HISTORY AND THE SCHOOL PRAYER CASES

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In a series of two decisions known as the School Prayer Cases*, the Supreme Court famously held that the Establishment Clause forbids state-sponsored prayer in public schools—even where the government provides opt-outs for dissenters. Yet subsequent legal developments have rendered those decisions unstable. And with the Court's recent turn to "historical practices and understandings," many question whether the* School Prayer Cases *can possibly survive.*

It is too soon to tell where the Court's renewed focus on Founding-era history might lead. But this Article contends, contrary to both some originalist Justices and their critics, that a focus on history does not spell the end of the School Prayer Cases*. On the contrary, it may well place those decisions on firmer ground.*

In a recent opinion, the Supreme Court observed that state-sponsored school prayer bears some relation to at least one "hallmark" of Founding-era establishments—namely, laws requiring citizens to attend worship in the established church. Contrary to what some Justices have suggested, however, the problem with these Founding-era laws was not that they lacked exemptions for dissenters. Rather, for the Founding generation, laws mandating attendance at state-sponsored worship were objectionable, opt-outs or no, because such laws exceeded the government's rightful authority. On this view, the key feature of the School Prayer Cases *is not the presence or absence of exemptions or proof of individual coercion. Instead, it is the*

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government's claimed right to mandate attendance at worship in the first place, no matter how tolerant the scheme. And understanding that point may offer important insight into larger questions about the propriety and limits of government-sponsored prayer, inside as well as outside of public schools.

INTRODUCTION

Speaking to a crowd on the morning of June 25, 1962, Justice Hugo Black's voice quaked with emotion.[1] As he cradled a paper that shook slightly as he spoke, Justice Black uttered words that would become immortal: "The Establishment Clause thus stands as an expression of principle . . . that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."[2] With that sentence

[1] See Roger K. Newman, Hugo Black: A Biography 522–23 (1994). The incident also appears in Andrew Koppelman, Defending American Religious Neutrality 67–68 (2013).

[2] Engel v. Vitale, 370 U.S. 421, 431–32 (1962) (quoting James Madison, Memorial and Remonstrance Against Religious Assessments, *in* 2 The Writings of James Madison 183, 187 (Gaillard Hunt ed., 1901)).

and several that followed, Justice Black announced to the country that—contrary to most people's expectations—the Establishment Clause forbade requiring public-school students to say a brief prayer during the school's morning exercises.[3] "[T]he right of the people to pray in their own way," Justice Black added extemporaneously, "is not to be controlled by the election returns."[4]

So was the birth of the two decisions that became the Supreme Court's famous *School Prayer Cases*. In *Engel v. Vitale*, the opinion containing Justice Black's immortal words, the Court held that a New York program requiring students to begin the day with a formulaic, government-composed prayer violated the Establishment Clause.[5] A year later, in *School District of Abington Township v. Schempp*, the Court doubled down on that holding by asserting that, whether government composes the prayer or not, requiring government-led prayer and devotional Bible reading in public schools violates the Establishment Clause.[6] And most importantly, in both cases, the Court expressly rejected the argument that excusing objecting students removed the constitutional problem.[7]

Scholars have generally supported the *School Prayer Cases*, albeit with some notable dissents.[8] But as a matter of so-called "popular constitutionalism," the *School Prayer Cases* are some of the more controversial decisions in Supreme Court history.[9] Following *Engel*, governors in every state but one supported a resolution to overturn the

[3] See Corinna Barrett Lain, God, Civic Virtue, and the American Way: Reconstructing *Engel*, 67 Stan. L. Rev. 479, 507–14 (2015) (describing the outcry over *Engel*).

[4] Anthony Lewis, Supreme Court Outlaws Official School Prayers in Regents Case Decision, N.Y. Times, June 26, 1962, at 16.

[5] 370 U.S. at 422, 436.

[6] 374 U.S. 203, 205 (1963).

[7] *Engel*, 370 U.S. at 430; *Schempp*, 374 U.S. at 224–25.

[8] For examples of scholarship praising the *School Prayer Cases* or building on their rationales, see Stephanie H. Barclay, The Religion Clauses After *Kennedy v. Bremerton School District*, 108 Iowa L. Rev. 2097, 2107–09 (2023); William P. Marshall, The Constitutionality of School Prayer: Or Why *Engel v. Vitale* May Have Had It Right All Along, 46 Cap. U. L. Rev. 339, 341–42 (2018); Ira C. Lupu & Robert W. Tuttle, Secular Government, Religious People 119–22 (2014); Koppelman, supra note 1, at 67–71. For a provocative dissent, see generally Steven D. Smith, Constitutional Divide: The Transformative Significance of the School Prayer Decisions, 38 Pepp. L. Rev. 945 (2011) (arguing the *School Prayer Cases* deepened divides in America by constitutionalizing secularism).

[9] See, e.g., Bruce J. Dierenfield, The Battle Over School Prayer: How *Engel v. Vitale* Changed America, at vii (2007) (claiming *Engel* was "greeted with more shock and criticism than *Dred Scott v. Sandford*"); Lain, supra note 3, at 507–14 (similar). For more on "popular constitutionalism," see generally Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2004).

decision.[10] More than half of Americans disapproved of the outcomes when *Engel* and *Schempp* were decided,[11] and polling indicates similar disagreement persists today.[12] Members of Congress have introduced no fewer than ten bills to strip the Supreme Court of jurisdiction over the topic of school prayer, not to mention hundreds of proposed constitutional amendments.[13] And just last year, New York City Mayor Eric Adams openly lamented the *School Prayer Cases*, insisting that "[w]hen we took prayers out of schools, guns came into schools."[14]

In some measure, of course, disagreement about government-led school prayer is predictable. Since the mid-nineteenth century, public schools have played an important role in instilling moral values in children through government intervention—a project nearly always rife with controversy.[15] But the *School Prayer Cases* are about more than that. They are also part of a larger set of questions about the propriety of government-sponsored religious observance. Can government officials lead citizens in prayer? If not, what about examples like prayers at presidential inaugurations or prayers by military chaplains? If so, what are the limits government cannot transgress? As it turns out, those questions are far from settled. In fact, they are very much up for debate.

The puzzle comes about this way. In recent opinions, the Supreme Court has emphasized that, from now on, the Establishment Clause must be interpreted primarily in light of "historical practices and understandings" as evidenced by "the Founding Fathers."[16] And in modern cases involving government-sponsored religious observance including the *School Prayer Cases*, the Court has relied on two theories

[10] Lain, supra note 3, at 512.

[11] Id. at 482, 522 n.271 (discussing contemporaneous polling).

[12] As of 2019, "roughly four-in-ten teens (including 68% of evangelical Protestant teens) who go to public school say they think it is 'appropriate' for a teacher to lead a class in prayer." For a Lot of American Teens, Religion Is a Regular Part of the Public School Day, Pew Rsch. Ctr. (Oct. 3, 2019), https://www.pewresearch.org /religion/2019/10/03/for-a-lot-of-american-teens-religion-is-a-regular-part-of-the-public-school-day/ [https://perma.cc/VHJ8-XFRP].

[13] See Cong. Rsch. Serv., School Prayer: The Congressional Response, 1962–1998, at 1–2 (1998).

[14] Dana Rubinstein, Adams, Discussing Faith, Dismisses Idea of Separating Church and State, N.Y. Times (Feb. 28, 2023), https://www.nytimes.com/2023/02/28/nyregion/eric-adams-religion-church.html [https://perma.cc/6UTX-F5V2].

[15] For one thoughtful perspective on this problem, see generally Noah Feldman, Non-sectarianism Reconsidered, 18 J.L. & Pol. 65 (2002).

[16] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) (quoting Town of Greece v. Galloway, 572 U.S. 565, 576–77 (2014)); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019) (quoting *Town of Greece*, 572 U.S. at 576) (same).

to justify its decisions: one about government religious speech, and a second based on what the Court has called "indirect coercion."[17] Yet, at least arguably, neither theory sits comfortably with the Court's more recent focus on Founding-era history.

The government-speech theory holds that the Establishment Clause forbids government from engaging in official religious speech—that is, speech that serves clearly devotional purposes.[18] Yet the Court never explained how this rule was consistent with long-accepted practices like legislative prayer, thanksgiving proclamations, or prayers by military chaplains or at presidential inaugurations.[19] And subsequently, the Court has upheld these practices—most notably, legislative prayer—while rejecting the idea that the Constitution forbids government from speaking religious messages.[20] Judged against history and precedent, the government-speech rationale faces significant hurdles.

A similar problem persists with respect to the coercion rationale. In *Lee v. Weisman*, the Court held that a public school district violated the Establishment Clause by including government-sponsored prayer at a middle school graduation.[21] Drawing on another strand of the original *School Prayer Cases*, Justice Kennedy insisted that the fundamental problem with government-led school prayer is the "indirect coercion" students face from "peer pressure."[22] But Justice Kennedy's expansive theory of coercion flowed from modern psychology, not Founding-era history.[23] Moreover, Justice Kennedy did not explain why the indirect-coercion rule does not render many other common practices unconstitutional. To take just one example, if opt-outs cannot dispel the coercion inherent in government-led school prayer, why doesn't the same conclusion follow as to requiring students to recite the Pledge of Allegiance, or requiring participation in some other school activity where

[17] See infra Sections I.A, I.B (describing these theories).

[18] See Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223–24 (1963); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 305–08 (2000). The government-speech theory became closely related to the three-part test first articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

[19] See infra Section I.A (discussing these practices).

[20] Marsh v. Chambers, 463 U.S. 783, 787–92 (1983); *Town of Greece*, 572 U.S. at 575–85; see also id. at 616 (Kagan, J., dissenting) (disagreeing on the outcome in *Town of Greece* while agreeing with *Marsh*'s decision "upholding [a] tradition of beginning each session with a chaplain's prayer").

[21] 505 U.S. 577, 599 (1992).

[22] Id. at 592–93.

[23] Id. at 593–94.

a student objects on free-speech grounds?[24] If peer pressure persists here too, are all these activities unconstitutional, opt-outs or no?

In a well-known dissent, Justice Scalia offered a different perspective. Pointing to various Founding-era practices associated with religious establishments—especially church-attendance laws and compulsory tithes—Justice Scalia agreed that the Establishment Clause forbids "coerc[ing] anyone to . . . participate in religion or its exercise."[25] But according to Justice Scalia, history indicated that the Founding generation endorsed nothing like indirect coercion, much less a ban on government religious speech. Instead, they followed a much narrower principle: "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*."[26]

Justice Scalia's position carries with it a radical implication. If the Establishment Clause condemns only government-induced religious activity involving "force of law and threat of penalty," it is hard to see how the *School Prayer Cases* qualify. Yes, requiring students to attend school or participate in morning exercises that include prayer may involve commands issued "by force of law."[27] But so long as these commands contain opt-outs for dissenters, they arguably do not involve any real "threat of penalty." In *Lee*, Justice Scalia hinted at this possibility, indicating that allowing children to opt out of government-led school prayer might "suffice[] to dispel the coercion resulting from . . . mandatory attendance."[28] Justice Thomas has since made a similar point, insisting that unless an objector can produce evidence of "actual legal coercion" as opposed to "peer pressure," there is no basis to complain.[29]

[24] For the classic exposition of this problem, see generally Abner S. Greene, The Pledge of Allegiance Problem, 64 Fordham L. Rev. 451 (1995).

[25] *Lee*, 505 U.S. at 640–42 (Scalia, J., dissenting) (quoting id. at 587 (majority opinion)).

[26] Id. at 640.

[27] See, e.g., Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 47 (2004) (Thomas, J., concurring in the judgment) (observing that "[s]tudents are actually compelled . . . by law . . . to attend school" (citation omitted)).

[28] *Lee*, 505 U.S. at 643 (Scalia, J., dissenting).

[29] *Elk Grove*, 542 U.S. at 47, 52–53 (Thomas, J., concurring in the judgment); see also Van Orden v. Perry, 545 U.S. 677, 693 (2005) (Thomas, J., concurring) ("The Framers understood an establishment 'necessarily [to] involve actual legal coercion.'" (quoting *Elk Grove*, 542 U.S. at 52 (Thomas, J., concurring in the judgment))); Town of Greece v. Galloway, 572 U.S. 565, 610 (2014) (Thomas, J., concurring in part and in the judgment) (similar).

