Thomas, J., concurring).

understandings.”<sup>163</sup> But the Court left unanswered what the scope of those historical practices and understandings entailed.

In sum, neither scholars nor judges have been able to come to consensus on what founding-era history means for establishment. This Article presents an alternative method for uncovering more information relevant to this question: a rigorous, data-driven approach to the problem of original meaning for the Establishment Clause.

## II. CORPUS LINGUISTICS

The law is embodied in words, and words have meaning. Here, we focus on the original public meaning of the Establishment Clause.<sup>164</sup> Ascertaining the original public meaning of the Establishment Clause requires determining what it would have meant “in context, to ordinary readers, speakers, and writers of the English language, reading a document of this type, at the time adopted.”<sup>165</sup> This requires determining the ways in which a “word or phrase is most likely implicated in a given linguistic context.”<sup>166</sup>

It will not do to replace law-office history with what James Cleith Phillips and Sara White dub “law-office linguistics.”<sup>167</sup> Too often, scholars rely on just a few founding era sources to support their position.<sup>168</sup> But small, handpicked samples of how the drafters and adopters of the First Amendment or a few other founding-era elites spoke of religious establishment provide an incomplete picture of how the public at large would have understood the term, and indeed, play into the hands of originalism’s critics. Originalists must do better than cherry-picking through the annals of history. What we need is careful and accurate “data-driven originalism.”<sup>169</sup>

The tendency to base interpretation entirely on founding-era dictionaries is likewise flawed. Founding-era dictionaries were generally the work of a single

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163. *Id.* at 2087.

164. For more detailed discussion of original public meaning originalism and semantic meaning, see generally, for example, Randy E. Barnett, *The Gravitational Force of Originalism*, 82 *FORDHAM L. REV.* 411 (2013); Lawrence B. Solum, *Semantic Originalism* (Univ. of Ill. Coll. of Law Ill. Pub. Law & Legal Theory Research Papers Series, Paper No. 07-24, 2008), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244); Keith Whittington, *The New Originalism*, 2 *GEO. J. L. & PUB. POL’Y* 599 (2004); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *LOY. L. REV.* 611 (1999).

165. See Phillips & White, *supra* note 5, at 186 (citing Vasam Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 *GEO. L. J.* 1113, 1118 (2003)); see also Richard Kay, *Original Intention and Public Meaning*, 103 *Nw. U. L. REV.* 703, 706–07 (2009) (distinguishing original public meaning from original intent in constitutional interpretation).

166. Lee & Mouritsen, *supra* note 5, at 795.

167. Phillips & White, *supra* note 5, at 187.

168. See *id.*

169. Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 *U. PA. L. REV.* 261, 261–62 (2019).

author,<sup>170</sup> and human beings, particularly when acting without the input of another person, “bring their prejudices and biases into the dictionaries they make.”<sup>171</sup> Dictionaries therefore offer a poor reflection of the public understanding of language in the late eighteenth century. Examining multiple founding-era dictionaries does little to ameliorate the problem because the authors of such dictionaries often plagiarized from each other.<sup>172</sup> Taken at face value, these dictionaries create a false sense of consensus when unwary readers see similar definitions in multiple dictionaries and take that as decisive evidence that one sense of a word is the correct one.<sup>173</sup> And because of their plagiarism of earlier works, founding-era dictionaries often fail to capture *linguistic drift*—changes in meaning over time.<sup>174</sup> The problem of linguistic drift is exacerbated by Webster and Johnson’s reliance in their definitions on usage of words in significant but archaic works, such as the King James Bible or the works of William Shakespeare.<sup>175</sup> And while the dictionaries relied on by originalists are, in that sense, too old, they are also too new. Webster’s *Dictionary of the English Language* was published in 1828, and may have been subject to linguistic drift in the 40 years between the Constitution’s ratification and its publication.<sup>176</sup>

Founding-era dictionaries are also bad at capturing common meaning because they focused on providing prescriptive definitions of what words should mean in proper English, rather than how the public used them in common parlance.<sup>177</sup> And given the difficulty of creating dictionaries purely as a physical matter, authors tended to “lump” multiple definitions together into one broad sense of a word, rather than writing discrete definitions to capture variations in meaning.<sup>178</sup> This is particularly problematic when a term has multiple senses, an attribute linguists call *polysemy*.<sup>179</sup>

Finally, dictionaries are particularly weak tools of interpretation where, as here, we are trying to ascertain the meaning of phrases and clauses.<sup>180</sup> As Justice Thomas R. Lee and James Cleith Phillips have noted, “[Because] the human brain understands words not in isolation but in their broader semantic (and pragmatic) context, we may often miss the import of a given constitutional term if we just separately look up its component words in the dictionary.”<sup>181</sup> This is the problem of compositionality. Phrases are not always (though they are sometimes) mere sums of

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170. See *id.* at 285 (citing JONATHAN GREEN, CHASING THE SUN: DICTIONARY MAKERS AND THE DICTIONARIES THEY MADE 4 (1997)).

171. *Id.*

172. See *id.* at 284–85.

173. Phillips & White, *supra* note 5, at 191.

174. *Id.*

175. *Id.*

176. Lee & Phillips, *supra* note 169, at 10.

177. *Id.* at 326.

178. *Id.* at 286; see also *infra* note 295.

179. Lee & Phillips, *supra* note 169, at 284.

180. See Phillips & White, *supra* note 5, at 188.

181. Lee & Phillips, *supra* note 169, at 283.

their parts.<sup>182</sup> One cannot necessarily determine the meaning of *establishment of religion* by simply looking up the founding-era definitions of *establishment*, *of*, and *religion*, just as one cannot determine the communicative content of the phrases *at all* or *for good* through the amalgamation of the meaning of the words in those phrases.<sup>183</sup> Relatedly, the *idiom principle* observes that “a language user has available to him or her a large number of semi-preconstructed phrases that constitute single choices [in communication], even though they might appear analyzable into segments.”<sup>184</sup> Common examples are *of course* or *in fact*. The meaning of these idioms cannot be correctly obtained by simply looking up their independent parts in the dictionary.<sup>185</sup>

#### A. Why Corpus Linguistics?

Lee and Phillips have remarked, “Corpus linguistics is the study of language (linguistics) through systematic analysis of data derived from large databases of naturally occurring language.”<sup>186</sup> It offers a “more rigorous, relevant, transparent, and accurate methodology than scholars have so far employed”<sup>187</sup> in analyzing the Establishment Clause. By analyzing how language is actually used, we gain a clearer picture of ordinary meaning.<sup>188</sup> Although corpus linguistics has only begun to emerge as a tool of constitutional interpretation in recent years, its methods are similar to those that lawyers and judges engage in when “sifting through a body (or corpus) of precedent.”<sup>189</sup> With “a little background and training in the underlying methodology,”<sup>190</sup> lawyers, judges, and others who seek to understand original meaning can employ this tool. Indeed, Justice Thomas recently employed this tool in the Court’s 2017 term, an important nod to the growing relevance of corpus linguistics in constitutional interpretation.<sup>191</sup> And Judge Thapar on the Sixth Circuit employed corpus linguistics just months ago.<sup>192</sup>

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182. Phillips & White, *supra* note 5, at 188. (“[W]hile we do have word combinations that are the sum of their parts (*apple pie* is a pie made of apples), there are many exceptions where ‘the combination of words has a meaning of its own that is a reliable amalgamation of the components at all: *at all, for good*.”); *see also* Lee & Phillips, *supra* note 169, at 283.

183. Lee & Phillips, *supra* note 169, at 283–84.

184. Phillips & White, *supra* note 5, at 188 (quoting J.M. Sinclair, *Collocation: A Progress Report*, in *ESSAYS IN HONOUR OF M. HALLIDAY* 319–31 (R. Steele and T. Threadgoald ed., 1987)).

185. *Id.*

186. Lee & Phillips, *supra* note 169, at 289.

187. Phillips & White, *supra* note 5, at 184.

188. *See* Lee & Phillips, *supra* note 169, at 289.

189. *See* Phillips & White, *supra* note 5, at 197.

190. Lee & Mouritsen, *supra* note 5, at 866.

191. *See* *Carpenter v. United States*, 585 U.S. 1, 7 n.4 (2018) (Thomas, J., dissenting).

192. *Wilson v. Safelite Grp., Inc.*, 930 F.3d 429, 439 (6th Cir. 2019) (Thapar, J., concurring) (“Because the text . . . is clear, we should go no further. And the text is clear, as many tried-and-true tools of interpretation confirm. But so does one more: corpus linguistics. Courts should consider adding this tool to their belts.”).

A “key goal of corpus linguistics is to aim for replicability of results,”<sup>193</sup> which provides greater generalizability and validity than other methods constitutional scholars have employed.<sup>194</sup> Corpora are available to anyone with Internet access, unlike founding-era dictionaries and many historical sources scholars have relied on.<sup>195</sup> As Judge Thapar explained, “corpus linguistics . . . draws on the common knowledge of the lay person by showing us the ordinary uses of words in our common language. How does it work? Corpus linguistics allows lawyers to use a searchable database to find specific examples of how a word was used at any given time.”<sup>196</sup>

### *B. Explanation of Corpora*

Corpora can be either general, “aimed at representing a broad speech community, like an entire country,”<sup>197</sup> or special, “narrowed to specific types of speech or sub-parts of a language, such as a dialect.”<sup>198</sup> They can also be either dynamic, “continuously updated to track ongoing developments in language usage,”<sup>199</sup> or static, such as a historical corpus which “captures language usage from a particular time period.”<sup>200</sup>

### *C. Tools of Corpus Linguistics*

Corpus linguistics offers several tools for ascertaining ordinary meaning. One is *frequency*.<sup>201</sup> Examining how often a word appears over time and across different genres and registers can provide insight into meaning.<sup>202</sup> “By tabulating the relative frequencies of different senses of a word or phrase within a corpus, a linguist can do what a dictionary can’t—discern the more common sense of a given term in a given linguistic context.”<sup>203</sup> This requires “coding,” or classifying search results.<sup>204</sup> “The first step is to perform a search in the corpus to identify each instance (or ‘hit’) of the word or phrase in question,”<sup>205</sup> and then to code each hit or a random sample of results. This allows us to determine empirically whether a contested sense of a given word is possible, common, or the most common sense of that word in a given context.<sup>206</sup>

We can also use *concordance lines*—each of which is a listing of each occurrence of the sought word or pattern presented with the words surrounding it—

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193. Phillips & White, *supra* note 5, at 198 (quoting TONY McENERY & ANDREW HARDIE, CORPUS LINGUISTICS: METHOD, THEORY AND PRACTICE 66 (2011)).

194. See Lee & Phillips, *supra* note 169, at 290.

195. *Id.* at 292.

196. *Wilson*, 930 F.3d at 440 (Thapar, J., concurring).

197. Lee & Phillips, *supra* note 169, at 290.

198. Phillips & White, *supra* note 5, at 198.

199. Lee & Phillips, *supra* note 169, at 290.

200. *Id.*

201. *Id.*

202. *Id.* at 290–91; Phillips & White, *supra* note 5, at 199–200.