With this backdrop, the heart of the controversy now comes fully into view. In *Kennedy v. Bremerton School District*, the Supreme Court recently held that a public school district violated the Constitution by punishing a high school football coach for praying on the field after several games, and it rejected the idea that the Establishment Clause condemned the coach's actions.[30] In doing so, the Court explicitly abandoned *Lemon v. Kurtzman* and, by implication, most of the original government-speech rationale for the *School Prayer Cases*.[31] The majority also rejected the argument that accommodating the coach's religious exercise coerced students, mainly because the coach's prayers took place after games concluded, when students were otherwise occupied and staff engaged in their own private activities.[32]

In *Kennedy*, the Court carefully avoided taking a position on which version of coercion—Justice Kennedy's or Justice Scalia's—best comported with "the original meaning of the Establishment Clause."[33] But the majority's focus on record evidence—and especially its use of a district court quotation observing there was "no evidence that students were *directly* coerced"—struck the dissenters as capitulating to Justice Scalia's position.[34] In their view, the coach's past practice of occasionally praying with students along with the presence of peers created clear "social pressure."[35] By ignoring that, the dissenters insisted, the majority portended a change in the law. Several scholars have suggested the same thing.[36]

[30] 142 S. Ct. 2407, 2415–16 (2022).

[31] Id. at 2427.

[32] Id. at 2428–32.

[33] Id. at 2429.

[34] Id. (emphasis added); see also id. at 2451 (Sotomayor, J., dissenting) ("The Court's suggestion that coercion must be 'direc[t]' . . . is contrary to long-established precedent." (alterations in original)).

[35] Id. at 2451–52 (Sotomayor, J., dissenting) (quoting Lee v. Weisman, 505 U.S. 577, 594 (1992)).

[36] See, e.g., Justin Driver, Three Hail Marys: *Carson*, *Kennedy*, and the Fractured Détente Over Religion and Education, 136 Harv. L. Rev. 208, 239 (2022) (suggesting that *Kennedy* "comes perilously close to installing the understanding of coercion that Justice Scalia's dissenting opinion [in *Lee*] advanced"); Ira C. Lupu & Robert W. Tuttle, Response, *Kennedy v. Bremerton School District*—A Sledgehammer to the Bedrock of Nonestablishment, Geo. Wash. L. Rev. on the Docket (July 26, 2022), https://gwlr.org/kennedy-v-bremerton-school-district-a-sledgehammer-to-the-bedrock-of-nonestablishment [https://perma.cc/F46M-BKLS] (suggesting that after *Kennedy*, "[p]rayer in schools may soon . . . requir[e] the provision of opt out rights to avoid compelled speech but no limitations on what schools may sponsor"). Others have gone even further. See, e.g., Alexander Tsesis, Government Speech and the

The dissenters in *Kennedy* are probably right that the law of the *School Prayer Cases* may be in flux. But this Article argues that both sides of the debate are wrong in assuming that a historical approach to the Establishment Clause yields the end of the *School Prayer Cases*. Specifically, this Article argues that a more nuanced understanding of Founding-era history might well place those cases on firmer ground, and for reasons that Justice Scalia simply overlooked. And in so doing, this Article also suggests this same history may also help illuminate other questions surrounding government-sponsored prayer.

Begin with the most basic point. Individual justices and scholars have long noted that compulsory public education of the kind recognizable to us today did not exist at the Founding.[37] But as the *Kennedy* majority hinted, members of the Founding generation were well-acquainted with a practice that resembles government-mandated school prayer in several relevant respects—namely, laws requiring attendance at worship services in state-approved churches.[38] Like mandatory school prayer, those laws required that citizens attend state-sanctioned religious instruction and worship. Yet contra Justice Scalia, it is inaccurate to say that Founding-era Americans viewed such laws as permissible so long as they contained opt-outs that might "dispel the coercion."[39] From the late seventeenth century onward, mandatory church-attendance laws throughout the American colonies contained exemptions for religious dissenters. But supporters of religious liberty roundly rejected those schemes across different states. When it came to mandatory attendance at state-sponsored worship, opt-outs simply were not enough.[40]

Yet if "direct coercion" was not the fundamental problem with laws mandating formal worship, what was? Here, members of the Founding generation offered a variety of answers. But in the main, their answers focused not on individual coercion, but instead on the limits of

Establishment Clause, 2022 U. Ill. L. Rev. 1761, 1801–02 (suggesting that in *Kennedy* "a majority of the Court adopted [Justice Scalia's] flawed test").

[37] See Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 238–39 & n.7 (1963) (Brennan, J., concurring) (noting that in early America, "education was almost without exception under private sponsorship and supervision" until at least "the first quarter of the nineteenth century"); see also infra Section III.B.

[38] *Kennedy*, 142 S. Ct. at 2429 (noting that "government may not, consistent with a historically sensitive understanding of the Establishment Clause, 'make a religious observance compulsory' [or] . . . 'coerce anyone to attend church' " (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952))).

[39] *Lee*, 505 U.S. at 643 (Scalia, J., dissenting).

[40] See infra Section II.B.

government power. On this theory, mandating attendance at state-sponsored worship was objectionable—opt-outs or no—because government simply had no authority to command a religious observance through law.[41] As one contemporary writer put it, citizens had "no right to invest their Legislature with [this] power," because "[m]atters of religion lie between God and their own consciences, to whom each man is to give account for *himself*."[42] And as I explain in more detail below, understanding that point potentially offers several important insights for clarifying the law today.[43]

First and most basically, understanding prominent Founding-era objections to mandatory church-attendance laws provides at least some reason to think the Court's famous *School Prayer Cases* were correct, though not for the reasons the Court has said. As initially formulated, the *School Prayer Cases* rested on what have become uncertain foundations—an increasingly outmoded theory of government religious speech on the one hand, and a nebulous theory of coercion on the other. But a reexamination of the Founding-era evidence offers a different way forward. From this perspective, the problem with teacher-led prayer in public schools is not that government expression must be strictly secular, nor that special rules about coercion apply to religion but nothing else. Instead, the problem is that the legal mechanisms supporting mandatory school prayer are analogous to mandatory church-attendance laws in the most relevant respects, and arguably violate the Establishment Clause for the same reasons.

Where government mandates both attendance at public school and attendance at official classroom activities—including daily prayer or devotional Bible reading—it has created a coercion-backed rule requiring attendance at state-sponsored worship. Moreover, as with Founding-era church-attendance laws, such programs necessarily assume a governmental power to command a religious observance, even if they might also provide opt-outs for dissenters. To be sure, the Founding generation never confronted this precise problem. And as explained more below, the complex history of public schools makes the issue more complicated still.[44] Nonetheless, a proper understanding of Founding-era history provides a plausible argument that policies mandating public-

[41] See id.
[42] Philanthropos, Number IV, Indep. Chron. & Universal Advertiser (Bos.), Apr. 6, 1780.
[43] See infra Part IV.
[44] See infra Section III.B.

school prayer are no different in kind from the laws mandating worship that the Founding generation rejected as a feature of religious establishment, and thus are similarly prohibited.

At a minimum, then, a more nuanced understanding of history might lend support to the Court's famous *School Prayer Cases*. But even more, understanding Founding-era objections to laws requiring attendance at state-sponsored worship provides a new vantage point for thinking about the role of coercion in Establishment Clause doctrine, especially as it relates to government-sponsored prayer.

Members of the Founding generation objected to laws mandating attendance at government-sponsored worship, even where such laws exempted dissenters. In doing so, however, they did not limit their objections to instances of so-called direct coercion, as Justices Scalia and Thomas have emphasized.[45] Instead, proponents of religious liberty at the Founding believed government lacked the power to issue commands requiring a religious observance. Rather than merely condemning discrete acts of punishment, Founding-era proponents of religious liberty condemned any governmental attempt to require formal acts of worship through law, no matter how permissively such laws functioned in practice. What mattered was the claimed power to enforce religious duties through a coercion-backed rule, not whether the rule also contained exemptions or ultimately punished discrete individuals.[46] Thus, while not fully solving the debate about the role of coercion in Establishment Clause analysis, the Founding-era history described here offers a different way forward in how to understand it.

All this leads to a third point—this one more general. Many Founding-era objections to church-attendance laws rested, in significant part, on a belief that government lacked power to mandate worship, even under the most tolerant conditions. Yet by and large, members of the Founding generation did not seem to object to at least some other government actions involving religious observance, especially where such actions did not take the form of a coercion-backed command. Most notably, while

[45] See Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2096 (2019) (Thomas, J., concurring in the judgment) ("In an action claiming an unconstitutional establishment of religion, the plaintiff must demonstrate that he was actually coerced by government conduct that shares the characteristics of an establishment as understood at the founding."); Lee v. Weisman, 505 U.S. 577, 640 (1992) (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*.").

[46] See infra Section II.C.

many in the Founding generation believed that government lacked the power to "enjoin" days of prayer or thanksgiving, they generally thought that merely "recommending" such activity was acceptable, even while recognizing the dangers that distinction posed.[47] And indeed, reflection on that point might illuminate a path for thinking through other thorny problems surrounding government-sponsored religious observance, especially in contexts where a formal rule or policy is lacking.

This Article proceeds as follows. Part I briefly explains the development of the Court's jurisprudence surrounding mandatory public-school prayer and the puzzles surrounding those precedents, culminating in *Kennedy v. Bremerton School District*. Part II takes a step back to consider Founding-era history. This Part begins by canvassing laws mandating attendance at state-sponsored worship in England and the early American colonies. It goes on to explore why Founding-era Americans ultimately rejected those laws, even when they contained opt-outs for dissenters. Part III briefly discusses the scope of these Founding-era objections, first with respect to things like thanksgiving proclamations at the federal level, and second with respect to the historical development of public schools. Finally, Part IV returns to the modern cases and explores implications for government-sponsored school prayer and more.

Before proceeding to the discussion, two preliminary observations are in order. The first involves method. Following the Court's invitation in *Kennedy*, this Article seeks to understand how and why Founding-era Americans rejected laws requiring church attendance, on the theory that those laws are relevant to thinking about the constitutional limits on things like government-sponsored public-school prayer today.[48] In doing so, however, the Article does not seek to provide an independent theory about why and how the Establishment Clause is incorporated against the states. Instead, I simply defer to the Court's precedents in this area along with the Court's corresponding assumption that—for both claims against the states as well as the federal government—Founding-era evidence is of primary importance.[49] Likewise, this Article looks to evidence from the

[47] See infra Section III.A.

[48] See infra notes 105–19 and accompanying text (discussing *Kennedy*'s invitation to consider Founding-era history).

[49] See, e.g., Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2421, 2428 (2022) (reaffirming the incorporation of the First Amendment and suggesting interpretation of the Establishment Clause must "faithfully reflect[] the understanding of the Founding Fathers" (quoting Town of Greece v. Galloway, 572 U.S. 565, 577 (2014))); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2258–59 (2020) (looking to Founding-era history when

states as well as the federal government during the Founding period, because both kinds of evidence are highly relevant to understanding the historic concept of "establishment" and objections to it in this period.

The second point concerns the limits of my argument. In this Article, I attempt to chart Founding-era objections to government-mandated religious observance and the possible implications of those objections for several modern controversies. In doing so, however, the Article takes no hard-and-fast position on whether other limits under the Establishment Clause—including those not necessarily involving coercion—may also apply in specific circumstances. To take just one example, it seems likely that many at the Founding believed that government could not designate a national church or tie a religious group's official status to adopting certain articles of faith.[50] In this Article, I contend that understanding historical objections to mandatory church-attendance laws provides the simplest path for addressing several puzzles surrounding the *School Prayer Cases* and related issues. But I do not foreclose the possibility that other Establishment Clause considerations may sometimes be relevant.

I. THE LAW TODAY

In its decisions involving government-led public-school prayer and other kinds of government-sponsored religious observance, the Court has wavered between two rationales—one focused on government religious speech, and a second focused on individual coercion. But subsequent legal developments have left both rationales unstable. This Part surveys

interpreting the Establishment Clause's application to a state-level controversy); see also id. at 2264 (Thomas, J., concurring) ("Even assuming that the [Establishment] Clause creates a[n] [individual] right and that such a right could be incorporated . . . it would only protect against an 'establishment' of religion as understood at the founding . . . ."). For a sampling of arguments defending the incorporation of the Establishment Clause, see Nathan S. Chapman & Michael W. McConnell, Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience 75–84 (2023); see also Kurt T. Lash, The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle, 27 Ariz. St. L.J. 1085, 1088 (1995). For a contrary perspective, see generally Vincent Phillip Munõz, The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation, 8 U. Pa. J. Const. L. 585 (2006).

[50] See, e.g., Donald L. Drakeman, Church, State, and Original Intent 229–32 (2010) (concluding that, at minimum, the Establishment Clause was understood to mean Congress could not establish a national church); Michael W. McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 Wm. & Mary L. Rev. 2105, 2135–36 (2003) [hereinafter McConnell, Establishment] (discussing government control over articles of faith in South Carolina's 1778 constitution).

those difficulties and the corresponding invitation that the Court's decision in *Kennedy v. Bremerton School District* set out.

A. The Government-Speech Rationale

The government-speech rationale originated in *Engel v. Vitale*.[51] There, the Court considered an Establishment Clause challenge to New York State's Regents Prayer. State officials had composed the prayer for recitation in public schools to be said after the Pledge of Allegiance.[52] It consisted of a single sentence: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."[53] By the time the case reached the Supreme Court, school policy allowed any child to stay seated during the prayer, attend morning exercises in a room without prayers, or simply arrive late after the exercises had concluded.[54]

Writing for a 6-1 majority, Justice Black nonetheless struck down the prayer.[55] Casting aside the fact that New York's policy allowed children to excuse themselves by written request, Justice Black nodded to Founding-era history and "the dangers of a union of Church and State."[56] But the heart of his opinion was instead a ringing statement of principle. "[I]n this country," Justice Black wrote, "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."[57] For Justice Black, the problem with government-led public-school prayer was first and foremost a problem about government religious speech.

The following year, the Court doubled down on this approach. In *School District of Abington Township v. Schempp*, the Court invalidated government-led devotional Bible reading and daily recitation of the Lord's Prayer in public schools.[58] Writing for the majority, Justice Clark quickly surveyed the historical record and acknowledged that "religion

[51] 370 U.S. 421, 425 (1962).
[52] Id. at 423; id. at 438 (Douglas, J., concurring).
[53] Id. at 422 (majority opinion).
[54] Id. at 424 n.2.
[55] Id. at 424.
[56] Id. at 425–30 (discussing objections to the English establishment and subsequent controversies in the Founding Era).
[57] Id. at 425.
[58] 374 U.S. 203, 205, 207 (1963).

has been closely identified with our history and our government."[59] Having done so, however, Justice Clark quickly retreated into abstraction. Insisting that the Religion Clauses require a "strict neutrality" as to religion, Justice Clark went on to insist that, under the Establishment Clause, laws must have "a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[60] He then declared that the schools' programs requiring devotional Bible reading and prayer violated those requirements.[61]

Read together, *Engel* and *Schempp* suggested a wide-ranging principle. Rather than merely asking whether government had composed the prayer as *Engel* had done, the Court in *Schempp* declared it sufficient that the "opening exercise is a religious ceremony and was intended by the State to be so."[62] By reasoning as such, *Schempp* transformed *Engel*'s original rationale into a much broader one: the Establishment Clause removes from government "all legislative power" respecting the "expression" of religious belief.[63] According to this theory, the Establishment Clause forbade government not just from composing prayers, but from engaging in devotional religious speech of seemingly any kind.

As many readers will recognize, Justice Clark's mention of a "secular legislative purpose" and an effect that "neither advances nor inhibits religion" was the first iteration of what eventually became the Court's infamous *Lemon* test.[64] Under *Lemon v. Kurtzman*, courts assessing an Establishment Clause violation would ask whether the law had a secular purpose, whether it had the effect of neither advancing nor inhibiting religion, and whether it produced excessive entanglement between religion and government.[65] And applying this test, the Court sometimes prohibited similar activities in the school setting, such as official prayers before high school football games, based in part on the theory that such activities impermissibly "endorsed" religion.[66]

[59] Id. at 212–13.
[60] Id. at 222, 225.
[61] Id. at 223–25.
[62] Id. at 223.
[63] Id. at 222 ("[T]he Establishment Clause . . . withdrew all legislative power respecting religious belief or the expression thereof.").
[64] Lemon v. Kurtzman, 403 U.S. 602 (1971).
[65] Id. at 612–13.
[66] See, e.g., Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294, 305–08 (2000).

Scholars have frequently defended the *School Prayer Cases* by appealing to some version of the government-speech rationale.[67] Here, however, my aim is not to engage in a full-fledged debate on the merits of the *Lemon* test or its scholarly elaborations. Rather, I want to suggest only that—whatever its strengths or shortcomings as an abstract matter—the government-speech rationale has become a tenuous basis for defending the *School Prayer Cases*. That is so for at least two interrelated reasons.

The first reason involves the limits of constitutional interpretation. Ronald Dworkin famously observed that, to be convincing as law, a moral reading of the Constitution must also "fit[] the broad story of America's historical record."[68] Without a doubt, *Schempp*'s rule against government religious speech was a kind of "moral reading"—it was a specification of the principle that "[g]overnment maintain strict neutrality, neither aiding nor opposing religion."[69] Yet as even its supporters have acknowledged, this specification sits in notable tension with the arc of government religious expression in America.[70]

Consider just a few examples. Since the Founding, chaplains in both houses of Congress have offered prayers before legislative sessions.[71] Military chaplains have provided worship services for servicemembers on and off the battlefield.[72] Presidents have frequently issued thanksgiving proclamations inviting citizens to offer "supplications to the great Lord

[67] See, e.g., Marshall, supra note 8, at 362–63 (arguing that government-sponsored school prayer is unconstitutional because it involves "the government's stamp of approval of religion," leading to "divisiveness"); Koppelman, supra note 1, at 90, 105 (arguing that the *School Prayer Cases* flow naturally from a bedrock principle that the Establishment Clause prohibits government from "declaring religious truth"); Lupu & Tuttle, supra note 8, at 122 (arguing the *School Prayer Cases* rest on the idea the "[g]overnment may not align itself with divine authority").

[68] Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 11 (1996).

[69] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 225 (1963).

[70] See Lee v. Weisman, 505 U.S. 577, 626–27 (1992) (Souter, J., concurring) (arguing that "the State may not favor or endorse . . . religion generally over nonreligion," but acknowledging that "leaders of the young Republic engaged in" practices seemingly at odds with that proposition).

[71] See Marsh v. Chambers, 463 U.S. 783, 786–88 (1983) (recounting this history); Town of Greece v. Galloway, 572 U.S. 565, 575–76, 578–79 (2014) (same).

[72] See generally William E. Dickens, Jr., Answering the Call: The Story of the U. S. Military Chaplaincy from the Revolution Through the Civil War 7–50 (1998) (recounting this history). See also Katcoff v. Marsh, 755 F.2d 223, 224–25 (2d Cir. 1985) (detailing the same history).

and Ruler of Nations" or undertake similar acts of devotion.[73] And since at least 1827, the Supreme Court has begun its own sessions with what can only be described as an "expression" of religious belief: "God save the United States and this honorable Court."[74] Maybe there is a way to rationalize some of these practices as being consistent with a broad rule against government religious speech. But as Dworkin rightly noted, asking judges to enforce a rule seemingly at odds with so much well-settled practice is a tenuous enterprise, whatever one's constitutional methodology.

The second point flows directly from the first. *Schempp*'s (and later *Lemon*'s) near-categorical rule condemning government religious speech created a rift between constitutional doctrine and many historic practices. But as later cases make plain, that tension ultimately proved impossible to sustain. In *Marsh v. Chambers*, the Court ignored *Lemon* and upheld a state's practice of beginning legislative sessions with prayer, pointing back to similar practice before and during the Founding.[75] The next year, the Court largely ignored *Lemon* again to uphold holiday displays with religious elements.[76] Later, Justices across the ideological spectrum approved a historic monument displaying the Ten Commandments.[77] Later still, a lopsided supermajority approved a monument shaped like a giant cross.[78] Of course, the Court has sometimes tried to stress the ways that these monuments or practices served public purposes and not purely religious ones.[79] But if legislative prayer is justified in part because it

[73] See, e.g., George Washington, Proclamation: A National Thanksgiving (Oct. 3, 1789), *reprinted in* 1 James D. Richardson, A Compilation of the Messages and Papers of the Presidents 1789–1897, at 64, 64 (D.C., Gov't Printing Off. 1896); see also Lynch v. Donnelly, 465 U.S. 668, 675 & nn.2–3 (1984) (describing this practice).

[74] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 29 (2004) (Rehnquist, C.J., concurring in the judgment) (quoting 1 Charles Warren, The Supreme Court in United States History 469 (1926)) (describing this practice).

[75] 463 U.S. at 786–88.

[76] *Lynch*, 465 U.S. at 668. After canvassing historical examples of government religious speech, the *Lynch* majority emphasized the Court's "unwillingness to be confined to any single test or criterion" and half-heartedly applied *Lemon* only in correcting the lower courts' application of the test. Id. at 679–81.

[77] Van Orden v. Perry, 545 U.S. 677, 677 (2005); id. at 698 (Breyer, J., concurring in the judgment).

[78] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2067 (2019); id. at 2090 (Breyer, J., concurring); id. at 2094 (Kagan, J., concurring in part).

[79] See, e.g., id. at 2075 (noting that "[t]he image used in the Bladensburg memorial—a plain Latin cross—also took on new meaning after World War I," in part because of photographs or

"solemnize[s] the occasion" and places participants in an appropriate "frame of mind," why wouldn't the same be true of at least some kinds of school prayer?[80]

In *Kennedy v. Bremerton School District*, the Court took the final step and "abandoned *Lemon* and its endorsement test offshoot"—a move that, presumably, also abandoned *Schempp*'s broad government-speech rationale.[81] But as the case law discussed above makes plain, the change had come about long before. One may think the Court's cases in this area are right, wrong, or a mix of the two. But whatever one thinks about that larger issue, there is little doubt that the Court's jurisprudence over the past three decades has made the government-speech rationale a fragile basis for defending the *School Prayer Cases*.

B. The Coercion Rationale

A second rationale for the *School Prayer Cases* rests on a theory about coercion. According to this view, the important point about mandatory public-school prayer is not that government is engaged in religious expression, but rather that the practice forces unwilling participants to engage in a religious observance. Yet like the government-speech rationale, the coercion rationale also faces challenges, especially given the Court's renewed focus on history.

To understand the difficulties, begin by returning briefly to *Engel*. There, Justice Black eschewed coercion as a necessary element of an Establishment Clause violation.[82] Nonetheless, he went on to insist that New York's school-prayer regime actually *was* coercive, even if it contained opt-outs for dissenters. According to Justice Black, "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[83] Although New York's school-prayer policy excused dissenting

descriptions of cemeteries containing "rows and rows of plain white crosses" (footnote omitted)).

[80] Town of Greece v. Galloway, 572 U.S. 565, 570, 583 (2014).

[81] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022); see also Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222–23 (1963) (relying on a proto-version of the now-defunct *Lemon* test).

[82] Engel v. Vitale, 370 U.S. 421, 430 (1962).

[83] Id. at 431.

students, it nonetheless placed "indirect coercive pressure" on religious minorities to "conform to [a] prevailing officially approved religion."[84]

Justice Black's notion of indirect coercion would lay dormant at the Court for several decades. But eventually, the theory made a comeback with the help of Justice Kennedy. In *Lee v. Weisman*, the Court considered a constitutional challenge to a public school's practice of beginning its graduation ceremony with a prayer offered by a local clergy member—in this case, a local rabbi.[85] Writing for the Court, Justice Kennedy eschewed the *Lemon* test.[86] Instead, he insisted that the school's practice violated the Establishment Clause primarily because of the "subtle coercive pressures" inherent in the "secondary school environment."[87] Drawing on "[r]esearch in psychology," Justice Kennedy insisted that "adolescents are often susceptible to pressure from their peers towards conformity."[88] And, he reasoned, this fact rendered attendance at the graduation prayer "in a fair and real sense obligatory."[89] Although students could in theory choose not to attend or excuse themselves during the prayers, "social pressure" left students with no "real choice" but to participate.[90]

The coercion theory as articulated by Justice Kennedy has several virtues. For one, this theory offers a clear way to distinguish government-led school prayer from well-accepted practices like legislative prayer or military chaplains—only school prayer almost exclusively involves children.[91] Moreover, the coercion rationale also seems to come closer to identifying a particularly troubling aspect about mandatory school prayer—not that the government is engaged in religious speech per se, but that it may be pressuring *private citizens* to engage in such speech as well. Nonetheless, here too difficulties persist.

The most obvious difficulty is that cases like *Engel*, *Schempp*, and *Lee* do not involve coercion in any usual sense. Yes, students are generally required to attend public school. But even before *Engel*, the Supreme Court recognized that the Constitution guarantees a right to opt out of that

[84] Id. at 430–31.
[85] 505 U.S. 577, 581–85 (1992).
[86] Id. at 587.
[87] Id. at 588.
[88] Id. at 593–94.
[89] Id. at 586, 595.
[90] Id. at 594–95.
[91] See Town of Greece v. Galloway, 572 U.S. 565, 589–90 (2014) (opinion of Kennedy, J., joined by Roberts, C.J. & Alito, J.) (appealing to this logic); Marsh v. Chambers, 463 U.S. 783, 792 (1983) (similar).

requirement.[92] Yes, public-school students are generally required to participate in morning exercises during school hours. But by the time *Engel* and *Schempp* reached the Supreme Court, all the programs at issue allowed objecting students to opt out.[93] And if other constitutional contexts are the guide, that presents a conundrum. For example, the Free Exercise Clause sometimes mandates that dissenters receive exemptions from laws burdening their religious practice.[94] But courts do not usually think that such exemptions are inadequate to dispel coercion simply because invoking them sometimes involves psychological difficulty.[95]

In *Lee*, Justice Kennedy suggested that even if students are not coerced in the usual sense, they still experience *indirect* coercion via "peer pressure" that renders government-led school prayer unconstitutional. But Justice Kennedy made no attempt to explain how his modified version of coercion was consistent with Founding-era history. Instead, he explicitly based his conclusion on "[r]esearch in psychology"[96]—an approach that Justice Scalia chided as a "psycho-journey" more fitting "disciples of . . . Freud" than students of Blackstone.[97] Of course, one might defend Justice Kennedy's approach as simple common sense—hardly an implausible position, especially with respect to adolescents.[98] But it is nonetheless true that the general lack of Founding-era support for such an expansive notion of coercion renders the rationale potentially unstable, especially for a Court focused on "historical practices and understandings."[99]

There is also a deeper puzzle here. Under the coercion rationale, allowing students to opt out of government-led school prayer is insufficient because "peer pressure" nonetheless remains. Yet if this is so, it is difficult to explain why many other school-sponsored practices are not also unconstitutional. In *West Virginia State Board of Education v. Barnette*, the Court famously held that the Free Speech Clause allows public schools to require students to say the Pledge of Allegiance so long

[92] See Pierce v. Soc'y of Sisters, 268 U.S. 510, 510 (1925).