203. Lee & Phillips, *supra* note 169, at 291.

204. *Id.*

205. *Id.*

206. Lee & Mouritsen, *supra* note 5, at 831–32.

to review many examples of a term or phrase in naturally occurring language. This permits us to look at a broad, representative sample with more information than is found in dictionaries.<sup>207</sup>

Another tool is collocation, “which is the tendency of words to be biased in the way they co-occur.”<sup>208</sup> A collocate is “a word commonly used in association with another.”<sup>209</sup> Lawyers and judges have long accepted the principle that words can shed light on the meaning of those they are commonly used with, as in the *noscitur a sociis* canon.<sup>210</sup>

### III. DATA AND METHODOLOGY

In order to use corpus linguistics to explore how Americans in the late 1700s would have understood the First Amendment phrase *establishment of religion*, we needed to first identify the relevant corpus that adequately represents American English usage. We needed to then determine how, within that corpus, we would hone in on data most likely to be using variations of *establish* within a context at the intersection of both religious and government functions. We also needed to determine how to decrease false positives involving any usage of iterations of the word *establish* outside of the church and state context. Finally, we needed to determine how we would code (or classify) the search results from our corpora.

#### A. The COFEA and COEME Corpora

To explore how Americans in the late 1700s used language, and thus what they might have understood the Establishment Clause to mean at the time, we primarily used Brigham Young University’s J. Reuben Clark Law School’s Corpus of Founding-Era American English (“COFEA”).<sup>211</sup> This corpus covers 1760–1799, starting with the reign of King George III and ending with the death of George Washington.<sup>212</sup> Its documents are drawn from the writings of ordinary people at the time of the founding, legal sources, and the writings of the Founders themselves.<sup>213</sup> Those writings include letters, diaries, newspapers, nonfiction books, fiction, sermons, speeches, debates, legal cases, and other legal materials.<sup>214</sup> COFEA is larger and more representative of the writings of ordinary speakers of founding-era English than other corpora,<sup>215</sup> making it a valuable tool for ascertaining original

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207. Lee & Phillips, *supra* note 169, at 290.

208. Phillips & White, *supra* note 5, at 200 (quoting SUSAN HUNSTON, *CORPORA IN APPLIED LINGUISTICS* 68 (2002)).

209. Lee & Phillips, *supra* note 169, at 290.

210. *Id.* at 291–92.

211. *Corpus of Founding Era American English (COFEA)*, BYU LAW CORPUS LINGUISTICS, <http://lawcorpus.byu.edu/cofea> (last visited Dec. 21, 2018).

212. *Id.*

213. *Id.*

214. *Id.*

215. While other currently developing corpora contain debates and legislative histories surrounding the founding era, they comprise only around 2,000 texts and 2.5 million words. COFEA, on the other hand, contains a wider variety of sources beyond the legal realm and a much larger sample to draw from (126,393 texts and greater than 133 million words). *BYU LAW AND CORPUS LINGUISTICS*, <http://lawcorpus.byu.edu> (last visited Mar. 1, 2019).

public meaning. Furthermore, COFEA is, in a sense, “double-blind.” Because the majority of the documents in COFEA are drawn from every-day writings, the authors of the documents were not writing to understand the meaning of the Constitution. Thus, their writings are not necessarily skewed to a particular desired outcome. And documents were not included in COFEA with particular constitutional questions in mind.<sup>216</sup> However, COFEA is not without its limitations. It is representative mostly of elite white male voices of the founding era, and it does not have enough samples of some genres of the English language, notably newspapers.<sup>217</sup> But, “it’s a vast improvement over current sources, and the best tool we currently have.”<sup>218</sup>

For one search of particular importance (discussed further below), we also used the Corpus of Early Modern English (“COEME”). COEME includes texts from 1475–1800 that were included in the Evans Bibliography, the Early English Books Online, and Eighteenth Century Collections Online.<sup>219</sup> While COEME is not limited to founding-era texts (as COFEA is), it helps shed light on one particularly important phrase and provided additional insight into the meaning of establishment at the time of the founding.

### ***B. Searching for the Phrase “Establishment of Religion”***

The most relevant phrase for understanding the original public meaning of the Establishment Clause is arguably *establishment of religion*, the phrase that now appears in the First Amendment. As discussed above, phrases are not always (though they are sometimes) mere sums of their parts.<sup>220</sup> If *establishment of religion* is a term of art,<sup>221</sup> one cannot necessarily determine the meaning of *establishment of religion* by simply looking up the founding-era definitions of *establishment*, *of*, and *religion*, just as one cannot determine the communicative content of the phrases *at all* or *for good* through the amalgamation of the meaning of the words in those phrases.<sup>222</sup>

Thus, one of the most straightforward searches we ran was to look for *establishment of religion* in COFEA. As discussed below, since the search results in COFEA were limited, we looked for this same phrase in COEME. Many of these search results were simply quoting the First Amendment without providing additional information. Nevertheless, some of these results provided important and

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216. Lee & Phillips, *supra* note 169, at 295.

217. *Id.* at 294–95.

218. *Id.* at 295.

219. In total, COEME contains over 40,000 texts and 1.1 billion words. BYU LAW AND CORPUS LINGUISTICS, <http://lawcorpus.byu.edu> (last visited Mar. 1, 2019).

220. Phillips & White, *supra* note 5, at 188 (“[W]hile we do have word combinations that are the sum of their parts (*apple pie* is a pie made of apples), there are many exceptions where ‘the combination of words has a meaning of its own that is a reliable amalgamation of the components at all: *at all, for good.*’”); *Id.* at 283.

221. Of course, it may not be a term of art. If the concept was referred to in numerous way linguistically, such as *established church*, *state church*, *religious establishment*, and so forth, then it is unlikely that *establishment of religion* has any unique meaning.

222. Lee & Phillips, *supra* note 169, at 283–84.

illuminating examples. But in order to look at a broader, more comprehensive data set, we needed to broaden our search.

### C. Identifying Collocate Search Terms

The root word *establish* appeared 268.26 times per million within the COFEA database at the time of our search in September 2018.<sup>223</sup> We could have simply taken a random sample of all uses of *establish* standing alone and assessed the ways in which it was being used from that randomized data set. But this method would have involved a significant limitation. Specifically, such results would likely involve variations of *establish* outside the type of usage at the intersection of church and state in the constitutional Establishment Clause context. For instance, such a randomized search could include results discussing the establishment of a new law, or a new establishment that was built in a town. We judged that these sorts of uses were likely to be largely tangential to the pressing constitutional question of what the Founders meant when they referred to “an establishment of religion.”<sup>224</sup>

Thus, for a second method we used collocation, or patterns of word association, to see what this might reveal. As discussed above, a collocate is “a word commonly used in association with another.”<sup>225</sup> For the process of developing our search results, we opted to use a corpus-driven, or data-driven, approach to developing our collocate search terms, rather than a hypothesis-driven method.<sup>226</sup> A hypothesis-driven method would have involved us guessing at potentially five to ten words we thought would likely be used within a certain proximity and statistical frequency of the variations of *establish*, and then only searching for those words. That would likely have been a more concise project and smaller data set. But such an approach is subject to criticisms of potentially skewed or biased original search terms based on the hypothesis. Additionally, it can omit relevant data that one would not have thought to include in a hypothesis but would nonetheless be interested to review.

Through a corpus-driven approach, we instead chose to focus on what words the COFEA corpus showed us were being used within a statistically relevant proximity and frequency of various iterations of *establish*. In technical terms, this means we pulled up all collocates of the root word *establish* with a mutual

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223. Note that since September 2018, a number of additional documents have been added to COFEA, so running this search now likely results in an even higher number.

224. U.S. CONST. amend. I.

225. Lee & Phillips, *supra* note 169, at 291.

226. For examples of other linguistic articles using this sort of corpus-driven approach rather than a hypothesis-driven approach, see, for example, James C. Phillips & Jesse Egbert, *Advancing Law and Corpus Linguistics: Importing Principles and Practices from Survey and Content-Analysis Methodologies to Improve Corpus Design and Analysis*, 2017 BYU L. REV. 1589 (2018); Paul Baker et. al, *A Useful Methodological Synergy? Combining Critical Discourse Analysis and Corpus Linguistics to Examine Discourses of Refugees and Asylum Seekers in the UK Press*, 19 DISCOURSE & SOC'Y 273 (2008); Costas Gabrielatos & Paul Baker, *Fleeing, Sneaking, Flooding: A Corpus Analysis of Discursive Constructions of Refugees and Asylum Seekers in the UK Press, 1996-2005*, 36 J. OF ENG. LINGUISTICS 5 (Mar. 2008).

information score<sup>227</sup> greater than three (meaning their occurrence within six words to the right or left of *establish* was statistically significant in COFEA).

We also manually included a few words to search within proximity of the root word *establish* where these words have become relevant to some modern debates about the meaning of *establishment*. Specifically, we included *church*, *faith*, *Christian*, and *endorse*.

#### ***D. Coding Methodology***

To meaningfully code the relevant concordance lines, we needed to be able to identify potentially relevant categories of characteristics related to an *establishment* in a religious context. As discussed above, most scholars agree that at the very least, a religious establishment refers to a situation involving legal or official designation of a specific church or faith by a nation, state, colony, or locality, or an official or legally designated established church in the abstract.<sup>228</sup> Thus, we wanted to make sure to capture situations in which this characteristic was applicable.<sup>229</sup>

But as other scholars argue, additional characteristics are also relevant to what was understood historically as an *establishment*. For this reason, we drew heavily from the six historical features characterizing founding-era establishments identified by McConnell for our own coding categories. These categories are: (1) state control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) some forms of public financial support of churches; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restrictions of political participation to members of the established church.<sup>230</sup> However, we also left available “other categories,” and we remained open to new categories of characteristics revealing themselves from the data. One instance where this occurred involved “government control of liturgy, leadership, and doctrine.” We originally had this listed as a subcategory of a form of government coercion. But we noticed in some search results that some forms of government interference with the established church seemed to be welcomed by the church (or at least some church leaders or authors writing about this). When James Madison was Secretary of State, for instance, the Catholic Church solicited the Executive’s opinion on who should be appointed to run church affairs in a new territory.<sup>231</sup> Madison responded that the selection of church “functionaries was an

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227. See generally *BYU CORPUS MUTUAL INFORMATION*, <http://corpus.byu.edu/mutualinformation.asp> (last visited Mar. 1, 2019) (providing a more thorough explanation of how mutual information scores are calculated).

228. *Supra* Section I.B.

229. Preliminary review of data indicated that this characteristic was often discussed in the context of specific jurisdictions, such as England, the American colonies, and in Rome. We noted those jurisdictions as subcategories.

230. *Establishment and Disestablishment*, *supra* note 1, at 2131. Some judges have also begun to rely on these characteristics in their Establishment Clause analysis. See, e.g., *Felix v. City of Bloomfield*, 847 F.3d 1214, 1221 (10th Cir. 2017).

231. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 184 (2012).

‘entirely ecclesiastical’ matter left to the Church’s own judgment.”<sup>232</sup> Thus, we moved government interference with church affairs to its own category. Additionally, government interference with church affairs manifests itself in other sorts of Establishment Clause cases, such as church property disputes. We thus included these as subcategories within a larger category focused on interference with church affairs.

The data also revealed new subcategories for individual coercion beyond those identified by McConnell. These included things like punishment or persecution of dissenters from an established religion. And we left open the possibility that our data would reveal other forms of individual coercion as well.

We also included other categories of characteristics relevant to current academic debates about the meaning of establishment, including the third-party harm theory discussed above. And we included categories for other ways in which courts have treated establishment. Because of the Supreme Court’s recent decision in *American Legion*,<sup>233</sup> we looked specifically to see what the data revealed about the Establishment Clause’s relevance to government involvement with religious symbols.

Finally, we suspected that there would be discussions of iterations of *establish* that were used in a purely ecclesiastic sense (e.g., “the church establishes its religious doctrines”), and so we created a category to weed out those essentially irrelevant false positives.