[93] See supra note 54 and accompanying text (documenting these opt-out procedures).

[94] See Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1876–77 (2021).

[95] See, e.g., Nathan S. Chapman, Adjudicating Religious Sincerity, 92 Wash. L. Rev. 1185, 1232–33 (2017) (noting the emotional costs associated with seeking a religious exemption).

[96] Lee v. Weisman, 505 U.S. 577, 593 (1992).

[97] Id. at 642–43 (Scalia, J., dissenting).

[98] See, e.g., Chapman & McConnell, supra note 49, at 145 (taking this approach).

[99] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

as government exempts students who do not wish to participate.[100] But if opt-outs fall short of dispelling coercion in the school-prayer context, why wouldn't the same be true with respect to other school activities like the Pledge of Allegiance, or requiring attendance at many other school-sponsored activities to which some students might object?[101]

Scholars have sometimes responded by suggesting that, unlike the Pledge and similar practices, teacher-led school prayer involves "no legitimate government interest."[102] But as to the coercion point at least, that response merely begs the question. *Barnette* was decided on the premise that exempting students from reciting the Pledge vindicated each student's right not to be "compel[led] . . . to utter what is not in his mind."[103] Yet if the indirect-coercion theory is correct, it is hard to see how *Barnette* did anything of the sort. After all, peer pressure seems just as potent in the context of the Pledge as in school prayer.[104] At a minimum, the coercion theory suggests that special rules about what counts as coercion apply to religion but little else, without any clear explanation for why that is so. And that too makes the *School Prayer Cases* vulnerable.

C. The Court's Invitation

None of this is meant to suggest, however, that all roads are closed. In *Kennedy v. Bremerton School District*, the Court held that a public school district violated the Constitution by terminating a football coach for praying midfield after games and rejected the argument that accommodating the coach violated the Establishment Clause.[105] Here, the Court also declared in no uncertain terms that the Establishment Clause should be interpreted primarily by reference to Founding-era "historical

[100] See W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641–42 (1943).

[101] See Greene, supra note 24, at 452 (suggesting that under *Lee*'s logic, "[t]here's no reason to believe the psychological pressure to recite the pledge of allegiance is any weaker than the psychological pressure to join in prayer"); see also Michael W. McConnell, Thomas C. Berg & Christopher C. Lund, Religion and the Constitution 484 (4th ed. 2016) (noting this problem).

[102] Geoffrey R. Stone, In Opposition to the School Prayer Amendment, 50 U. Chi. L. Rev. 823, 838 (1983).

[103] *Barnette*, 319 U.S. at 634.

[104] See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 47 (2004) (Thomas, J., concurring in the judgment) ("On *Lee*'s reasoning, *Barnette*'s protection is illusory, for government officials can allow children to recite the Pledge and let peer pressure take its natural and predictable course.").

[105] 142 S. Ct. 2407, 2415–16 (2022).

practices and understandings."[106] As noted above, that holding cast some doubt on prior justifications for the *School Prayer Cases*. But it also opened others for further exploration.

In *Kennedy*, the Court directly acknowledged that the Establishment Clause contains important limits that apply to the public-school setting. Most notably, the Court observed that under a "historically sensitive understanding of the Establishment Clause," government may not "make a religious observance compulsory."[107] More specifically, the Court noted that government "'may not coerce anyone to attend church' . . . [or] engage in 'a formal religious exercise.'"[108] It then observed, in line with its historical approach, the reason for those conclusions: "[C]oercion along these lines was among the foremost hallmarks of religious establishments the framers sought to prohibit. . . ."[109]

The *Kennedy* majority did not fully explain these few brief sentences. But the Court's mention of "hallmarks of religious establishments" and its accompanying citation to an earlier concurrence by Justice Gorsuch make things clearer.[110] Concurring in *Shurtleff v. City of Boston*, Justice Gorsuch suggested that, rather than use *Lemon*'s general test, courts assessing an Establishment Clause challenge should consider whether a government action bears a reasonable similarity to certain "historical hallmarks of an establishment of religion," such as church taxes or punishing members of minority faiths.[111] Moreover, like the *Kennedy* majority's later reference to laws requiring citizens to "attend church," Justice Gorsuch specifically noted that one so-called hallmark of Founding-era religious establishments was "government mandated attendance in the established church."[112]

Read against Justice Gorsuch's *Shurtleff* concurrence, the Court's opinion in *Kennedy* suggests a desire to proceed by analogy when

[106] Id. at 2428 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

[107] Id. at 2429 (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).

[108] Id. (first quoting *Zorach*, 343 U.S. at 314; and then quoting Lee v. Weisman, 505 U.S. 577, 589 (1992)).

[109] Id.

[110] See id. & n.5 (citing Shurtleff v. City of Boston, 142 S. Ct. 1583, 1608–10 (2022) (Gorsuch, J., concurring in the judgment)).

[111] *Shurtleff*, 142 S. Ct. at 1609 (Gorsuch, J., concurring in the judgment).

[112] Id. at 1609. Both Justice Gorsuch's *Shurtleff* concurrence and the Court's opinion in *Kennedy* also referenced scholarship by Michael McConnell. Id.; *Kennedy*, 142 S. Ct. at 2429 n.5; see McConnell, Establishment, supra note 50, at 2144–46 (noting that one common feature of Founding-era religious establishments included "laws compelling church attendance").

discerning the meaning of "establishment." When resolving the football coach's case, the Court did not focus on the fact that public schools as we know them today did not exist at the Founding.[113] Nor did it suggest that public schools are somehow special or outside the Establishment Clause's concern. Instead, the Court said the question is whether, judged by "historical practices and understandings," mandatory public-school prayer raises concerns analogous to at least one "hallmark[] of religious establishment[]"—namely, laws requiring citizens to "attend church."[114]

Here, however, it is worth noting an important complication. Recall that in *Lee*, Justice Scalia disputed Justice Kennedy's suggestion that the *School Prayer Cases* could be justified by a theory of indirect coercion.[115] Instead, he suggested that "[t]he coercion that was a hallmark of historical establishments of religion was coercion . . . *by force of law* and *threat of penalty*."[116] Justice Scalia then hinted that as a historical matter, the *School Prayer Cases* may well be wrong, apparently because in those cases, opt-outs for dissenters might have "sufficed to dispel the coercion resulting from . . . mandatory attendance."[117]

In *Kennedy*, the Court declined to take a position on which understanding of coercion cohered to "the original meaning of the Establishment Clause."[118] The dissenters insisted that the Court silently opted for Justice Scalia's approach and with it the threatened demise of the *School Prayer Cases*.[119] But the majority opinion does not say that. At most, it suggests that any historical theory concerning compulsory religious observance must account for Justice Scalia's challenge.

The remainder of this Article attempts to do just that. In what follows, I explore how and why many members of the Founding generation rejected laws requiring attendance at state-sponsored worship. And in doing so, I argue that—contrary to what the *Kennedy* dissenters and Justice Scalia both seemed to assume—a historical approach does not

[113] See infra Section III.B (discussing the issue).

[114] *Kennedy*, 142 S. Ct. at 2429 (first quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952); and then quoting Lee v. Weisman, 505 U.S. 577, 589 (1992)).

[115] See *Lee*, 505 U.S. at 636–39 (1992) (Scalia, J., dissenting).

[116] Id. at 640.

[117] Id. at 643.

[118] See *Kennedy*, 142 S. Ct. at 2429 (noting these competing understandings but concluding that "Kennedy's private religious exercise did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion").

[119] Id. at 2451 (Sotomayor, J., dissenting) ("The Court's suggestion that coercion must be 'direc[t]' . . . is contrary to long-established precedent." (alterations in original)).

necessarily spell the demise of the *School Prayer Cases*. On the contrary, it may provide a more convincing reason to support them.

II. COMPULSORY RELIGIOUS OBSERVANCE AT THE FOUNDING

Laws mandating attendance at state-sponsored worship were common in early America, especially in colonies with a strong established church. On the eve of the Revolution, nearly all of the original colonies with religious establishments required regular church attendance.[120] Yet Founding-era Americans eventually rejected those laws in different places throughout the country. This Part offers an account of some of the most important debates surrounding that change. It first canvasses early church-attendance laws in England and colonial America. It then explores why many at the Founding rejected church-attendance laws even though—contra Justice Scalia's assumptions—these laws contained opt-outs for dissenters. To understand that story, however, the place to begin is in England.

A. The English Background and the Early American Colonies

In 1534, Parliament passed the Act of Supremacy, ending the Pope's dominion in England and making the monarch "the supreme head" of the church.[121] And subsequently, during the reign of Edward VI, Parliament set out legal requirements to govern the forms and means of worship in the newly recognized Church of England. It approved official articles of faith, which provided the standard of orthodoxy within the church.[122] Likewise, in 1549, Parliament adopted the first Book of Common Prayer and required all ministers to adhere to it on pain of punishment.[123]

[120] See infra notes 128–30 and accompanying text (Virginia); infra notes 131–34 and accompanying text (South Carolina); infra note 135 and accompanying text (Georgia); infra note 144 and accompanying text (Massachusetts); infra notes 145–46 and accompanying text (Connecticut); infra note 147 and accompanying text (New Hampshire). An additional state—Vermont—may have given the legislature power to create such laws, but that power appears never to have been exercised. See infra notes 255–57 and accompanying text.

[121] Act of Supremacy of Henry VIII 1534, 26 Hen. 8 c. 1, *reprinted in* Select Documents of English Constitutional History 239, 239–40 (George Burton Adams & H. Morse Stephens eds., 1920) [hereinafter Select Documents].

[122] See G.R. Elton, The Tudor Constitution: Documents and Commentary 396–97 (2d ed. 1982).

[123] First Act of Uniformity of Edward VI 1549, 2 & 3 Edw. 6 c. 1, *reprinted in* Select Documents, supra note 121, at 272, 272–74.

But uniformity is incomplete without corresponding attendance by the people. Thus, accompanying its policies standardizing doctrine and ritual, Parliament also enacted the country's first law mandating attendance at state-sponsored worship. The law commanded that every person inhabiting "the king's majesty's dominions" attend their parish church "diligently and faithfully" on Sundays and holy days.[124] Originally, that requirement was enforced through ecclesiastical censures.[125] But beginning in the reign of Elizabeth I and continuing thereafter, Parliament introduced set monetary penalties and, for a limited period, even imprisonment.[126] Around the time of the American Founding, Blackstone reported that under English law, "non-conformists" who "absent[ed] themselves from the divine worship in the established church" without excuse would be fined one shilling per absence, and twenty pounds for a month's absence.[127]

Unsurprisingly, those same sensibilities carried across the Atlantic to Virginia, England's first colony. In 1606, royal instructions accompanying the colony's charter directed settlers to "provide that the Word and Service of God be preached, planted, and used . . . according to the rites and doctrine of the Church of England."[128] Accordingly, in 1619, Virginia's inaugural general assembly mandated religious services pursuant to the Book of Common Prayer, and required "[a]ll persons whatever upon Sabaoth days shall frequente divine service & sermons both forenoon and afternoone," with a three shilling fine for

[124] Second Act of Uniformity of Edward VI 1552, 5 & 6 Edw. 6 c. 1, § 2, *reprinted in* Select Documents, supra note 121, at 278, 279.

[125] Id. at 279. Attending a dissenting church was a different matter. On that score, the law provided that anyone who "willingly and wittingly hear and be present at any other manner or form of common prayer" faced six months' imprisonment for a first offense, one year's imprisonment for a second, and life imprisonment for a third. Id. at 280–81.

[126] See An Acte for the Uniformitie of Common Prayoure and Dyvyne Service in the Churche, and the Administration of the Sacramentes 1558–59, 1 Eliz. c. 2, *reprinted in* 4 The Statutes of the Realm 355, 357 (1819); see also An Acte to Retayne the Quenes Subjects in Obedyence 1592–93, 35 Eliz. c. 1, *reprinted in* The Statutes of the Realm, supra, at 841, 841 (declaring imprisonment without bail for all over the age of sixteen who failed to attend services in the Church of England).

[127] 4 William Blackstone, Commentaries *51–52. For a history of the development of these laws, see generally Clive D. Field, A Shilling for Queen Elizabeth: The Era of State Regulation of Church Attendance in England, 1552–1969, 50 J. Church & State 213 (2008).

[128] 1 James S.M. Anderson, The History of the Church of England in the Colonies and Foreign Dependencies of the British Empire 166 (London, Rivingtons 2d ed. 1856) (citation omitted).

nonattendance.[129] Ten years later, the assembly adjusted the penalty to one pound of tobacco per absence and fifty pounds for a month's absence.[130]

Several other Anglican colonies followed the same basic path. In the colony of Carolina, the Fundamental Constitutions of 1669 declared the Church of England to be "the only true and orthodox" church and required each citizen to be "a member of some church or profession," mandating church attendance by default.[131] But the Fundamental Constitutions went on to state that a "church" consisted of any group of seven or more persons "agreeing in any religion," provided they acknowledged the existence of God, the duty to publicly worship Him, and recorded their particular modes of worship in writing.[132] The Fundamental Constitutions of 1669 was never fully implemented.[133] But after South Carolina became its own colony, it followed up with a law requiring all citizens to attend worship at the established church or "some [other] meeting or assembly of religious worship" or pay a fine.[134] Likewise, after Georgia became a colony in 1732, it enacted a similar law soon thereafter.[135]

[129] Laws Bearing Upon Religion and Moral Conduct, and Concerning the Indians Adopted at the First Meeting of the General Assembly in 1619, *in* 1 George MacLaren Brydon, Virginia's Mother Church and the Political Conditions Under Which It Grew app.4 at 422, 425 (1947) [hereinafter Virginia's Mother Church]. Prior to this law, Jamestown had enacted a law in 1610 that commanded "everie man and woman" to "repaire unto the Church, to hear divine Service" twice a day or risk corporal punishment or forfeiting their rations. See McConnell, Establishment, supra note 50, at 2144 (quoting The Laws Dealing with Religion Under the Martial Law Declared at Jamestown in 1610, *in* Brydon, supra, app.1 at 411, 412).

[130] Act VIII, 5 Car. (1629), *reprinted in* 1 The Statutes at Large; Being a Collection of All the Laws of Virginia, From the First Session of the Legislature in the Year 1619, at 144, 144 (William Waller Hening ed., N.Y.C., R. & W. & G. Bartow 1823). The general assembly eventually adjusted the attendance requirement to once per month. See An Act for the Effectual Suppression of Vice, and Restraint and Punishment of Blasphemous, Wicked, and Dissolute Persons, 4 Ann. c. 30, § VII (1705), *reprinted in* 3 The Statutes at Large; Being a Collection of All the Laws of Virginia (Phila., T. Desilver 1823), supra, at 358, 360.

[131] The Fundamental Constitutions of Carolina §§ 96, 101 (1669), *reprinted in* 5 The Federal and State Constitutions 2772, 2783–84 (Francis Newton Thorpe ed., 1909).

[132] Id. §§ 97–100.

[133] John Wesley Brinsfield, Religion and Politics in Colonial South Carolina 8 (1983).

[134] An Act for the Better Observation of the Lord's Day, Commonly Called Sunday, § I (1712), *reprinted in* 2 The Statutes at Large of South Carolina 396, 396 (Thomas Cooper ed., Columbia, A.S. Johnston 1837).

[135] An Act for Preventing and Punishing Vice, Profaneness, and Immorality, and for Keeping Holy the Lords Day, Commonly Called Sunday (1762), *reprinted in* 18 The Colonial Records of the State of Georgia 508, 508 (Allen D. Candler ed., 1910); Charter of Georgia—1732, *reprinted in* 2 The Federal and State Constitutions, supra note 131, at 765, 765 (noting Georgia's year of establishment); see also infra note 299 and accompanying text.

In the three additional Anglican colonies—Maryland, New York, and North Carolina—things unfolded differently. Originally founded at least in part as a haven for Catholics, Maryland later experienced a seizure by Protestants, who established the Church of England there.[136] This majority imposed numerous features of the Anglican establishment on the populace, for a time outlawing Catholic worship entirely.[137] But they fell short of mandating compulsory attendance at the established church.[138] Likewise, when the English took control of New York in 1664, the Duke's Laws effectively announced a form of dual establishment between the Church of England and various Dutch Reformed churches. But the law did not require attendance in the Church of England or any other church.[139] North Carolina also established the Church of England, but it never enacted a church-attendance law—quite possibly because the colony contained very few Anglican churches for citizens to actually attend.[140]

In New England, early laws mandating attendance at public worship originated from a different system than they had in Anglican colonies like Virginia. The English Calvinists who settled much of New England—known as "Puritans" or "Congregationalists"—ultimately became dissenters from the Church of England.[141] As a result, religious establishments in New England did not reflect the top-down structure of the Anglican establishment. Instead, these establishments were local, organized around each town's church as established by majority vote.[142] But because the population in New England was overwhelmingly Puritan in persuasion, the result in nearly all places was a de facto Puritan establishment.[143]

[136] Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 31, 47–48 (1986).

[137] Id. at 48–51.

[138] Winton U. Solberg, Redeem the Time: The Puritan Sabbath in Early America 105 (1977).

[139] Id. at 214; McConnell, Establishment, supra note 50, at 2130.

[140] See Curry, supra note 136, at 60–61 ("From 1708 on, North Carolina rarely had more than two Anglican clergymen, and in some years, it had none at all."); Solberg, supra note 138, at 240–43.

[141] Generally, I use the term "Puritan" to describe the initial Calvinist settlers and "Congregationalist" to describe the same church in later generations after around 1720. Puritans did not originally plan to leave the Church of England but eventually did so. See Cobb, supra note 128, at 150–58.

[142] See McConnell, Establishment, supra note 50, at 2110.

[143] See id.

Consistent with this localism, New England's church-attendance laws developed more organically. In 1634, the General Court in Massachusetts heard complaints of "dyvers psons within . . . [the] jurisdiccon . . . absent[ing] themselves from church meeteings upon the Lords day." In response, it authorized civil authorities to punish absences by fine or imprisonment at their discretion, provided the fine not exceed five shillings per offense.[144]

A few years later, Connecticut enacted a similar law, though with a twist. In 1668, authorities there commanded that any person who remained out of the local meetinghouse during public worship where there was room to attend should be fined five shillings or sit in the stocks for an hour.[145] A few months later, the legislature added a provision explicitly stating that those accused of flouting the law would be presumed guilty, unless they demonstrated they actually did attend public worship or were necessarily detained.[146] And the following decade, New Hampshire also imposed a ten-shilling penalty for absence from public worship.[147]

In one sense, the willingness of New Englanders to adopt punitive church-attendance laws is startling. After all, Puritans in England had experienced harsh suffering under those same types of laws.[148] But for the Puritan settlers, church-attendance laws followed theological orthodoxy as they understood it. In his famous *Institutes of the Christian Religion*, John Calvin had suggested that both natural law and the Ten Commandments establish that "the public worship that God once

[144] Act of Mar. 4, 1634, *in* 1 Records of the Governor and Company of the Massachusetts Bay in New England 135, 140 (Nathaniel B. Shurtleff ed., Bos., William White 1853) [hereinafter Records of the Governor]; see Solberg, supra note 138, at 131–32.

[145] At a Court of Election Held at Hartford (May 14, 1668), *in* 2 J. Hammond Trumbull, The Public Records of the Colony of Connecticut from 1665 to 1678, at 82, 88 (Hartford, F.A. Brown 1852).

[146] A General Assembly Held at Hartford (Oct. 8, 1668), *in* 2 The Public Records of the Colony of Connecticut, supra note 145, at 93, 102; Solberg, supra note 138, at 269.

[147] The General Laws and Liberties of the Province of New Hampshire, ch. 1, Crim. L., § 9 (1679), *reprinted in* 1 Laws of New Hampshire: Province Period 17, 17–18 (Albert Stillman Batchellor ed., 1904). Before that, New Hampshire had prosecuted individuals for absence from public worship under Massachusetts's law. See Solberg, supra note 138, at 186.

[148] To note just one example, the famed author of *The Pilgrim's Progress*, John Bunyan, suffered at least twelve years' imprisonment in England for refusing to attend state-sponsored worship and holding unauthorized religious meetings. See Vera Brittain, In the Steps of John Bunyan: An Excursion into Puritan England 201–05 (1950).

prescribed [to Israel] is still in force," at least in a moral sense.[149] Accordingly, besides enforcing the portion of the Ten Commandments dealing with human relations, magistrates also had a duty to "cherish and protect the outward worship of God" by enforcing "the true religion"—at least among those who had already accepted Christianity.[150] Parts of Calvin's theology pointed in a different direction.[151] But for the early Puritans, this basic thrust along with select passages from Scripture all but resolved the issue.

These arguments did not convince everyone. Early on, for instance, Massachusetts banished eccentric religious dissenter Roger Williams in part for his protests against the colony's church-attendance laws.[152] Thus, when Williams founded Rhode Island in 1636, the colony did not require church attendance, either then or thereafter.[153] Likewise, Quakers challenged church-attendance laws in Virginia and Massachusetts in the mid-seventeenth century and suffered significant persecution as a result.[154] So unsurprisingly, colonies founded or dominated by Quakers—Pennsylvania, Delaware, and New Jersey—never had an established church or laws mandating attendance at state-sponsored worship.[155]

Nearing the end of the seventeenth century, then, the American colonies generally occupied a world of extremes with respect to church-attendance laws. In colonies like Pennsylvania or New York that either lacked religious establishments or only loosely maintained them, laws requiring attendance at state-sponsored worship were never a prominent part of the legal or political culture if they ever existed at all. By contrast, in Virginia and New England, where religious establishments were

[149] John Calvin, Institutes of the Christian Religion, bk. II, ch. viii.1, at 367 (John T. McNeill ed., Ford Lewis Battles trans., 1960).

[150] Id. at bk. IV, ch. xx.2–3, at 1487–88. See generally John Witte, Jr., The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism 39, 39–80 (2007) (exploring the role of the magistrate in Calvin's thought).

[151] For an illuminating discussion of the tensions in Calvin's theology on this point, see generally Elisabeth Rain Kincaid, Magisterial Authority and Competing Theories of Natural Law in Calvin's *Institutes*, 74 Scottish J. Theology 299 (2021) (discussing the contradictions between Calvin's political theory and his support of magisterial enforcement of religious worship).

[152] See Curry, supra note 136, at 15–19 (describing Williams's banishment); 1 George Bancroft, History of the United States from the Discovery of the American Continent 369–71 (21st ed., Bos., Little, Brown & Co. 1866) (summarizing Williams's views).

[153] Solberg, supra note 138, at 191, 195.

[154] See id. at 93, 101, 170–74 (documenting Quaker persecutions).

[155] Id. at 246–52.

strong, compulsory attendance laws played an essential role in enforcing religious conformity.

This snapshot of the early colonies has important contemporary significance. In *Lee*, Justice Scalia hinted that opt-outs may "suffice[] to dispel the coercion" underlying state-mandated worship, seemingly based on the assumption that historic religious establishments required universal participation: "[A]ll persons were required to attend [the state] church and observe the Sabbath."[156] That assumption was generally accurate as to church-attendance laws existing in the mid-seventeenth century like those described above. As the next Section explains, however, it was decidedly not accurate as to later church-attendance laws—the laws the Founding generation actually considered and rejected. And indeed, understanding why later Americans rebuffed church-attendance laws—even laws containing exemptions—reveals just how radical their thinking really was.