Our final table of possible categories was as follows:

Main Category	Subcategory
1. Legal or official designation of a specific church or faith by a nation, state, or colony	a. England
	b. Rome
	c. Colonies
	d. Other named specific jurisdiction
	e. In the abstract
2. Government interference with church affairs	a. Government control of liturgy, leadership, and doctrine
	b. Church property disputes
	c. Other forms of government interference with church functions
3. Government coercion regarding individual religious practices	a. Punishment or persecution of dissenters from established religion

232. *Id.*

233. 139 S. Ct. 2067 (2019).

	b. Mandatory participation in church functions/ceremonies
	c. Prohibitions on religious worship in certain denominations
	d. Mandatory church tithe or taxes to participate in religious functions
	e. Other forms of individual coercion
4. Limitation of political participation to members of state church (includes religious tests for political office, or barring certain groups from public office)	
	a. Land grant
	b. Taxes levied specifically to give to churches
5. Public financial support to religious organizations	c. Tax exemptions
	d. Government directly paying salary or benefits to clergy
	e. Other forms of public support
	a. Social welfare
	b. Education
6. Use of state church for civil functions	c. Marriages and public records
	d. Prosecution of moral offenses
	e. Other civil functions
	a. Government involvement with religious symbols.
	b. Cost shifting—equating shifting costs or harms to nonreligious (or other religious groups) to benefit the religious exercise of some religious groups.
7. Other modern Establishment Clause theories or Supreme Court cases	c. Religious exemption (religious people or groups don't have to comply with a law that applies to others)
	d. Any prayer or religious practices/teaching in school
	e. Sunday closing laws

	f. Preferential treatment of religion in general over nonreligion
8. Purely ecclesiastic (no involvement of laws, government, etc. with establishment)	
9. Other	

What is noteworthy about our coding method is that one search result might indicate multiple coextensive characteristics of an establishment. We wanted our results to accurately reflect the likely coextensive characteristics involved in an *establishment*, and artificially choosing just one predominant characteristic might interfere with such findings. The purpose of identifying categories of establishments was thus not to determine the one exclusive or predominant sense of the word *establish* or its various iterations. Rather, following approaches incorporated by other linguists,<sup>234</sup> our method here was to identify the scope of characteristics linguistically relevant to the term *establish*, and given their frequency, what sorts of characteristics were common or even possible.<sup>235</sup>

Coding of characteristics in the larger religious collocate dataset was performed by a team of nine different linguistic interns, supervised by one of the Authors of this Article. Coding involved bi-weekly meetings to discuss findings and address questions, so as to enhance uniformity in coding. One of the Authors, Brady Earley, also performed a random sample quality check to ensure that his coding matched the intern coding at a rate of nearly 90% for each of the nine main categories, as well as all of the subcategories for category 7.<sup>236</sup>

#### IV. RESULTS

We discuss our results starting from the more specific findings related to the phrase *establishment of religion* in both COFEA and COEME. Those results, while highly relevant, were also quite limited in number. Thus, we proceed to discussing statistically significant collocates with any iteration of the word *establish* that had some sort of religious connotation. These collocate results provided a much larger data set, involving over 1,200 search results that we coded.

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234. See generally Douglas Biber, Jesse Egbert & Mark Davies, *Exploring the Composition of the Searchable Web: A Corpus-based Taxonomy of Web Registers*, 10 CORPORA 11 (2015).

235. Lee & Phillips, *supra* note 169, at 290–92; Phillips & White, *supra* note 5, at 199–200.

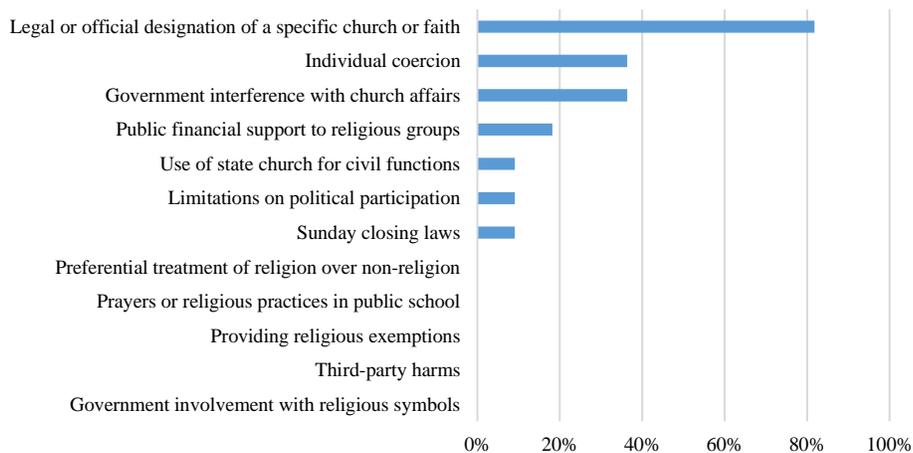
236. The quality check as a whole took a random sample of how often Brady’s blind coding agreed with the initial coding done by the intern through comparing agreeance rates. Broad category agreeance (how often they coded the same broad category) was 89%. Subcategory agreeance (how often they coded the same subcategory) was 95%.

### A. “Establishment of Religion” in COFEA

When we searched for the phrase *establishment of religion* anywhere in COFEA, the database only returned 33 search results.<sup>237</sup> Of those, 21 were simply quoting the phrase in the First Amendment without providing any additional information on the phrase, or providing a duplicate search result.<sup>238</sup> One was discussing establishment in the purely ecclesiastic sense and was thus a false hit. This left only 11 results providing some insights about *establishment of religion* as a phrase outside a constitutional quote in the COFEA database. Nevertheless, these 11 results provide some interesting insights and examples, particularly given the importance of this phrase.

Of the 11 relevant results, 9 of them use *establishment of religion* in the context of a legal or official designation of a specific church or faith by a particular nation or colony. This was the most common characteristic, though it was often discussed in the context of other characteristics. Beyond a legal recognition of an official church or faith, some of these search results address other characteristics that were relevant to an establishment. And a number of other characteristics in our key returned no results. The results are displayed in the chart below.

"Establishment of Religion" Results in COFEA



237. See search results for “Establishment of Religion,” *Corpus of Founding Era American English (COFEA)*, BYU LAW CORPUS LINGUISTICS, <https://lawcorpus.byu.edu/cofea/concordances;q=establishment%2520of%2520religion/search> (last visited Sept. 12, 2019). Note that the amount of results in the database have increased since this search was originally run in September 2018, because more documents have since been added to the database. An appendix of the September 2018 results is on file with the authors.

238. Some of these were also duplicates.

It is worth taking a close look at a few of the most salient examples discussing establishment in the COFEA database. One discussion of establishment by Henry Caner in 1763, for example, describes the sort of legal authority necessary for a colonial establishment of religion contrary to the established Church of England.<sup>239</sup> Caner determines that the Massachusetts charter lacks the authority to legally or officially designate its own established religion, and thus the colony must default to the established Church of England in that jurisdiction:

[T]he Church of England is beyond controversy established in all his Majesty's colonies and plantations . . . [S]uch an establishment is not to be collected from any powers granted in the Massachusetts charter, nor consequently in the laws founded upon that charter. And since no special power or privilege of this kind was conferred by the charter, it is evident that the state of religion in respect to establishments must and does in fact rest upon those acts of parliament which relate to this subject, and especially as they directly include all his Majesty's dominions.<sup>240</sup>

Some other examples describe this official sort of establishment, both in the abstract, as well as in reference to a particular jurisdiction. In a particularly insightful 1791 passage, John Leland discusses how an establishment arises when “a conclave of bishops, or a convocation of clergy . . . frame a system out of the bible, and persuade the legislature to legalize it.”<sup>241</sup> Leland asks, “What were, and still are the causes that ever there should be a state establishment of religion in any empire, kingdom, or state?”<sup>242</sup> He then goes on to explain that an “over-fondness for a particular system or sect . . . gave rise to the first human establishment of religion, by Constantine the Great.”<sup>243</sup> Because Constantine was “converted to the christian system, he established it in the Roman empire.”<sup>244</sup>

John Leland's passage also provides a helpful discussion of many characteristics of an establishment in the context of the first Roman establishment by Constantine. Starting with individual coercion, Leland argues that establishments were desirable because they channeled a “love of importance” by allowing men “to

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239. Henry J. Caner, *A Candid Examination of Dr. Mayhew's Observations on the Charter and Conduct of the Society for the Propagation of the Gospel in Foreign Parts* 38 (1763) <https://quod.lib.umich.edu/cgi/t/text/text-idx?c=evans;cc=evans;q1=N07328;rgn=main;view=text;idno=N07328.0001.001> (COFEA record: [https://lawcorpus.byu.edu/cofea/concordances;q=establishments;collocate=respect;left=6;right=6;limit=500/search/\(context:evans.N07328/14074\)](https://lawcorpus.byu.edu/cofea/concordances;q=establishments;collocate=respect;left=6;right=6;limit=500/search/(context:evans.N07328/14074)))).

240. *Id.*

241. JOHN LELAND, *THE RIGHTS OF CONSCIENCE INALIENABLE, AND THEREFORE RELIGIOUS OPINIONS NOT COGNIZABLE BY LAW* 16, (New-London, T. Green & Son 1791) <https://quod.lib.umich.edu/cgi/t/text/text-idx?c=evans;cc=evans;q1=N18125;rgn=main;view=text;idno=N18125.0001.001> (COFEA record: [https://lawcorpus.byu.edu/cofea/concordances;q=convocation;collocate=conclave;left=6;right=6;limit=500/search/\(context:evans.N18125/4102\)](https://lawcorpus.byu.edu/cofea/concordances;q=convocation;collocate=conclave;left=6;right=6;limit=500/search/(context:evans.N18125/4102)))).

242. *Id.* at 12.

243. *Id.*

244. *Id.*

dictate to others” and “have the halter around the necks of others, to hang them at pleasure.”<sup>245</sup> He explains that Constantine, for example, “compelled the pagans to submit, and banished the christian hereticks.”<sup>246</sup> Leland also touches on the use of public funds to support religion, noting that Constantine “built fine chapels at public expence, and forced large stipends for the preachers.”<sup>247</sup> He notes the way that Constantine’s interference with church affairs was motivated by “love to the christian religion,” and yet “his love operated inadvertently; for he did the christian church more harm than all the persecuting emperors ever did,” essentially spewing “poison . . . into the churches” and making the “christian religion . . . a stirrup to mount the steed of popularity, wealth and ambition.”<sup>248</sup> Thus, even where interference with church affairs is not coercive, and may even be done with good intentions by government officials, Leland observes that the established church was still harmed by such an interference.

Regarding more coercive practices, in a 1768 collection of tracts of newspapers that published *The American Whig*, one passage states that “every establishment of religion, if such establishments are themselves justifiable, ought to be maintained . . . by the infliction of temporal punishments on transgressors of the law.”<sup>249</sup> This passage goes on to note that “establishing English episcopacy in America” must be accomplished “by enforcing it, (for it otherwise cannot be an establishment) by pains and penalties.”<sup>250</sup>

Regarding government control of liturgy or ceremonies, George Coade wrote in a 1773 letter to a clergyman, “the establishing a national faith and religion, and enforcing the same by civil penalties, does not appear to be reasonable and just, or quite consistent with the nature and end of civil society.”<sup>251</sup> Coade goes on to say, “Religion, I mean true and real religion, in its own nature is incapable of being established by law.”<sup>252</sup> He noted that the “different modes and ceremonies of worship indeed may be established by the magistrate, but this is not the

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 12–13.