B. Rejecting Coerced Attendance Laws

At the dawn of the 1680s, toleration was on the rise. In England, the Glorious Revolution had brought Protestants Mary II and William of Orange to the throne, with the former Catholic monarch, James II, fleeing to Europe.[157] During his reign, James II had granted broad indulgence to Catholics and other "nonconformists."[158] But in 1688, after William and Mary assumed the throne, Parliament ultimately settled on a narrower version of James's policies, in a famous law known as the Act of Toleration.[159] In substance, however, the Act is better described by its official name: "An act for exempting their Majesties protestant subjects, dissenting from the church of England, from the penalties of certain laws."[160]

As its formal title suggests, the Act of Toleration provided exemptions from several laws that had restricted the worship of dissenting Protestants

[156] Lee v. Weisman, 505 U.S. 577, 643 (1992) (Scalia, J., dissenting); id. at 641.
[157] Steve Pincus, 1688: The First Modern Revolution 3–4 (2009).
[158] See Field, supra note 127, at 221.
[159] An Act for Exempting Their Majesties Protestant Subjects, Dissenting from the Church of England, from the Penalties of Certain Laws 1688, 1 W. & M. c. 18, *reprinted in* 9 Danby Pickering, The Statutes at Large, from the First Year of K. William and Q. Mary, to the Eighth Year of K. William III, at 19, 19–25 (Cambridge, Joseph Bentham 1764) [hereinafter The Act of Toleration].
[160] Id. at 19.

in England. But the heart of the Act was an exemption from laws requiring attendance at Anglican worship. Declaring a purpose of "unit[ing] their Majesties protestant subjects in interest and affection," the Act first announced that no laws requiring persons "to resort to their parish church or chapel . . . where the common prayer shall be used" would apply to Protestant dissenters, provided they fulfilled the Act's other requirements.[161] The Act went on to explain that, as a condition of exemption, dissenters must swear an oath to the monarch and reject the Catholic doctrine of transubstantiation.[162] The Act required dissenting congregations to obtain a certificate from the local Anglican bishop or the justice of the peace.[163] And the Act required dissenting ministers to meet oath and licensing requirements—including affirming the doctrine of the Trinity—as a condition for preaching.[164] Any dissenting congregation meeting with its "doors locked" was liable for punishment.[165]

The Act of Toleration did not challenge the idea that government possessed the power to command attendance at worship. On the contrary, the law explicitly reiterated that "all the laws made and provided for the frequenting of divine service . . . shall be still in force," except as to "such persons come to some congregation . . . allowed or permitted by this

[161] Id. at 19–20.

[162] Id. at 20. This part of the Act referenced another. See An Act for the More Effectuall Preserving the Kings Person and Government by Disableing Papists from Sitting in Either House of Parlyament 1678, 30 Car. 2 c. 1, *reprinted in* 5 Statutes of the Realm, supra note 126, at 894, 894–95 (describing the required oath).

[163] The Act of Toleration, supra note 159, at 25. In doing so, the law provided a partial exemption to the Conventicle Acts of 1664 and 1670, which prohibited attendance at religious meetings that did not cohere to the liturgy and practice of the Church of England. See An Act to Prevent and Suppresse Seditious Conventicles 1664, 16 Car. 2 c. 4, *reprinted in* 5 Statutes of the Realm, supra note 126, at 516, 516–20; An Act to Prevent and Suppresse Seditious Conventicles 1670, 22 Car. 2 c. 1, *reprinted in* 5 Statutes of the Realm, supra note 126, at 648, 648–51.

[164] The Act of Toleration, supra note 159, at 21–22. In its provisions concerning clergy, the Act referenced the Thirty-Nine Articles, the state-adopted statement of faith in the Church of England. See id.; see also An Act to Refourme Certayne Dysorders Touching Ministers of the Churche 1571, 13 Eliz. c. 12, *reprinted in* 4 Statutes of the Realm, supra note 126, at 546, 546–47 (requiring priests and ministers to declare assent to the "Artycles of Religion"). Article I declares: "There is but one lyuyng and true God . . . . [a]nd in vnitie of this Godhead there be three persons, of one substaunce, power and eternitie, the father, the sonne, and the holy ghost." See Oliver O'Donovan, On the Thirty Nine Articles: A Conversation with Tudor Christianity 135 (2d ed., SCM Press 2011) (1986).

[165] The Act of Toleration, supra note 159, at 21. Although the Act of Toleration did not apply to Jews in England, royal dispensations by Charles II and James II separately allowed Jews to escape the penalties of recusancy laws in this period. See H.S.Q. Henriques, The Jews and the English Law 9, 157–64 (1908).

act."[166] Among America's Revolutionary generation, however, a much more radical view was waiting in the wings.

1. Prelude to a Revolution

As written, the Act of Toleration did not technically extend to the earlier-created American colonies—or so it was then understood.[167] But beginning nearly contemporaneously with the Act's passage and extending into the ensuing decades, the Act of Toleration came to apply to the American colonies anyway, either by way of a colony's charter, its ordinary law, or the instruction of royal officials.[168]

In Massachusetts, for instance, English authorities revoked the colony's original charter in 1684, in part out of disapproval of the colony's prior religious persecutions.[169] When the crown reinstated the charter in 1691, the new charter applied the Act of Toleration,[170] and Massachusetts followed up with church-attendance laws understood to incorporate the Act's protections.[171] A few years later, Connecticut followed a similar course. In 1708, the legislature explicitly adopted the

[166] The Act of Toleration, supra note 159, at 24; see also Field, supra note 127, at 221 (noting that the Act of Toleration "explicitly restat[ed]" the obligation to attend church services for those not specifically exempted by the Act).

[167] See 1 Brydon, supra note 129, at 249 (noting that "legally" the Act of Toleration "did not extend to Virginia because the Act did not include the provision that its operation should extend to 'the Plantations'"); 2 id. at 369–70. In 1753, however, the King's Attorney General issued an opinion that the Act of Toleration applied to British colonies throughout America. See Douglas Laycock, Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause, 81 Notre Dame L. Rev. 1793, 1804 (2006); see also infra note 269 and accompanying text.

[168] Curry, supra note 136, at 79 (noting this phenomenon).

[169] 1 William G. McLoughlin, New England Dissent 1630–1833: The Baptists and the Separation of Church and State 106–07 (1971) [hereinafter New England Dissent].

[170] See Mark Valeri, The Opening of the Protestant Mind: How Anglo-American Protestants Embraced Religious Liberty 77 (2023). The Massachusetts Charter of 1691 declared that inhabitants enjoyed "all liberties and immunities of free and natural subjects . . . as if they and every of them were born within this our realm of England," and explicitly provided "a liberty of conscience . . . in the worship of God to all christians (except papists)." The Charter of the Province of the Massachusetts Bay in New England (1691), *reprinted in* The Charters and General Laws of the Colony and Province of Massachusetts Bay 18, 31 (Bos., T.B. Wait & Co. 1814).

[171] See, e.g., An Act in Addition to the Act Intituled "An Act for the Better Observation and Keeping of the Lord's Day," ch. 13 (Nov. 7, 1716), *reprinted in* 2 The Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay 58, 58 (Bos., Wright & Potter 1874) (providing punishment for anyone who so accused fails to make proof that they "have attended divine worship in some publick assembly"); see also 1 New England Dissent, supra note 169, at 108–10 (discussing the Act of Toleration's application to the colony).

Act of Toleration's protection into the colony's laws, thereby recognizing "libertie of worshipping God in a way separate from that which is by law established."[172] In 1680, New Hampshire's governing document likewise guaranteed "liberty of conscience . . . unto all protestants," effectively modifying the church-attendance law enacted a year before.[173]

Events in the Anglican colonies unfolded much the same way. In 1699, Virginia's general assembly reiterated its requirement that persons "resort to their parrish church or chapell . . . to heare devine service" at least once every two months, but made allowance for those protected by the now well-known "act for exempting their majesties protestant subjects."[174] After Georgia became a colony in 1732, its church-attendance law likewise allowed attendance at an alternative church "Tolerated and allowed by the Laws of England."[175] In a slight variation, South Carolina required attendance at the Church of England but also allowed attendance at any church "tolerated and allowed by the laws of this Province."[176] The allusion to local law may have referenced the fact that the colony's proprietors had previously extended toleration to any church willing to acknowledge the existence of God and fulfill various other requirements.[177] But in all these places, the Act of Toleration or something close to it applied.

To be sure, this was hardly the end of the story. As we shall see, pro-establishment forces in these jurisdictions often took a narrow view of the

[172] At a General Assembly and Court of Election Holden at Hartford (May 13, 1708), *in* 4 The Public Records of the Colony of Connecticut 40, 50 (Charles J. Hoadly ed., Hartford, Case, Lockwood & Brainard 1870); see also M. Louise Greene, The Development of Religious Liberty in Connecticut 153–57 (1905) (explaining the circumstances surrounding the law's passage).

[173] Commission of John Cutt (1680), *reprinted in* 4 The Federal and State Constitutions, supra note 131, at 2446, 2448; see supra note 147 and accompanying text (noting the church-attendance law).

[174] See An Act for the More Effectuall Suppressing of Blasphemy, Swearing, Cursing, Drunkenness and Sabbath Breaking, 11 Will. 3 (1699), *reprinted in* 3 The Statutes at Large; Being a Collection of All the Laws of Virginia, supra note 130, at 168, 170–71; see also 2 Virginia's Mother Church (1952), supra note 129, at 371–72 (noting references to the Act of Toleration in Virginia's church-attendance law).

[175] An Act for Preventing and Punishing Vice, Profaneness, and Immorality, and for Keeping Holy the Lords Day, Commonly Called Sunday (1762), *reprinted in* 18 The Colonial Records of the State of Georgia, supra note 135, at 508, 508; see also infra note 299 and accompanying text.

[176] An Act for the Better Observation of the Lord's Day, Commonly Called Sunday, § I (1712), *reprinted in* 2 The Statutes at Large of South Carolina, supra note 134, at 396.

[177] See supra notes 131–33 and accompanying text (discussing the Fundamental Constitutions of 1669).

Act of Toleration's exemptions.[178] But it is nonetheless true that beginning in this period and continuing thereafter, American colonies that required attendance at state-sponsored worship also formally exempted most dissenting Protestants, provided they still attended an approved form of worship elsewhere. And by doing so, they approximated the views of the most eminent defender of toleration in this period—the English philosopher John Locke.

In his famous *Letter Concerning Toleration*, Locke had endeavored to provide a justification for policies of toleration by "distinguish[ing] exactly the Business of Civil Government from that of Religion."[179] And in answering that question, Locke famously argued that "the whole Jurisdiction of the Magistrate reaches only to . . . civil Concernments . . . and . . . neither can nor ought in any manner to be extended to the Salvation of Souls."[180] According to Locke, the magistrate lacked power to "prescribe . . . what Faith or Worship [others] shall embrace," because true religion consists "in the inward and full perswasion of the mind," which by its nature cannot be compelled.[181] Likewise, although all had a duty to worship, requiring people to do so through a form of worship they believed displeasing to God produced only "Hypocrisie, and Contempt of [God's] Divine Majesty."[182] As a result, Locke contended, "the Magistrate's Power extends not to the establishing of any Articles of Faith, or Forms of Worship, by the force of his Laws."[183]

In several ways, Locke's theory of toleration extended beyond the predominant models of his day. Unlike the Act of Toleration, for instance, Locke suggested that exemptions from laws requiring attendance at state-sponsored worship should not be limited to dissenting Protestants, but also extended to Jews, Muslims, and perhaps even pagans.[184] Relatedly, he argued that in general, the state should tolerate not just recognized churches, but any group "joining themselves together of their own accord, in order to the publick worshipping of God, in such a manner as they judge

[178] See infra notes 266–68 and accompanying text.

[179] John Locke, A Letter Concerning Toleration (1689), *reprinted in* John Locke: A Letter Concerning Toleration and Other Writings 1, 12 (Mark Goldie ed., 2010).

[180] Id. at 12–13.

[181] Id. at 13.

[182] Id.

[183] Id. at 14.

[184] Id. at 58–59.

acceptable to him."[185] In at least these ways, Locke's vision of toleration extended beyond what English law had allowed.

Locke was a celebrated figure among Founding-era Americans.[186] It is important to realize, however, that Locke's *Letter* did not clearly dispute that government retained the power to establish a single preferred church, or the power to enforce attendance at public worship generally. "All men know and acknowledge that God ought to be publickly worshipped," Locke noted. "Why otherwise do they compel one another unto the publick Assemblies?"[187] Indeed, at points, Locke seemed to imply that mandating participation in *some* form of public worship fell within the state's rightful authority to protect society, since "[t]he taking away of God, though but even in thought, dissolves all."[188]

In sum, Locke's arguments required exempting dissenters from participating in the state's preferred religious rites; they did not clearly require renouncing government's power to compel worship as such. To be sure, parts of Locke's *Letter* could be read a different way. But marshaling Locke's arguments into a full rejection of government's ability to mandate acts of worship would require the input of other, more subversive perspectives.

From the start, Baptists were some of America's fiercest religious reformers. Their signature conviction was a rejection of infant baptism, which they saw as a departure from the substance of the New Testament.[189] Instead, they insisted that the church should consist only of mature, visible believers who had been called by the Holy Spirit and responded of their own free choice.[190] Those views meant Baptists could not abide by early laws in places like Virginia or New England requiring attendance at state-sponsored worship. And as the century progressed,

[185] Id. at 15.

[186] See, e.g., Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1430–31 (1990) [hereinafter McConnell, Origins] (describing Locke's influence); Noah Feldman, The Intellectual Origins of the Establishment Clause, 77 N.Y.U. L. Rev. 346, 348–51 (2002) (noting the same and emphasizing the importance of Locke to Founding-era conceptions of religious liberty).