249. *The American Whig*, No. XV, PARKER’S NEW YORK GAZETTE, June 20, 1768, reprinted in A COLLECTION OF TRACTS FROM THE LATE NEWS PAPERS, &C. 243 (New York, John Holt 1768), <https://quod.lib.umich.edu/cgi/t/text/text-idx?c=evans;cc=evans;q1=N08490;rgn=main;view=text;idno=N08490.0001.001>, (COFEA record: [https://lawcorpus.byu.edu/cofea/concordances;q=establishments;collocate=justifiable;left=6;right=6;limit=500/search/\(context:evans.N08490/128440\)](https://lawcorpus.byu.edu/cofea/concordances;q=establishments;collocate=justifiable;left=6;right=6;limit=500/search/(context:evans.N08490/128440))).

250. *Id.*

251. GEORGE COADE, JR., A LETTER TO A CLERGYMAN, RELATING TO HIS SERMON ON THE 30<sup>TH</sup> OF JANUARY 60 (4<sup>th</sup> ed. 1773), <https://quod.lib.umich.edu/cgi/t/text/text-idx?c=evans;cc=evans;q1=N10016;rgn=main;view=text;idno=N10016.0001.001> (COFEA record: [https://lawcorpus.byu.edu/cofea/concordances;q=establishing;collocate=national;left=6;right=6;limit=500/search/\(context:evans.N10016/24597\)](https://lawcorpus.byu.edu/cofea/concordances;q=establishing;collocate=national;left=6;right=6;limit=500/search/(context:evans.N10016/24597))).

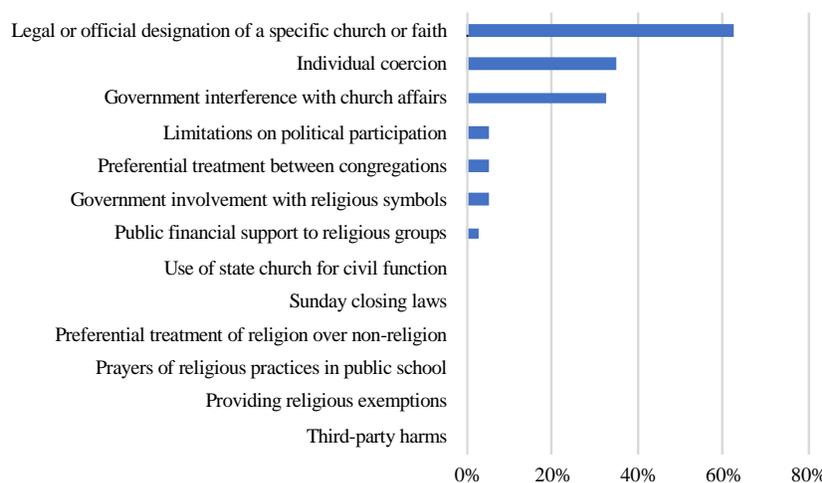
252. *Id.*

establishment of religion; these modes and ceremonies are, at best, only forms of godliness, and are often destitute of real devotion, reverence and love of God.”<sup>253</sup>

### B. “Establishment of Religion” in COEME

When we searched for the phrase *establishment of religion* anywhere in COEME, the database returned 88 search results.<sup>254</sup> But once we removed any duplicates, purely ecclesiastic false hits, or results with insufficient information to code, we were left with only 40 relevant search results providing some insights about *establishment of religion*. The results are displayed in the chart below.

“Establishment of Religion” Results in COEME



One passage by Edward Burroughs in 1659 provides a good example of government interference associated with establishment that was welcomed by the established church in order to create obstacles for other religious sects. He states:

And thus hath it been for Generations, and in this Nation in particular; and many Sects have risen besides the Papists and the Protestants, and all these Sects have risen one out of another, and appeared divers one from the other; and each one of them have sought to the Powers of the Earth for settlement and defence; and that the other that were contrary to them, and of another appearance might be stopt and limited; and this hath been done by these Teachers and Professors under the account of establishment of Religion; and they have begged

253. *Id.*

254. See Search Results for “Establishment of Religion,” *Corpus of Early Modern English (COEME)*, BYU LAW & CORPUS LINGUISTICS, <https://law.corpus.byu.edu/coeme/concordances;q=establishment%2520of%2520religion/search> (last visited Sept. 12, 2019). Note that the amount of results in the database have increased since this search was originally run in September 2018, because more documents have since been added to the database. An appendix of the September 2018 results is on file with the authors.

to Parliaments and to Rulers for the establishment of Religion, and for the stopping of Heresie, that is to say, for tollerating and defending of their own Sect, which they call Religion, and for the stopping and subduing of all others, which they call Heresie.<sup>255</sup>

Burroughs warns against the risks of such an approach by religious groups, arguing that “confusion hath come upon all this, and will upon the like for ever; and true Religion never gets established by it.”<sup>256</sup> Burroughs then describes how he believes establishment of religion should only occur under the authority of God, and not by the “outward Authorities to establish religion, or to make men religious, for that belongs to the Lord to rule over, and in men’s consciences.”<sup>257</sup>

Some COEME examples also highlight government interference with church affairs that was not welcome, for both established and nonestablished churches. For example, one 1794 source critiques “an establishment of religion” for imbuing the established church with “feeble and unwarranted aid of the civil power.”<sup>258</sup> Regarding interference with nonestablished churches, in 1662, Samuel Fisher discusses ways in which government officials would “obstruct the Writing and Printing of Books, and also Disputing or Preaching otherwise than according to the interpretation and approbation of the Church.”<sup>259</sup> In a 1784 history of British churches in England, John Brown discusses one government official who “became much more negligent of the establishment of religion, and of punishing masspriests.”<sup>260</sup> In 1579, William Fulke and others describe the way in which government “made lawes for establishment of religion, punished Bishoppes and

255. Edward Burrough, *To the Rulers and to Such as Are in Authority, A True and Faithful Testimony Concerning Religion, and the Establishment Thereof* (1659), in *THE MEMORABLE WORKS OF A SON OF THUNDER AND CONSOLATION* 511 (London, 1672), <https://quod.lib.umich.edu/e/eebo/A30510.0001.001/568:55?ALLSELECTED=1;c=eebo;c=eebo2:g=eebogroup;singlegenre=All;sort=occur;type=simple;vid=50179;xc=1;q1=rulers+for+the+establishment+of+religion>, (COEME record: [https://lawcorpus.byu.edu/coeme/concordances;q=establishment;collocate=rulers/search/\(context:eebo.A30510/436560\)](https://lawcorpus.byu.edu/coeme/concordances;q=establishment;collocate=rulers/search/(context:eebo.A30510/436560)))).

256. *Id.*

257. *Id.* at 512.

258. JEDIDIAH MORSE, *THE AMERICAN GEOGRAPHY* 218 (London, John Stockdale 1793), <https://books.google.com/books?id=yJNcAAAacAAJ&lpg=PA218&ots=UPKBnniL6w&dq=%22provides%20against%20the%20making%20of%20any%20law%20respecting%20an%20establishment%20of%20religion%20%2C%20or%20prohibiting%20the%20free%20exercise%20of%20it%20%22&pg=PA218#v=onepage&q&f=false>, (COEME record: [https://lawcorpus.byu.edu/coeme/concordances;q=feeble;collocate=aid/search/\(context:eebo.N19780/167478\)](https://lawcorpus.byu.edu/coeme/concordances;q=feeble;collocate=aid/search/(context:eebo.N19780/167478)))).

259. SAMUEL FISHER, *THE BISHOP BUSIED BESIDE THE BUSINESS* 35 (London, 1662), <https://quod.lib.umich.edu/e/eebo/A39570.0001.001?rgn=main;view=fulltext>, (COEME record: [https://lawcorpus.byu.edu/coeme/concordances;q=interpretation;collocate=approbation;left=6;right=6;limit=500/search/\(context:eebo.A31366/21281\)](https://lawcorpus.byu.edu/coeme/concordances;q=interpretation;collocate=approbation;left=6;right=6;limit=500/search/(context:eebo.A31366/21281)))).

260. 2 JOHN BROWN, *A COMPENDIOUS HISTORY OF THE BRITISH CHURCHES IN ENGLAND, SCOTLAND, IRELAND, AND AMERICA* 33 (Glasgow, John Bryce 1784), <https://quod.lib.umich.edu/e/ecco/004886198.0001.002/1:5?rgn=div1;view=fulltext>, (COEME record: [https://lawcorpus.byu.edu/coeme/concordances;q=establishment;collocate=negligent;left=6;right=6;limit=500/search/\(context:ecco.K102523.002/11253\)](https://lawcorpus.byu.edu/coeme/concordances;q=establishment;collocate=negligent;left=6;right=6;limit=500/search/(context:ecco.K102523.002/11253)))).

other of the Cleargie offenders.”<sup>261</sup> In a letter to a member of parliament in 1699 advocating an establishment of religion, the author argued that civil magistrates had a duty to suppress incorrect religion and false prophets:

GOD thought fit upon the first positive Establishment of Religion, to institute an Order of Men, and separate them from the rest of the People, to attend at his Altar, to offer for themselves, and the sins of others; yet it’s manifest he did not exempt the Civil Magistrate from inspecting the Affairs of Religion. No, it was his special Duty, to protect and defend the True Religion; to punish and suppress Idolatry, Seducers, and Falle Prophets, and to make such wholesom provisions, as served the cause of Religion, in the enforcement of its Publick Acts and Offices, and in the Advancement of its Ends and Designs.<sup>262</sup>

One form of government interference with church affairs that is particularly interesting in light of the *American Legion* case involves government removal or destruction of dissenting religious symbols. For example, in the context of the discussion of an establishment of religion, John Brown discussed in 1784 how government officials “promote the destruction of idolatrous monuments, suspend, depose, and transplant ministers.”<sup>263</sup> Similarly, in a 1577 passage in *Holinshed’s Chronicles of England, Scotland and Ireland* (reprinted in New York in 1807), Raphael Holinshed describes changes that were enforced after the ascension of Queen Elizabeth I and the reestablishment of Anglicanism. Holinshed observes that “[c]ommissioners sent abroad for establishing religion” and “by vertue of an act established in parliament, all such religious houses as were erected and set up, were now suppressed . . . . Images taken down and burned in the streets. The high altar in Paules church, with the rood and the image of Marie and John, standing in the rood loft, were taken down.”<sup>264</sup> Conversely, there were no search results for the *establishment of religion* phrase in either COEFA or COEME that involved discussion of a religious establishment simply by virtue of a government display of religious symbols. This finding is consistent with the Supreme Court’s recent

261. William Fulke, D. Heskins, D. Sanders, & M. Rastel, *Accounted (Among Their Faction) Three Pillers and Archpatriarches of the Popish Synagogue 793* (London, Henrie Middleton 1579), <https://quod.lib.umich.edu/e/eebo/A68078.0001.001?view=toc>, (COEME record: [https://lawcorpus.byu.edu/coeme/concordances;q=establishment;collocate=bishoppe;left=6;right=6;limit=500/search/\(context:eebo.A68078/344098\)](https://lawcorpus.byu.edu/coeme/concordances;q=establishment;collocate=bishoppe;left=6;right=6;limit=500/search/(context:eebo.A68078/344098)))).

262. DANIEL DEFOE, *A LETTER TO A MEMBER OF PARLIAMENT, SHEWING THE NECESSITY OF REGULATING THE PRESS 8* (Oxford, George West & Henry Clements 1699), <https://quod.lib.umich.edu/e/eebo/a37430.0001.001/1:A37430.0001.001:3?firstpubl1=1470;firstpubl2=1700;singlegenre=All;sort=dated;type=simple;vid=54806;view=toc;q1=establishment+of+religion>, (COEME record: [https://lawcorpus.byu.edu/coeme/concordances;q=establishment;collocate=positive;left=6;right=6;limit=500/search/\(context:eebo.A37430/1404\)](https://lawcorpus.byu.edu/coeme/concordances;q=establishment;collocate=positive;left=6;right=6;limit=500/search/(context:eebo.A37430/1404)))).

263. BROWN, *supra* note 260, at 32.

264. 3 RAPHAEL HOLLINSHEAD, *CHRONICLES OF ENGLAND, SCOTLANDE, AND IRELANDE* (1587), <https://quod.lib.umich.edu/cgi/t/text/text-idx?c=eebo;idno=A68202.0001.001>, (COEME record: [https://lawcorpus.byu.edu/coeme/concordances;q=established;collocate=vertue;left=6;right=6;limit=500/search/\(context:eebo.A68202/1822277\)](https://lawcorpus.byu.edu/coeme/concordances;q=established;collocate=vertue;left=6;right=6;limit=500/search/(context:eebo.A68202/1822277)) (last visited Sep. 10, 2019)).

decision in *American Legion*. There, the Court explained, “A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion.”<sup>265</sup>

A number of examples in the COEME database also shed light on the type and level of individual coercion that drove concerns about establishment of religion. Coercive practices often involved extreme sorts of legally-sanctioned punishment of dissenters from the established religion. For example, Samuel Fisher in 1662 states that:

There are but those four ways of treating any party, that dissents from the publick Establishment of Religion and its Laws, in any Church and Kingdom. First, either to Impoverish, Imprisan, Banish and Destroy all Dissenters, as the King of Castile did the Moores of Granada, which is a very rough, barbarous, unwelcome and unchristian way, disallowed by all Wise Men of all persuasions.<sup>266</sup>

Fisher also notes that books viewed as “heretical” were burned, and government officials also sometimes “condemned” dissenting religious leaders “to be burned as an obstinate Heretick.”<sup>267</sup> Another essay from 1744 discusses a “legal establishment of religion,” and then states that “rights of conscience. . . are always invaded by such Establishments.”<sup>268</sup>

Mandatory church tithes could also be viewed as another form of individual coercion. John Murray in 1764 describes English colonies who worked to reject an establishment of religion to avoid some of these types of government coercion.

They partook, with the other Dissenters from the legal establishment of religion, of that invaluable blessing, liberty of conscience, at the revolution; and the reader is already acquainted with the fate of their petition to have these words, “in the presence of Al | mighty God,” omitted in their solemn affirmation . . . And, since that, they have made an attempt to get themselves eased of the *burden of tithes*, which they could not conscientiously pay, and for refusal of which they have so greatly suffered; but it did not succeed.<sup>269</sup>

Some examples highlight ways in which religious establishments were used to limit political office or positions of power to members of established

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265. *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2084–85 (2019).

266. FISHER, *supra* note 259, at 36 (original emphasis omitted).

267. *Id.* at 35.

268. ELISHA WILLIAMS, *THE ESSENTIAL RIGHTS AND LIBERTIES OF PROTESTANTS* 41 (Boston, S. Kneeland & T. Green 1744), [https://quod.lib.umich.edu/cgi/t/text/text-idx?c=evans;idno=N04455.0001.001,\(COEME record: https://lawcorpus.byu.edu/coeme/concordances;q=establishments;collocate=invaded;left=6;right=6;limit=500/search/\(context:evans.N04455/20544\)\)](https://quod.lib.umich.edu/cgi/t/text/text-idx?c=evans;idno=N04455.0001.001,(COEME%20record:https://lawcorpus.byu.edu/coeme/concordances;q=establishments;collocate=invaded;left=6;right=6;limit=500/search/(context:evans.N04455/20544))).

269. 4 JAMES MURRAY, *THE HISTORY OF RELIGION: PARTICULARLY OF THE PRINCIPAL DENOMINATIONS OF CHRISTIANS* 240 (London, C. Henderson et al. 1764) (emphasis added), [https://quod.lib.umich.edu/e/ecco/004836775.0001.001?view=toc,\(COEME record: https://lawcorpus.byu.edu/coeme/concordances;q=establishment;collocate=invaluable;left=6;right=6;limit=500/search/\(context:ecco.K052994.004/95248\)\)](https://quod.lib.umich.edu/e/ecco/004836775.0001.001?view=toc,(COEME%20record:https://lawcorpus.byu.edu/coeme/concordances;q=establishment;collocate=invaluable;left=6;right=6;limit=500/search/(context:ecco.K052994.004/95248))).

churches by use of religious covenants or tests. John Brown explains in 1784 that “in order to the establishment of religion and peace, and that all the members of Parliament may attend it . . . and none but such as take the covenant, or are well affected to religion, be hereafter employed, either in my army or in command garrisons.”<sup>270</sup>

### C. Religious Collocates of Establishment

Because there were very few search results with the actual phrase *establishment of religion* in the most relevant corpora, we needed to broaden our search results to gain wider perspective on the characteristics that were being used in connection with iterations of the word *establish*.

For this next step, we ran a collocate search in COFEA six words to the right and left of any iteration of the word *establish*. We came back with over 500 total results of collocates associated with *establish*. Of these, we narrowed down our results by only selecting collocates that had a mutual information (“MI”) score above three, meaning that there was a statistically significant relationship between the words. We further narrowed our results by only selecting collocates that had some sort of religious connotation. The complete list of these naturally occurring religious collocates, along with their mutual information score and the frequency with which those sorts of collocates appeared, is as follows:

Religious collocates with MI Score over 3	MI Score	Frequency	Sample Size
ordain	5.04	131	1,233
ordinance	3.38	118	3,703
ecclesiastical	3.51	77	2,096
episcopacy	4.71	70	830
protestant	3.27	65	2,095
episcopal	3.31	44	1,378
reli <sup>271</sup>	3.29	39	1,236

270. BROWN, *supra* note 260, at 223.

271. It may appear that some of the collocates listed in this table are either incomplete words or misspelled. However, because many sources in COFEA are searching

episcopate	4.10	34	618
ligion	3.01	22	848
religions	3.94	21	425
seminary	3.63	17	428
gious	3.26	14	453
seminaries	4.15	13	227
ecclesi	4.69	7	84
lutheranism	7.50	7	12
congregationalism	5.78	6	34
bishopricks	5.08	5	46
clesiastical	4.05	4	75
eccle	3.06	4	149
ecclesiasti	3.87	4	85
koran	3.43	4	115
presbyterianism	4.2	4	65
gospel-covenant	5.96	3	15

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copies of these texts that have broken words up in their formatting to reflect a more authentic transcription of the original (e.g. religion was frequently broken up as reli gion with a space in between that caused each to appear in COFEA as separate collocates). Additionally, spelling in the founding era was sometimes different from modern day (e.g. “bishopricks” instead of bishoprics).

As mentioned above, we also added in a few manual collocates which have gained relevance in modern debates about the meaning of *establishment*. It is noteworthy that these words did not have any mutual information score above three, meaning that they did not have a statistically significant relationship for purposes of collocation. And it is particularly interesting that no version of the word *endorse* appeared anywhere in the COFEA database within six words to the right or left of any iteration of *establish*. This absence is telling, and the absence of evidence of correlation between iterations of the words *endorse* and *establish* is potentially evidence of an absence of any correlation. This finding could be particularly important in light of modern conceptions of the *Lemon*/endorsement test that rely on some sort of equivalence between establishment of religion and the idea of government endorsement.<sup>272</sup>

Religious collocates with MI Score below 3	MI Score	Frequency	Sample Size
church	1.30	709	249
faith	0.87	170	118
christian	0.80	90	73
endorse	N/A	0	0

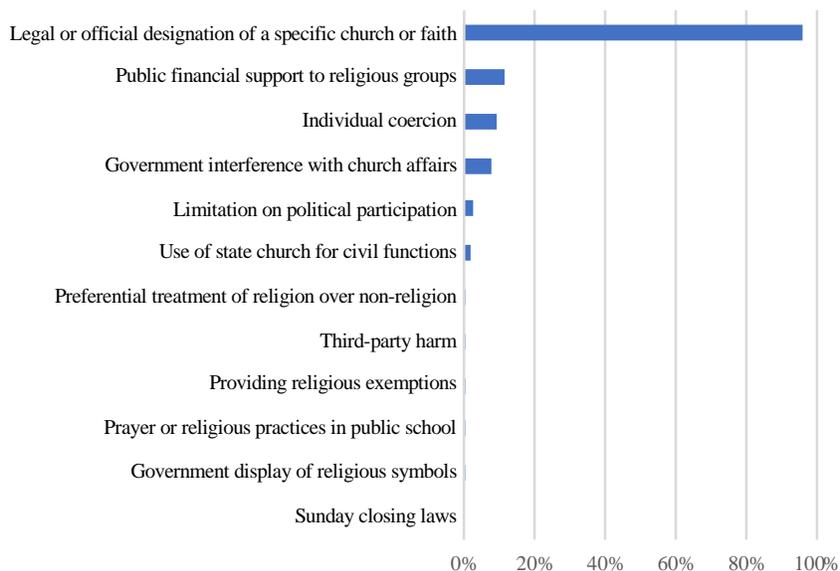
Using these religious collocates of *establish* provided over 1,200 concordance lines, or search results.<sup>273</sup> Removing duplicates or purely ecclesiastic false hits decreased our search results to around 800 concordance lines. And if one removes the “other” category of search results, which included use of *establish* in a purely governmental context or in the context of establishing seminaries, then there

272. See *Lynch v. Donnelly*, 465 U.S. 668, 668 (1984).

273. See search results for “Query: establish\* Collocates: ordain, ordinance, ecclesiastical, episcopacy, protestant, reli, episcopate, ligion, religions, seminary, gious, seminaries, ecclesi, lutheranism, congregationalism, bishopricks, clesiastical, eccle, ecclesiasti, koran, presbyterianism, gospel-covenant, church, faith, Christian,” with the context including six to the right and six to the left, in the *Corpus of Founding Era American English (COFEA)*, BYU LAW CORPUS LINGUISTICS, [https://lawcorpus.byu.edu/cofea/concordances;q=establish\\*;collocate=ordain,ordinance,ecclesiastical,episcopacy,protestant,reli,episcopate,ligion,religions,seminary,gious,seminaries,ecclesi,lutheranism,congregationalism,bishopricks,clesiastical,eccle,ecclesiasti,koran,presbyterianism,gospel-covenant,church,faith,christian;left=6;right=6;limit=500/search](https://lawcorpus.byu.edu/cofea/concordances;q=establish*;collocate=ordain,ordinance,ecclesiastical,episcopacy,protestant,reli,episcopate,ligion,religions,seminary,gious,seminaries,ecclesi,lutheranism,congregationalism,bishopricks,clesiastical,eccle,ecclesiasti,koran,presbyterianism,gospel-covenant,church,faith,christian;left=6;right=6;limit=500/search) (last visited Sept. 12, 2019). Note that the amount of results in the database have increased since this search was originally run in September 2018, because more documents have since been added to the database. An appendix of the September 2018 results is on file with the authors.

were over 600 relevant search results remaining. The results of our coding for characteristics of an establishment are displayed below:

Characteristics of Establishment in Religious Collocates



As with our results above in the context of the *establishment of religion* phrase, the legal or official designation of a specific church or faith is by far the most common characteristic, applicable to 96% of the search results. Public financial support to some religious groups, individual coercion, and government interference with church affairs are the three next biggest categories, all between 8–11% of the search results. After that, the remaining categories involved less than 4% of all search results.