[187] Locke, supra note 179, at 32.

[188] Id. at 53. According to Locke, atheists were unworthy of toleration because they lacked the fear of divine punishment that guarantees the keeping of "Promises, Covenants, and Oaths." Id. at 52–53. But just as importantly, Locke argued that because atheists denied any duty to worship God, they had "no pretence . . . whereupon to challenge the Privilege of a Toleration." Id. at 53.

[189] 1 New England Dissent, supra note 169, at 32–33.

[190] Id. at 35–36.

many Baptists and their allies—especially evangelical Presbyterians and Congregationalists—began to articulate a new set of arguments that would prove decisive on the issue of compelled worship.

One early example can be found in a popular tract entitled *A Key, to Unlock the Door* by Ebenezer Frothingham, a prominent evangelical "Separate" in Connecticut.[191] Frothingham began his argument by asserting that any person who "sees Christ to be All in All, sees that his Conscience is not his own to give, to please this Man or that," since "no Man, whether Saint, Priest, or civil Ruler, can stand between the great and terrible God, at the Judgment Day, to plead off his Neighbour."[192] He then argued that, among the colony's other requirements, Connecticut's church-attendance law transgressed that limit.[193]

Frothingham first observed that Connecticut's law forbade any person from "neglect[ing] the public Worship of God, in some lawful Congregation," and also prohibited worshipping in "private Houses"—an allusion to the colony's church-attendance requirement and efforts to tighten its grip by punishing unauthorized religious meetings.[194] He went on to report that, notwithstanding the law's allowance for dissenters, he and others had been punished for engaging in worship that should have been "lawful" under the Act of Toleration.[195] But even beyond this, Frothingham insisted that the church-attendance scheme itself "assume[d] the Prerogative that belongs to the Son of God alone."[196] According to Frothingham:

> [Christ] give[s] Liberty of Conscience, and allow[s] every One to judge for himself, which Worship is spiritual, and which is not . . . . [But] we [i.e., Connecticut] have decreed . . . that if any Person neglect the public Worship, where we have fixed the Spot . . . he shall incur the Penalty

[191] Ebenezer Frothingham, A Key, to Unlock the Door, That Leads in, to Take a Fair View of the Religious Constitution, Established by Law, in the Colony of Connecticut (New Haven, Benjamin Mecom 1767). Separates were radical pietists who shared Baptist sensibilities but remained Congregationalists or Presbyterians and sought to "separate" from locally established churches. See 1 New England Dissent, supra note 169, at 340–59.

[192] Frothingham, supra note 191, at 45–46.

[193] Id. at 46–47, 55.

[194] Id. at 51. See An Act for Preventing Disorders in the Worship of God (1723), *reprinted in* 6 The Public Records of the Colony of Connecticut, supra note 172, at 401, 401.

[195] Frothingham, supra note 191, at 51–52. In 1743, the Connecticut legislature reaffirmed that attendance at an authorized dissenting church was sufficient to satisfy the colony's church-attendance law but excluded dissenting "presbiterians or congregationalists"—meaning Separates like Frothingham. See 1 New England Dissent, supra note 169, at 361–62.

[196] Frothingham, supra note 191, at 51.

> of ten Shillings . . . . The Scriptures saith . . . . 'Not by Might, nor by Power, but by my Spirit' . . . his Church shall be built. But this religious Plan saith (in its own Nature) 'Not so, Lord—for our Churches will crumble to Pieces, if they are not upheld by the civil Power.'[197]

Frothingham complained that officials had improperly narrowed Connecticut's allowances for dissenters. But in truth, that was mostly beside the point. Instead, the real problem was the power claimed by Connecticut's church-attendance law itself. By purporting to punish citizens for "neglect [of] public Worship, where we [i.e., the legislature] have fixed the Spot," Connecticut assumed for itself a power to say "where persons shall worship, and where not" in violation of Christ's prerogative.[198] "[Jesus Christ] challenges the sole Right of Conscience—that a Man's Judgment . . . be wholly subjected to him alone," Frothingham urged. "Who art thou that judgest another Man's Servant? To his own Master he standeth or falleth."[199]

In one sense, Frothingham's arguments were not new. Since their emergence in England more than a century earlier, Baptists had contended that "none should be compelled to worship God but such as come willingly," in part because "my soul, wherewith I am to worship . . . belongeth to another King . . . whose weapons *are not carnal, but spiritual*."[200] But arguments like Frothingham's also hinted at something more. Rather than focusing exclusively on Christ's dominion and the nature of true worship, Frothingham asserted that each person's conscience "is not his own to give," and thus that "Liberty of Conscience, is a Person's unalterable Right, &c."[201] And in doing so, he tapped into a

[197] Id. at 54–56. Frothingham's quotation comes from a prophetic vision recorded in the Bible about the rebuilding of the temple by Zerubbabel, the governor of Judah. See Zechariah 4:6 (King James) ("Then he answered and spake unto me, saying, This *is* the word of the LORD unto Zerubbabel, saying, Not by might, nor by power, but by my spirit, saith the LORD of hosts.").

[198] Frothingham, supra note 191, at 55, 154.

[199] Id. at 56 (quoting Romans 14:4 (King James)).

[200] Persecution for Religion Judged and Condemned (1615), *reprinted in* Tracts on Liberty of Conscience and Persecution: 1614–1661, at 83, 104, 108 (Edward Bean Underhill ed., London, J. Haddon 1846); see also Tracts on Liberty of Conscience and Persecution, supra, at v (noting Baptist authorship). This is not to say, however, that Baptists uniformly rejected schemes requiring attendance at worship. As Professor McLoughlin observes, at least some Baptists as late as the 1730s (and likely some later than that) seemed content with allowing dissenters to choose which church to attend. See 1 New England Dissent, supra note 169, at 271–73. The same was true of at least some Separates. See id. at 389–92.

[201] Frothingham, supra note 191, at 45–46.

form of reasoning about governmental power especially resonant with Founding-era Americans—an argument that, here too, Americans inherited from John Locke.

In his *Second Treatise of Government*, Locke had argued that governmental authority is formed when human beings surrender a portion of their natural rights to society in exchange for protection.[202] Government, in turn, had authority to secure and protect natural rights the people retained.[203] Importantly, however, not all natural rights could be surrendered. In the *Letter Concerning Toleration*, Locke observed that power "to compell any one to [true] Religion" could not be "vested in the Magistrate by the *Consent of the People*," because no one can "abandon the care of his own Salvation . . . to the choice of any other, whether Prince or Subject."[204] In other words, the right to worship according to one's conscience was an inalienable right.[205]

As we have already observed, Locke's *Letter* stopped short of asserting that all church-attendance laws were improper.[206] But arguments like Frothingham's pointed the way to that conclusion. By noting that each person's conscience "is not his own to give," and that "Liberty of Conscience, is a Person's unalterable Right, &c.," Frothingham gestured at the consensual origin of government power, consistent with Locke.[207] But by offering these observations alongside appeals to Christ's absolute authority over conscience, tracts like Frothingham's invited readers to radicalize Locke's theories as a basis for condemning *all* church-attendance laws, no matter how tolerant the scheme. And indeed, during the Revolutionary period and after, that is exactly what writers across America did.

2. Massachusetts and the New England States

In New England, the most important events occurred in Massachusetts. Prior to and immediately following the American Revolution,

[202] John Locke, Second Treatise of Government §§ 96–99 (1690), *reprinted in* Two Treatises on Civil Government by John Locke 191, 241–42 (London, George Routledge & Sons 1884).

[203] Id. §§ 130–31, at 258–59.

[204] Locke, supra note 179, at 13.

[205] For a sophisticated discussion of the concept of inalienable rights in the context of the freedom of speech, see Jud Campbell, Natural Rights and the First Amendment, 127 Yale L.J. 246, 280–87 (2017).

[206] See supra notes 187–88 and accompanying text.

[207] Frothingham, supra note 191, at 45–46.

Massachusetts required each citizen to pay taxes to support the minister of the local established church.[208] It also—like Connecticut—required attendance at state-sponsored worship unless a dissenter was entitled to toleration.[209]

Many Baptists in Massachusetts staunchly opposed these requirements. "[I]t is evident to us," wrote famed minister Isaac Backus, "that God always claimed it as his sole prerogative to determine by his own laws, what his worship shall be, who shall minister in it, and how they shall be supported."[210] After the Revolution began, Massachusetts initially failed to ratify a constitution.[211] But when deliberation began again in 1779, the viability of this ecclesiastical system was a key part of the debate.[212]

Unfortunately for advocates of religious freedom, however, the draft constitution fell far short of dismantling Massachusetts's establishment.[213] Although the draft declared that citizens could not be "hurt, molested, or restrained . . . for worshipping GOD in the manner and season most agreeable to . . . his own conscience," it also reiterated that "[i]t is . . . the duty of all men in society, publicly, and at stated seasons,

[208] See John Witte Jr. & Justin Latterell, The Last American Establishment: Massachusetts, 1780–1833, *in* Disestablishment and Religious Dissent: Church-State Relations in the New American States 1776–1833, at 399, 407–08 (Carl H. Esbeck & Jonathan J. Den Hartog eds., 2019) [hereinafter Church-State Relations].

[209] See An Act for Repealing the Several Laws Now in Force, Which Relate to the Observation of the Lord's Day, and for Making More Effectual Provision for the Due Observation Thereof, ch. 20, §§ 6–7 (1760–61), *reprinted in* 4 The Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay 415, 416 (Bos., Rand, Avery & Co. 1881) (providing an exemption from attendance at state-sponsored worship where "upon trial, it shall appear that any person so charged had good and sufficient excuse"). Although this particular law did not mention the Act of Toleration explicitly, its provision for "sufficient excuse" likely encompassed appeals to the Act as the charter demanded. See supra notes 170–71 and accompanying text. For a collection of the Massachusetts laws requiring compulsory church attendance, see Solberg, supra note 138, at 295 n.52.

[210] Isaac Backus, An Appeal to the Public for Religious Liberty, Against the Oppressions of the Present Day 17 (Bos., John Boyle 1773); see Feldman, supra note 186, at 374 (noting Backus's identity).

[211] Witte & Latterell, supra note 208, at 399–400.

[212] Id. at 400.

[213] A copy of the draft constitution can be found in A Constitution or Frame of Government, Agreed upon by the Delegates of the People of the State of Massachusetts Bay, *in* Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay, from the Commencement of Their First Session, September 1, 1779, to the Close of Their Last Session, June 16, 1780, at 222, 222–49 (Bos., Dutton & Wentworth 1832) [hereinafter Constitution or Frame of Government].

to worship the SUPREME BEING."[214] Accordingly, in addition to preserving the state's church-tax system, Article III announced that

> the people . . . have also a right to, and do, invest their legislature with authority to enjoin upon all the subjects an attendance upon the instructions of the public teachers aforesaid [i.e., public Protestant teachers of piety], at stated times and seasons, if there be any on whose instructions they can conscientiously and conveniently attend.[215]

In at least two ways, Massachusetts's draft constitution was more tolerant than the prior regime. First, although Article III preserved the state's church-tax system, it explicitly provided dissenters the right to redirect their tax dollars to the ministers of their own churches.[216] But second and more importantly for our purposes, the proposed constitution significantly relaxed the state's position on required attendance at state-sponsored worship.

Under Massachusetts's prior scheme, dissenters could excuse themselves from worship in the locally established church only if they could prove they had worshipped at an alternative, approved church instead.[217] By contrast, the draft constitution allowed the legislature to require attendance at public worship only if "there be any [Protestant public teacher] on whose instructions [a citizen] *can conscientiously and conveniently attend*."[218] On its face, that provision went further than providing dissenters an alternative *venue* for fulfilling their duty to worship. Instead—similar to modern policies in cases like *Engel* and *Schempp*—it explicitly exempted citizens from worshipping altogether if they could not "conscientiously" do so at any local gathering.[219] The

[214] See id. pt. 1, art. II, at 223.

[215] Id. pt. 1, art. III, at 223.

[216] Id. pt. 1, art. III, at 223–24 (providing that "all monies paid by the subject to the support of public worship . . . shall, if he require it, be uniformly applied to the support of the public teacher or teachers of his own religious sect or denomination, provided there be any on whose instructions he attends").

[217] See supra note 209 and accompanying text.

[218] Constitution or Frame of Government, supra note 213, pt. 1, art. III, at 223–24 (emphasis added).

[219] Id.; see also Engel v. Vitale, 370 U.S. 421, 423 & n.2 (1962) (observing that New York's policy "did not compel any pupil to join in the prayer over his or his parents' objection"); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 205, 211–12, 211 n.4 (1963) (programs allowed students to be excused upon parental request).

exemption was, in Baptist minister John Leland's words, "a gap wide enough for any man to creep out."[220]

Given the laxity of the proposed constitution's policy on mandatory attendance at worship, one might have thought proponents of religious liberty would have simply let that point lie. In fact, however, they did no such thing. The day after Article III had been accepted by the convention, Isaac Backus and his allies resolved to oppose the draft, including its lenient provision on mandatory church attendance.[221] And over the next several months, they engaged in an extensive public campaign in the state's most prominent newspapers.