Regarding public financial support of religious organizations, the majority of these results (about 75%) discussed taxes levied specifically to give to churches. These sorts of taxes often involved other relevant characteristics of establishment, including individual coercion in the form of requiring individuals to essentially contribute a mandatory church tithe. One 1775 passage by Alexander Hamilton also sheds new light on why church tithes also involved government interference in church affairs.<sup>274</sup> Hamilton discusses how mandatory church tithes in Canada involve the government making a determination about whether churches were entitled to tithes or not from their practitioners.<sup>275</sup> Such a determination is essentially

274. Alexander Hamilton, *Remarks on the Quebec Bill: Part Two*, RIVINGTON'S N.Y. GAZETTEER, June 22, 1775, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Hamilton/01-01-02-0059> (COFEA record: [https://lawcorpus.byu.edu/cofea/concordances;q=uncontrolable;collocate=laws/search/\(cont ext:fndrs.hamilton.01-01-02-0059/632\)](https://lawcorpus.byu.edu/cofea/concordances;q=uncontrolable;collocate=laws/search/(cont ext:fndrs.hamilton.01-01-02-0059/632))).

275. *Id.*

settling an internal church property dispute between the church itself and its parishioners, with the dispute over whether they “owed” tithing.<sup>276</sup> As Hamilton explained, “But I should be glad to know . . . how tithes can be the property of any but an established church.” He went on to say:

Nothing can be deemed my property, to which, I have not a perfect and uncontrolable right by the laws. If a church have not a similar right to tithes, it can have no property in them; and if it have, it is plain the laws must have made provision for its support, or in other words must have established it.<sup>277</sup>

Church taxes are often relevant to the modern Establishment Clause theory regarding third-party harm. Some search results, for example, specifically discussed things like the building of “fine chapels at public expence.”<sup>278</sup> We coded examples that specifically included that sort of reference to a burden to nonbelievers. We tried looking for relevant examples outside of this church tax context, but because of the malleability of this theory, particularly with regard to what constitutes harm,<sup>279</sup> almost any other category could arguably be categorized as a third-party harm at a high enough level of abstraction. Other sorts of harms to members of nonestablished churches are captured, for example, in the category regarding individual coercion and punishment of dissenters or for exclusion of political participation for those not part of the established church. But we kept the coding for those sorts of specific harms separate, and looked for instances where we actually saw a discussion of harms or costs being shifted to others.

With respect to the use of established churches to perform state civil functions, we found just a few examples where this was discussed.<sup>280</sup> But the authors of these sources never expressed concern that the act of religious groups performing civil functions at all constituted an establishment of religion or even a concerning characteristic associated with an establishment. The only result we came across discussing an establishment in the context of schools involved an article in a

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276. *Id.*

277. *Id.*

278. *E.g.*, LELAND, *supra* note 241, at 12.

279. For a discussion about theoretical problems with a reliance on a harm principle, particularly when harm becomes a term of art, see Stephanie H. Barclay, *First Amendment “Harms,”* 95 IND. L. J. (forthcoming 2020), <https://ssrn.com/abstract=3385311>. See also Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595, 1596 (2018) (analyzing the types of harms that can arise in religious exemption contexts compared to speech contexts).

280. JONAS HANWAY, TRAVELS OF JONAS HANWAY, ESQ. THROUGH RUSSIA INTO PERSIA, AND AFTERWARDS THROUGH RUSSIA, GERMANY, & HOLLAND 107 (Philadelphia, Joseph & James Crukshank 1797); GEORGE WHITEFIELD, LETTER TO HIS EXCELLENCY GOVERNOUR WRIGHT, GIVING AN ACCOUNT OF THE STEPS TAKEN RELATIVE TO THE CONVERTING THE GEORGIA-ORPHAN HOUSE INTO A COLLEGE 16 (Charleston, Robert Wells 1768); *The Remonstrant*, [No. I], PA. J. (Nov. 3, 1768), reprinted in A COLLECTION OF TRACTS FROM THE LATE NEWS PAPERS, &C. 41–42 (N.Y., John Holt 1768); *The Remonstrant*, [No. IV], PA. J. (Oct. 20, 1768), reprinted in A COLLECTION OF TRACTS FROM THE LATE NEWS PAPERS, &C. 83 (N.Y., John Holt 1768).

newspaper called the *Pennsylvania Journal* expressing concern about a law that only allowed members of an established church in England to teach in schools. But part of the concern was that the law prevented parents from sending their children to a religious school that was consistent with the parents' religious beliefs, which the article asserted was a right of parents.<sup>281</sup>

Regarding public financial support of religion, our results indicate that the presence of such support, alone, does not capture the characteristic associated with an establishment. Rather, our results all discussed public funding that was specifically offered to the established church in a preferential way. This relationship is well articulated in Thomas Bradbury Chandler's pamphlet maintaining that:

an established religion is a religion, which the civil authority engages, not only to protect, but to support; and a religion that is not provided for by civil authority, but which is left to provide for itself, or to subsist on the provision it has already made, can be no more than a tolerated religion.<sup>282</sup>

Similarly, a 1768 passage of *The American Whig* compared the state of religion in old England to the colonies, observing that while in New England they accepted the English stipulation that "every denomination must maintain their own clergy," they groaned over the unjust requirements in Britain where "near a million dissenters must maintain the established clergy."<sup>283</sup> As another example of preferential public support, the establishment defined by Rhode Island Pastor Ezra Stiles in his discourse at the Convention of the Congregational Clergy details that specific financial advantage is given exclusively to the established church.<sup>284</sup> He states, "In Maryland and Virginia it is episcopacy [that is established], with appropriations of large revenue from tobacco for the established clergy only."<sup>285</sup> In

281. See *The Remonstrant, No. IV* (Nov. 3, 1768), reprinted in A COLLECTION OF TRACTS FROM THE LATE NEWS PAPERS, &C., *supra* note 249, at 85 ("[T]he Toleration Act . . . deprived all parents that were not of the established Church, of the great trust committed to them by GOD, and nature, to train up their own children according to their own sentiments in religion, and the fear of GOD. No catechism was to be taught to children, but that of the Church of England, and no man under severe penalties was allowed to teach even an English school, who did not, in all things, conform to that Church. Let our Anatomist call this unmerited abuse.").

282. THOMAS BRADBURY CHANDLER, A FRIENDLY ADDRESS TO ALL REASONABLE AMERICANS, ON THE SUBJECT OF OUR POLITICAL CONFUSIONS 55 (N.Y., James Rivington 1774), <https://quod.lib.umich.edu/cgi/t/text/text-idx?c=evans;cc=evans;q1=N10431;rgn=main;view=text;idno=N10431.0001.001>, (COFEA record: [https://lawcorpus.byu.edu/cofea/concordances;q=established;collocate=religion;left=6;right=6;limit=500/search/\(context:evans.N10431/17867\)](https://lawcorpus.byu.edu/cofea/concordances;q=established;collocate=religion;left=6;right=6;limit=500/search/(context:evans.N10431/17867)))).

283. *The Remonstrant, No. III* (Oct. 20, 1798), reprinted in A COLLECTION OF TRACTS FROM THE LATE NEWS PAPERS, &C., *supra* note 249, at 69.

284. EZRA STILES, A DISCOURSE ON THE CHRISTIAN UNION 99 (1760), <https://quod.lib.umich.edu/cgi/t/text/text-idx?c=evans;cc=evans;rgn=main;view=text;idno=n07082.0001.001>, (COFEA Record: [https://lawcorpus.byu.edu/cofea/concordances;q=established;collocate=tobacco;left=6;right=6;limit=500/search/\(context:evans.N07082/35299\)](https://lawcorpus.byu.edu/cofea/concordances;q=established;collocate=tobacco;left=6;right=6;limit=500/search/(context:evans.N07082/35299)))).

285. *Id.*

contrast, we did not find any examples of more neutral forms of government financial support for religious organizations, such as even-handed tax exemptions, being discussed as a characteristic of establishment.

Almost all of the examples of government interference with church affairs involved government control of liturgy, leadership, or doctrine of either the established church or dissenting churches (although at least one example did discuss government involvement in church property disputes<sup>286</sup>). Some results included negative (or coercive) interference with the doctrine of the established church. For example, in 1768, Charles Chauncey wrote that “in the first forming our present established church, or in ordering its rites and articles of faith” the government accomplished this not only “without” the “bishops and clergy from having any hand” in that process, but “it was done . . . in actual opposition to them.”<sup>287</sup> Chauncey gave an example of the “common-prayer book” that was adopted by parliament “in spite of all the opposition from the Bishops in the house of Lords.”<sup>288</sup> Chauncey thus concludes that “the Church of England is really a parliamentary church; that it is not properly an ally but a mere creature of the state. It depends entirely on the acts and authority of parliament for its very essence and frame.”<sup>289</sup> In a 1768 passage from *The American Whig* critiquing an establishment of religion in the colonies, the author describes the “regulating of church discipline, and establishing particular forms of religion” as including the government’s decision to “establish bishopricks and bishops among us.”<sup>290</sup> The newspaper describes this as “an attack upon the liberty of the colonies.”<sup>291</sup>

On the other hand, some forms of government interference with the established church were described in a way that seemed to be positive or welcome by some members of that established church. One 1768 example in *The American Whig* discussed “Honours and Powers” that were conferred “on the Church . . . to make it more serviceable to the state,” including a state “[p]ower of choosing those Persons whom [the government] judges best capacitated for the public Good.”<sup>292</sup>

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286. Hamilton, *supra* note 274.

287. CHARLES CHAUNCEY, THE APPEAL TO THE PUBLIC ANSWERED, IN BEHALF OF THE NON-EPISCOPAL CHURCHES IN AMERICA 59 (Bos., Kneeland & Adams 1768), <https://quod.lib.umich.edu/cgi/t/text/text-idx?c=evans;cc=evans;q1=N08486;rgn=main;view=text;idno=N08486.0001.001>, (COFEA record: [https://lawcorpus.byu.edu/cofea/concordances;q=established;collocate=ordering;left=6;right=6;limit=500/search/\(context:evans.N08486/16341\)](https://lawcorpus.byu.edu/cofea/concordances;q=established;collocate=ordering;left=6;right=6;limit=500/search/(context:evans.N08486/16341)))).

288. *Id.*

289. *Id.*

290. *The Centinel. No. VI, PA. J.* (Apr. 28, 1768), reprinted in A COLLECTION OF TRACTS FROM THE LATE NEWS PAPERS, &C. 101 (1768), <https://quod.lib.umich.edu/cgi/t/text/text-idx?c=evans;cc=evans;q1=N08490;rgn=main;view=text;idno=N08490.0001.001>, (COFEA record: [https://lawcorpus.byu.edu/cofea/concordances;q=establish;collocate=bishopricks;left=6;right=6;limit=500/search/\(context:evans.N08490/53647\)](https://lawcorpus.byu.edu/cofea/concordances;q=establish;collocate=bishopricks;left=6;right=6;limit=500/search/(context:evans.N08490/53647)))).

291. *Id.*

292. Timothy Tickle, *A Whip for the American Whig*, reprinted in A COLLECTION OF TRACTS FROM THE LATE NEWS PAPERS, &C., *supra* note 249, at 276,

And still, other governmental interference with church affairs was characterized as negative or coercive interference with the leadership or doctrines of nonestablished churches. For example, in Pastor Issac Forster's 1780 address on religious liberty in Connecticut, he described the sort of persecution and coercion that was inflicted on dissenters of the established religion.<sup>293</sup> He stated, "both preachers and professors of religion have oftner been persecuted, proscribed, imprisoned, deprived and slain, for preaching and professing doctrines and opinions contrary to sacred creeds and confessions of faith, and the established religion, than for contradicting any thing implied in the Bible."<sup>294</sup>

To highlight a few particularly relevant examples of individual coercion, *The American Whig*, published in a newspaper in 1768, explains how "establishing particular forms of religion" involves requiring people to "yield obedience to such laws and establishments made not only without, but against their consent" and enabling government to "inflict penalties upon such as do not conform."<sup>295</sup> The newspaper then states: "In vain did our ancestors leave their native land, and fly into the wilderness to avoid spiritual tyranny, if those who established it in England can extend it to America."<sup>296</sup> What is noteworthy is that, as Justices Thomas and Scalia have argued, the type of coercion that seemed to be at issue in all of our relevant examples involved "coercion of religious orthodoxy and of financial support by force of law and threat of penalty."<sup>297</sup>

One interesting finding related to how certain political or official positions were reserved for leaders or members of an established church. The data revealed that this issue spread more broadly to other sorts of general political participation or privileges that excluded normal citizens (and/or subsequently subjected them to additional burdens) if they were not followers of the established church. For example, in a 1792 passage delivered at the request of the Historical Society in Massachusetts, Jeremy Belknap stated that "A preference is still given to one denomination above all others; and if an Englishman would fully enjoy the privileges of an Englishman, he must conform to the rites and ceremonies of what

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<https://quod.lib.umich.edu/cgi/t/text/text-idx?c=evans;cc=evans;q1=N08774;rgn=main;view=text;idno=N08774.0001.001>, (COFEA record: [https://lawcorpus.byu.edu/cofea/concordances;q=establish;collocate=obedience;left=6;right=6;limit=500/search/\(context:evans.N08774/135806\)](https://lawcorpus.byu.edu/cofea/concordances;q=establish;collocate=obedience;left=6;right=6;limit=500/search/(context:evans.N08774/135806))).

293. ISAAC FOSTER, A DEFENCE OF RELIGIOUS LIBERTY 52 (1780), <https://quod.lib.umich.edu/cgi/t/text/text-idx?c=evans;cc=evans;q1=N13265;rgn=main;view=text;idno=N13265.0001.001>, (COFEA record: [https://lawcorpus.byu.edu/cofea/concordances;q=established;collocate=contradicting;left=6;right=6;limit=500/search/\(context:evans.N13265/11113\)](https://lawcorpus.byu.edu/cofea/concordances;q=established;collocate=contradicting;left=6;right=6;limit=500/search/(context:evans.N13265/11113))).

294. *Id.*

295. *The Centinel, No. VI* (Apr. 28, 1768), reprinted in A COLLECTION OF TRACTS FROM THE LATE NEWS PAPERS, &C, *supra* note 249, at 101–02.

296. *Id.*

297. *Town of Greece v. Galloway*, 572 U.S. 565, 608 (2014) (Thomas, J., concurring) (quoting *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting)); *Id.* ("In a typical case, attendance at the established church was mandatory, and taxes were levied to generate church revenue . . . Dissenting ministers were barred from preaching, and political participation was limited to members of the established church.").

is called the established church.” Belknap went on to say that “all other persons are subject to burdens and incapacities, from which they cannot be free, whilst they continue within that realm.”<sup>298</sup>

A brief note about religious exemptions is also warranted, though our findings in this category were particularly limited. In one 1792 example, William Smith described a religious exemption from a church tax in positive terms, as a means of otherwise combatting problems associated with establishment of religion.<sup>299</sup> He stated:

As to Connecticut, all the Episcopalians of that colony, and even their ministers, were legally compellable to contribute to an annual tax for the support of the congregational clergy, till of late they were favoured with a law which grants them a privilege of exemption from that iniquitous and unreasonable burden.<sup>300</sup>

And in other examples, giving exemptions to members of the established church was deemed problematic because exemptions or immunities were only offered on a preferential basis to members of the established church, and not to other denominations.<sup>301</sup> These problematic immunities also appear to share the characteristic of not being related to any conflicts of conscience; rather, they were simply exemptions given to individuals based on their status as members of the established church. For instance, *The American Whig* publication in 1768 explained that “[i]f the parliament, or any other power upon earth, may establish in the colonies any form of religion, or the heirarchy they please, they can grant to the members of that establishment what immunities and exemptions they see fit, and inflict penalties upon such as do not conform.”<sup>302</sup> This sort of exemption, giving preference to some religious denominations over others, is the same issue that scholars such as Professor Mark Storslee have identified as being problematic in the historical Virginia church tax controversy.<sup>303</sup>

298. JEREMY BELKNAP, A DISCOURSE, INTENDED TO COMMEMORATE THE DISCOVERY OF AMERICAN BY CHRISTOPHER COLUMBUS 40 (Boston, Apollo Press 1792), <https://quod.lib.umich.edu/cgi/t/text/text-idx?c=evans;cc=evans;q1=N18556;rgn=main;view=text;idno=N18556.0001.001>, (COFEA record: [https://lawcorpus.byu.edu/cofea/concordances;q=established;collocate=ancestors;left=6;right=6;limit=500/search/\(context:evans.N18556/7649\)](https://lawcorpus.byu.edu/cofea/concordances;q=established;collocate=ancestors;left=6;right=6;limit=500/search/(context:evans.N18556/7649)))).

299. WILLIAM SMITH, THE HISTORY OF THE PROVINCE OF NEW-YORK, FROM THE DISCOVERY TO THE YEAR 1732 246 (1792), <https://quod.lib.umich.edu/cgi/t/text/text-idx?c=evans;cc=evans;q1=N19064;rgn=main;view=text;idno=N19064.0001.001>, (COFEA record: [https://lawcorpus.byu.edu/cofea/concordances;q=establishments;collocate=antecedent;left=6;right=6;limit=500/search/\(context:evans.N19064/108363\)](https://lawcorpus.byu.edu/cofea/concordances;q=establishments;collocate=antecedent;left=6;right=6;limit=500/search/(context:evans.N19064/108363)))).

300. *Id.*

301. See, e.g., *The Centinel*, No. VI (Apr. 28, 1768), reprinted in A COLLECTION OF TRACTS FROM THE LATE NEWS PAPERS, &C, *supra* note 249, at 101.

302. *Id.*

303. Mark Storslee observes the ways in which religious exemptions from the Virginia church tax law were provided to certain congregations on a preferential basis, which provides a more persuasive explanation for the historical concerns with this law than simply a cost to third-parties associated with the tax. Storslee, *supra* note 79.

Regarding religious symbols, there were no clearly relevant results in this dataset where government involvement with a symbol was described as a characteristic of an establishment of religion. However, there were two examples that discussed how government should “erect” a “suitable monument of religious gratitude” when that nation has received “divine goodness.”<sup>304</sup> Conversely, we did find some examples where government removal or destruction of dissenting religious symbols was discussed in relation to a characteristic of an established church.<sup>305</sup>

Finally, we found no examples, in any dataset, where a religious establishment was equated with preferential treatment of religion in general over nonreligion. Rather, all of the characteristics of an establishment were discussed in the context of a particular faith or church, and often in such a way that the established church was given special treatment. For example, an 1805 case discussed “statutes made for the benefit of an established church.”<sup>306</sup> Similarly, in 1795 James Kent described an “established church with exclusive privileges” in the context of England’s establishment.<sup>307</sup>

## V. CAVEATS AND FURTHER RESEARCH

Our research does not claim to definitively identify the original meaning of a religious establishment. Corpus linguistics is a valuable tool, but it is just one piece of the puzzle in determining the original meaning of the Establishment Clause.<sup>308</sup> For our project, we did not set out to determine the predominant sense that applied to iterations of the word *establish*.<sup>309</sup> Further linguistic work would be needed to research that question. Rather, we focused instead on looking to the characteristics that were associated with the word *establish*. In other words, we looked at the application of *establish* to various categories of government action. We did not treat

304. See, e.g., CHAUNCY, *supra* note 287, at 129; *The Centinel*, No. XII (May 9, 1798), reprinted in A COLLECTION OF TRACTS FROM THE LATE NEWS PAPERS, &C, *supra* note 249, at 211.

305. See *supra* notes 263–64 and accompanying text.

306. *Glasgow’s Lessee v. Smith*, 1 Tenn. 144, 153 (1805).

307. JAMES KENT, DISSERTATIONS 16 (N.Y., George Forman 1795), <https://heinonline.org/HOL/Page?handle=hein.beal/adar0001&id=1&size=2&collection=beal&index=beal>, (COFEA record: [https://lawcorpus.byu.edu/cofea/concordances;q=established;collocate=exclusive;left=6;right=6;limit=500/search/\(context:HeinR76/3897\)](https://lawcorpus.byu.edu/cofea/concordances;q=established;collocate=exclusive;left=6;right=6;limit=500/search/(context:HeinR76/3897)))).

308. See Lee & Mouritsen, *supra* note 5, at 853.

309. Philosophers of language and academic linguists distinguish between “sense” and “reference” and between “intensional meaning” and “extensional meaning.” Solum has argued that the original public meaning of the constitutional text is best understood as the communicative content conveyed by the text in context. Communicative content can be understood as the set of propositions that are communicated. See Solum, *supra* note 7, at 1678–79 (“Propositions are to sentences as concepts are to words. Just as the same word expresses a concept that can be represented by different words in other languages (‘recht’ in German, ‘loi’ in French), so can the propositional content of the constitutional text can be represented in contemporary American English or another natural language.”). Roughly speaking, the sense or intensional meaning of “establishment” is the concept the word represents and the sense or intensional meaning of the Establishment Clause is the proposition conveyed by the whole clause.

characteristics as mutually exclusive, given the multi-layered characteristics that were often associated with an establishment.

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

In addition, further historical and corpus linguistics research is needed to evaluate the public meaning of "establishment of religion" during the Reconstruction period, and particularly surrounding the adoption of the Fourteenth Amendment. Since that Amendment has been interpreted to incorporate the Establishment Clause to the states, further inquiry into how public understanding of "establishment of religion" had evolved, if at all, by that time period could shed further important light on the meaning of the Clause.<sup>310</sup>

## VI. DOCTRINAL IMPLICATIONS

Our data revealed no confirming evidence for a number of current doctrinal theories regarding the original meaning of the Establishment Clause. For example, our results did not indicate that any of the following were historic characteristics discussed in the context of a religious establishment: (1) concerns about government display of religious symbols; (2) enactment of Sunday closing laws; (3) prayers or religious practices in public schools;<sup>311</sup> (4) providing religious exemptions to

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310. See generally, e.g., Frederick Mark Gedicks, *Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account*, 88 IND. L. J. 669 (2013); Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994).

311. The only example we came across discussing an establishment in the context of schools involved an author expressing concern about a law that only allowed members of an established church in England to teach in schools, and prevented parents from sending their children to a religious school that was consistent with the parents' religious beliefs. See *The Remonstrant*, No. IV, PA. J., October 20, 1768, reprinted in A COLLECTION OF TRACTS FROM THE LATE NEWS PAPERS, &C., *supra* note 249, at 83 ("[T]he Toleration Act . . . deprived all parents that were not of the established Church, of the great trust committed to them by GOD, and nature, to train up their own children according to their own sentiments in religion, and the fear of GOD. No catechism was to be taught to children, but that of the Church of England, and no man under severe penalties was allowed to teach even an English school, who did not, in all things, conform to that Church. Let our Anatomist call this unmerited abuse.").

religious believers in an even-handed way to protect conscience; or (5) providing preferential treatment to religion in general over nonreligion. Our results thus do not support modern constitutional theories that treat any one of these characteristics as a sufficient condition for an Establishment Clause violation.

On the other hand, there was significant confirming evidence for current theories treating the following as characteristics associated with an establishment: (1) legal designation of an official state church; (2) state control over doctrine, governance, and personnel of the church; (3) compulsory church attendance; (4) prohibitions on worship in dissenting churches; and (5) restrictions of some forms of political or civic participation nor privileges to members of the established church. Our results are thus consistent with a modern constitutional theory that treats any one of these characteristics as a necessary condition for an Establishment Clause violation.

There are a few characteristics of establishment being debated by modern scholars and advocates where our results indicate that the story is more nuanced than current narratives suggest. For example, in the *American Legion* case decided by Supreme Court,<sup>312</sup> the legal team defending the memorial cross argued that a “coercion standard” should become the legal test for identifying a violation of the Establishment Clause.<sup>313</sup> Yet our results indicate that sometimes problematic government interference with church affairs, including doctrine or leadership, occurred in a way that was not necessarily unwelcome to the established church or its leaders. Thus, not all salient characteristics of an establishment occurred in a coercive way. On the other hand, many government behaviors that the Court has described as coercive today fall far short of the type of government coercion that raised concern about an establishment historically. For example, in *Lee v. Weisman*, the Supreme Court invalidated a school’s practice of inviting members of the clergy to deliver nondenominational invocations and benedictions at events like graduation ceremonies, even though students were not required to participate in any prayers or even to attend such events.<sup>314</sup> This government practice looks nothing like the laws requiring participation in church services or paying of fines or other government penalties that seemed to inspire early historical concern about an establishment of religion.<sup>315</sup> As a result, a “coercion standard” may be both overinclusive and underinclusive relative to what was viewed historically as an establishment.

The Court’s recent holding in *American Legion* was also consistent with the lack of any confirming evidence associated with government involvement with

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

313. *See, e.g.*, Reply Brief for Petitioners at 2, *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019), No. 17-1717 (Feb. 13, 2019), available at [https://www.supremecourt.gov/DocketPDF/17/17-1717/88316/20190213163922725\\_17-1717%20rb.pdf](https://www.supremecourt.gov/DocketPDF/17/17-1717/88316/20190213163922725_17-1717%20rb.pdf).

314. 505 U.S. 577, 586–87 (1992).

315. *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.”); *see also* *Town of Greece v. Galloway*, 572 U.S. 565, 608 (2014) (Thomas, J., concurring).

religious symbols or displays in our results.<sup>316</sup> Indeed, our results indicated that when concerns about religious symbols did arise, they arose where government was suppressing or destroying symbols of dissenting churches. And along these lines, the Court appeared to overrule previous precedent<sup>317</sup> when it held that “[a] government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion.”<sup>318</sup>

With respect to the use of established churches to perform state civil functions, the few sources we found related to this issue never expressed concern that the act of religious groups performing civil functions at all constituted an establishment of religion, or even a concerning characteristic associated with an establishment. This is possibly because, at the time, there may simply have not been any other options than for churches to perform some of these civil functions, such as maintaining birth records, schooling children, or administering some social welfare practices such as adoption.<sup>319</sup> If in fact churches pervasively performed these functions historically,<sup>320</sup> and they did so without causing alarm or discussion of an establishment, this may be evidence that this practice was not viewed as a concerning characteristic of an establishment. As an example, the only result we came across discussing an establishment in the context of schools involved an article in a newspaper called the *Pennsylvania Journal* expressing concern about a law that only allowed members of an established church in England to teach in schools.<sup>321</sup> But part of the concern was that the law prevented parents from sending their children to a religious school that was consistent with the parents’ religious beliefs, which the article asserted was a right of parents.<sup>322</sup> This historical anecdote would

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316. *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2090 (2019).

317. *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844 (2005).

318. *Am. Legion*, 139 S. Ct. at 2084–85.

319. Indeed, private, mostly religious, organizations largely developed the adoption and foster care system. *See* E. Wayne Carp, *Introduction: A Historical Overview of American Adoption*, in *ADOPTION IN AMERICA: HISTORICAL PERSPECTIVES* 1, 3–4 (E. Wayne Carp ed., 2002); *see also* ELLEN HERMAN, *KINSHIP BY DESIGN: A HISTORY OF ADOPTION IN THE MODERN UNITED STATES* 60, 125 (2008); BARBARA MELOSH, *STRANGERS AND KIN: THE AMERICAN WAY OF ADOPTION* 15 (2006); Paula E. Pfeffer, *A Historical Comparison of Catholic and Jewish Adoption Practices in Chicago, 1833-1933*, in *ADOPTION IN AMERICA: HISTORICAL PERSPECTIVES* 101, 103–05 (E. Wayne Carp ed., 2002).

320. *See Establishment and Disestablishment*, *supra* note 1, at 2131 (historic hallmarks of an establishment included “use of church institutions for public functions”); *see also* Maddigan, *supra* note 8; Mirsky, *supra* note 8.

321. *See The Remonstrant, No. IV*, PA. J. (Oct. 20, 1768), *reprinted in* A COLLECTION OF TRACTS FROM THE LATE NEWS PAPERS, &C. 83 (1768), <https://quod.lib.umich.edu/cgi/t/text/text-idx?c=evans;cc=evans;q1=N08774;rgn=main;view=text;idno=N08774.0001.001>.

322. *Id.* (“[T]he Toleration Act . . . deprived all parents that were not of the established Church, of the great trust committed to them by GOD, and nature, to train up their own children according to their own sentiments in religion, and the fear of GOD. No catechism was to be taught to children, but that of the Church of England, and no man under severe penalties was allowed to teach even an English school, who did not, in all things, conform to that Church. Let our Anatomist call this unmerited abuse.”).

suggest that in a case like *Espinoza*,<sup>323</sup> there is no problem with government-aided religious schools as long as parents are given true choices in where to send their children.

The characteristic of an establishment that requires the most nuance might be public financial support of religious organizations. Our results indicate that the presence of such support, alone, does not capture the characteristic associated with an establishment. Neither is the characteristic captured by theories that focus on the existence of a cost imposed on others, as modern third-party harm theorists claim. Indeed, if either of these two things were the primary concern associated with public support of religion, we would have expected to see more results raising concern about costs associated with other financial benefits for churches like tax exemptions or land grants.<sup>324</sup> But we did not. Rather, our results always involved public support given in a way that *preferred* established churches to other congregations. Sometimes government compounded the problem by leveraging that support to try to control church leadership or doctrine of the established church. These results are thus consistent with a theory that treats public support as a characteristic that is not independently sufficient to result in an Establishment Clause violation, but rather a condition that must be paired with other relevant characteristics, such as interference with church affairs or preferential treatment to one religious group above others. Such a combination of characteristics could create a presumptive Establishment Clause violation.<sup>325</sup> If the Court followed this approach, it would involve the Court overruling *Lemon v. Kurtzman*<sup>326</sup> and its progeny, to the extent that they have “recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions.”<sup>327</sup>

The pending *Espinoza* case<sup>328</sup> may provide an important vehicle for the Supreme Court to revise its current jurisprudence about funding religious organizations to the extent it is out of step with an approach that focuses on historical hallmarks of established religion that gave rise to the Establishment Clause. Overruling this line of cases would, among other things, bring the United States’

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323. *Espinoza v. Montana Department of Revenue*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/espinoza-v-montana-department-of-revenue/> (last visited July 10, 2019).

324. “So ingrained was the practice of land grants for the support of religion that when Congress set about to organize settlement of the Northwest Territory, its first two substantial grants specified that a section in each township would be set apart for the support of religion, along with one for education.” *Establishment and Disestablishment*, *supra* note 1, at 2150.

325. For additional discussion of doctrinal implications of public support in the Establishment Clause context, see Barclay, *supra* note 279.

326. 403 U.S. 602 (1971).

327. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995) (citing cases).

328. *Espinoza v. Montana Department of Revenue*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/espinoza-v-montana-department-of-revenue/> (last visited July 10, 2019).

educational approach more in line with other countries, and their treatment of religious schools. As Justice Scalia observed:

Most other countries—including those committed to religious neutrality—do not insist on the degree of separation between church and state that this Court requires . . . . [C]ountries such as the Netherlands, Germany, and Australia allow direct government funding of religious schools on the ground that “the state can only be truly neutral between secular and religious perspectives if it does not dominate the provision of so key a service as education, and makes it possible for people to exercise their right of religious expression within the context of public funding.” England permits the teaching of religion in state schools. Even in France, which is considered “America’s only rival in strictness of church-state separation,” “[t]he practice of contracting for educational services provided by Catholic schools is very widespread.”<sup>329</sup>

### CONCLUSION

This Article provides the first corpus linguistics analysis of the Establishment Clause. This Article adds a piece to the Establishment Clause puzzle, providing information about the most salient characteristics of an established religion, or in other words, those characteristics implicated most often (or not at all) in founding-era mentions of established religion. This Article also provides a more rigorous and transparent method for investigating original public meaning than has been employed by other scholars. By sifting through hundreds of results discussing establishment in a religious context, our Article brings to light new historic sources that have been previously overlooked.

This Article’s findings indicate that by far the most common characteristic discussed in the context of an establishment of religion involved legal or official designation of a specific church or faith. Beyond that, the most common characteristics involved government coercion of individuals with respect to religious prohibitions, mandates, or government persecution; government interference with church affairs; preferential public support of the established church (particularly in the form of direct taxes levied for the church in a preferential way); and limitations on participations in political life to members of the established church. On the other hand, our data did not reveal specific confirming evidence for a number of current theories regarding the original meaning of the Establishment Clause, including: (1) concerns about government display of religious symbols; (2) enactment of Sunday closing laws; (3) prayers or religious practices in public schools; (4) providing religious exemptions to religious believers in an even-handed way to protect conscience; or (5) providing preferential treatment to religion in general over nonreligion. Our results thus do not support a modern constitutional theory that

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329. *Roper v. Simmons*, 543 U.S. 551, 625 (2005) (Scalia, J., dissenting) (citations omitted) (citing *STEPHEN V. MONSMA & J. CHRISTOPHER SOPER, THE CHALLENGE OF PLURALISM: CHURCH AND STATE IN FIVE DEMOCRACIES* 67, 103, 142, 176, 207 (1997); *CHARLES L. GLENN, THE AMBIGUOUS EMBRACE: GOVERNMENT AND FAITH-BASED SCHOOLS AND SOCIAL AGENCIES* 115 (2000)).

treats any one of these characteristics as a sufficient condition for an Establishment Clause violation.

Regarding religious symbols, our findings indicate that government display of such symbols was not a particular concern discussed in the context of an establishment. Instead, when concerns about religious symbols did arise, they arose where government was suppressing or destroying symbols of dissenting churches. This finding is consistent with the Supreme Court's recent decision in *American Legion*, which concluded that tearing down religious symbols would in fact seem hostile to religion. With respect to government funding of religious organizations, our results only reveal that this was historically problematic if done in a preferential way, or as a means of leveraging government control over internal church affairs. Indeed, in the context of religious schools, our only relevant result in our findings discussed concern about a law that only allowed members of an established church in England to teach in schools. The problem was that the law prevented parents from sending their children to a religious school that was consistent with the parents' religious beliefs, which the source asserted was a right of parents. This historical anecdote would suggest that in a case like *Espinoza*, there is no problem with government-aided religious schools as long as parents are given true choices in where to send their children. The pending *Espinoza* case may provide an important vehicle for the Supreme Court to revise its current jurisprudence about funding religious organizations to the extent it is out of step with an approach that focuses on the historical hallmarks of established religion that gave rise to the Establishment Clause.