The debate began in a letter Backus wrote to the *Independent Chronicle* on November 16, 1779, which was probably the first time the proposed text of Article III appeared in public.[222] Backus noted that, while he agreed with Article III's suggestion that religion and morality were necessary for a commonwealth, he could not agree to its provisions "giv[ing] rulers the power of compelling people to attend and support the public worship of God."[223] For Backus, the reason was simple:

> [The Article] gives a Legislative and Executive Power to man, in the affairs of divine worship, which is evidently contrary both to scripture and reason. . . . Both scripture and reason teach us, that the civil magistrate's power is limited to the affairs that lie between man and man, and not betwixt man and God.[224]

The draft constitution was impermissible because it purported to give the legislature power to mandate acts of worship that the legislature did not and could not possess.

This was not the first time Backus had offered this argument. The previous year, an anonymous critic known as "Hieronymus" had attacked Backus by noting that, under Massachusetts's existing system, "every man is left at liberty to attend divine worship in the manner which he supposes most agreeable to the scripture."[225] He continued: "I can

[220] Jack Nips [John Leland], The Yankee Spy (1794), *reprinted in* The Writings of the Late Elder John Leland 213, 225 (L.F. Greene ed., N.Y.C., G.W. Wood 1845).

[221] 1 New England Dissent, supra note 169, at 604.

[222] Id.

[223] Isaac Backus, Mr. Willis, Indep. Chron. & Universal Advertiser (Bos.), Dec. 2, 1779.

[224] Id.

[225] Hieronymus, To the People, Bos. Gazette & Country J., Nov. 2, 1778. Hieronymus was likely the pen name of Robert Treat Paine, a prominent lawyer and defender of Massachusetts's establishment. See Curry, supra note 136, at 131, 172.

conceive of no[] [grievance], unless it be that men are obliged to attend divine service at all . . . ."[226] Backus shot back: "What is the ground of complaint? . . . In a word, it is because [the civil authorities] have assumed a legislative and executive power, in soul affairs, which the bible never gave them, and their constituents never had to give."[227]

Backus's criticism of Article III treaded similar ground. But the fact that Backus maintained this argument while resisting Article III shows just how far the principle extended. Rather than merely offering dissenters a "right . . . to choose their own mode of worship," as Hieronymus had described the previous system,[228] Article III provided the possibility of a complete exemption from worshipping where a person's conscience forbade it. But for Backus, that was quite beside the point. Exemptions or no, the draft constitution still gave government a power in "soul affairs" which citizens could not surrender to government as part of the social contract. "For as surely as every man must give account of himself to God," Backus wrote, "so sure is it that he cannot substitute another man as his representative in the affairs of divine worship."[229] And indeed, Backus was hardly alone in concluding as much.

Another important example of this position came from a writer dubbing himself "Philanthropos." Probably the most well-known critic during the debate, Philanthropos published at least a dozen letters in four separate newspapers criticizing various aspects of Article III, including its proposed church-attendance requirement.[230] Philanthropos first pointed out that, under Article III's proviso, the law exempted a person only from public worship that he could not "*conveniently and conscientiously*

[226] Hieronymus, supra note 225.

[227] Isaac Backus, Mr. Edes, Bos. Gazette & Country J., Dec. 14, 1778.

[228] Hieronymus, To the People of the Massachusetts Bay, Bos. Gazette & Country J., Jan. 18, 1779.

[229] Isaac Backus, An Address to the Inhabitants of New England, Bos. Gazette & Country J., Feb. 22, 1779 (emphasis omitted). Backus seems to have settled on this argument as early as 1771. Writing under the pseudonym "A Countryman," Backus declared: "For unless a Man could constitute another to answer for him at the Bar of God, it is impossible for him to convey to another a right to compel him or others to attend, or support any Worship contrary to their Consciences." A Countryman [Issac Backus], A Letter to a Gentleman in the Massachusetts General Assembly, Concerning Taxes to Support Religious Worship 21 (n.p. 1771). Backus's position in this early pamphlet stands in some tension with Professor McLoughlin's assertion that Backus's letter to the *Chronicle* in 1779 was "the first time" that "a Baptist openly objected to the principle of compulsory church attendance." 1 New England Dissent, supra note 169, at 605.

[230] 1 New England Dissent, supra note 169, at 617–18. As Professor McLoughlin notes, the identity of Philanthropos is still a matter of debate. See id. at 608 n.36, 618 n.9.

attend," thus requiring a jury to decide whether the exemption applied.[231] Yet, Philanthropos continued, there was also a more fundamental issue.

> [S]ome of my worthy and pious fellow citizens [may] ask[:] Whether it is not the duty of the people to worship God; and whether they may not invest the Legislature with power to oblige them to comply with their duty in this respect?—To these inquiries I answer, It is undoubtedly the duty of all the people to worship the Deity, both in private and public . . . . But it is absolutely denied, that the people have a right to invest the Legislature with power to force them to comply with their duty to God.[232]

Philanthropos agreed that public worship was a duty held by all citizens, with salutary effects on the community at large. But like Backus, Philanthropos rejected the idea that "the people have a right to invest the Legislature with power" to enforce it.[233] Consistent with Locke's theories about the social contract, Philanthropos observed that "[w]hatever duties the subject owes to the commonwealth, the magistrate ought to have power to enjoin."[234] But, Philanthropos continued, "attendance . . . on the public worship of God, is not a duty which the subject owes to the State; rather it is a duty which he owes to God and to himself; consequently the civil magistrate can have no right to enjoin it."[235] And to prevent such oppression, Philanthropos ended his letter by encouraging his fellow citizens to adopt another proposal—"A Bill for the Establishment of Religious Liberty"—which bore strong similarities to Thomas Jefferson's famous "Bill for Establishing Religious Freedom in Virginia."[236]

Predictably, pro-establishment forces vehemently disagreed with Philanthropos's position. But even their disagreement highlights what was really at stake. Opposing Philanthropos, a writer called "Irenaeus"—likely state constitutional convention delegate Samuel West—suggested that Article III enshrined a "most ample liberty of conscience" since "every person that owns the being of a God, may choose the manner and

[231] Philanthropos, Number III, Indep. Chron. & Universal Advertiser (Bos.), Mar. 23, 1780.
[232] Philanthropos, supra note 42.
[233] Id.
[234] Id.
[235] Id.
[236] Id.; see also 1 New England Dissent, supra note 169, at 618–19 (noting the similarity between Philanthropos's proposed bill and Jefferson's bill); infra notes 296–97 and accompanying text (describing the adoption of Jefferson's bill in Virginia).

season for divine worship which suits him best."[237] Moreover, he continued, Philanthropos's position implied that "religious instructions do not tend to promote the civil good; otherwise . . . the magistrate hath a right to enjoin them upon the subject."[238]

Neither Backus nor Philanthropos denied that religion and public worship were essential to the "preservation of civil government" as Article III had put it.[239] But for scriptural as well as philosophical reasons, both contended that the power to command acts of worship lay outside the rights that citizens could rightfully surrender, and thus the duties governments could rightfully enforce. "[W]e have but One Lawgiver in such affairs," Backus insisted simply.[240] Likewise, citizens had "no right to invest their Legislature with [this] power," Philanthropos proclaimed, because "[m]atters of religion lie between God and their own consciences, to whom each man is to give account for *himself*."[241]

The popular vote on Article III was extremely close. From records kept by clerks, it is clear that Article III fell some 600 votes short of the two-thirds majority needed for ratification.[242] What is more, returns show that Philanthropos's arguments opposing Article III had "wide appeal" throughout the State, as messages from more than two dozen towns repeated his arguments that "the interference of civil government in religious matters was contrary to the liberty of conscience and the Word

[237] Irenaeus, Mess'rs Draper & Folsom, Indep. Ledger & Am. Advertiser (Bos.), May 8, 1780; see also 1 New England Dissent, supra note 169, at 619 (noting Irenaeus's likely identity as West).

[238] Irenaeus, supra note 237.

[239] Constitution or Frame of Government, supra note 213, pt. 1, art. III, at 223.

[240] Isaac Backus, An Appeal to the People of the Massachusetts State Against Arbitrary Power (Bos. 1780), *reprinted in* Isaac Backus on Church, State, and Calvinism: Pamphlets, 1754–1789, at 385, 392 (William G. McLoughlin ed., 1968). Professor McLoughlin implies that Backus's argument against compulsory church attendance was "casual" and "cavalier" because in a later pamphlet, Backus stated: "We believe that attendance upon public worship and keeping the first day of the week holy to God are duties to be inculcated and enforced by his laws instead of the laws of men, but we have had no controversy with our rulers about that matter." 1 New England Dissent, supra note 169, at 606 n.28 (quoting Isaac Backus, A Door Opened for Equal Christian Liberty (Bos. 1783), *reprinted in* Isaac Backus on Church, State, and Calvinism: Pamphlets, 1754–1789, supra, at 427, 433 [hereinafter Backus, A Door Opened]). But as Backus himself explained, Backus's aside referred to the fact that the church-attendance law was apparently not obeyed by Boston. Backus, A Door Opened, supra, at 433 n.* ("A law about these things was made here last fall which, after repeated meetings, is not obeyed by this town.").

[241] Philanthropos, supra note 42.

[242] Witte & Latterell, supra note 208, at 414.

of God."[243] Ultimately, however, whether out of political guile or simple mistake, the convention delegates treated the full constitution—including Article III—as having been duly ratified.[244] It would take until 1833 before Massachusetts formally abandoned laws compelling attendance at worship.[245] Yet the historical record suggests that, in other places, arguments like Backus's and Philanthropos's had a more immediate effect.

One such place was Connecticut. Following the Revolution, the legislature enacted a law in 1784 requiring everyone to attend public worship but stating Protestant dissenters could fulfill that requirement by worshipping at their own churches.[246] By then, however, that concession failed to satisfy religious liberty's more radical supporters.

In 1794, for instance, Baptist minister John Leland—then pastoring in Connecticut—wrote a tract criticizing Article III and resisting similar laws elsewhere. As to Article III's mandatory church-attendance requirement, Leland wrote: "I cannot see upon what principle of national right, the people of Massachusetts could invest their legislature with that power."[247] The reason flowed in part from Christ's prerogative over conscience.[248] But just as importantly, it followed from the limits of the social contract. "Whatever is found in the commonwealth, in aggregate, is found in small, essential particles among all the individuals; if, therefore, this power is in the commonwealth, each individual has a little of it in his own breast . . . ."[249] But no individual ever possessed power to "force [his neighbor] to worship God."[250] "That it is the duty of men, and women too, to worship God publicly, I heartily believe," wrote Leland. "[B]ut that it is the duty or wisdom of a convention or legislature to enjoin it on others, is called in question."[251]

[243] Samuel Eliot Morison, The Struggle Over the Adoption of the Constitution of Massachusetts, 1780, 50 Mass. Hist. Soc'y Proc. 353, 379 (1917). Professor McLoughlin also references this passage in 1 New England Dissent, supra note 169, at 628 n.38.

[244] Witte & Latterell, supra note 208, at 414.

[245] Id. at 419. According to Professor McLoughlin, however, even as early as 1820, Article III's provision authorizing the legislature to require attendance at public worship was "already a dead letter." See 2 New England Dissent, supra note 169, at 1160, 1183.

[246] See Sanford H. Cobb, The Rise of Religious Liberty in America: A History 501 (1902) (discussing this law).

[247] Leland, supra note 220, at 224.

[248] Id.

[249] Id. at 222.

[250] Id.

[251] Id. at 220–21.

There is no way to know how influential tracts like Leland's may have been. But however it happened, Leland's baseline position ultimately carried the day. In 1816, the Connecticut legislature passed a law repealing the penalty for nonattendance at church.[252] Two years later, the state adopted a constitution that affirmed both the "duty of all men to worship the Supreme Being" as well as "their right to render that worship, in the mode most consistent with the dictates of their consciences."[253] In its wording, that provision was ambiguous as to whether the state possessed power to mandate attendance at worship. Yet so far as I am aware, Connecticut never again enacted or enforced such laws.[254]

Vermont followed a similar course. The state's 1777 declaration of rights ambiguously stated that "every sect or denomination of people ought to observe the Sabbath . . . and keep . . . some sort of religious worship."[255] Yet it also declared that, since all have "a natural and unalienable right to worship Almighty God, according to the dictates of their own consciences," no one "ought, or of right can be compelled to attend any religious worship."[256] It is unclear how the declaration's framers intended those provisions to fit together. But no law requiring church attendance was ever put into effect.[257]

The same basic pattern also occurred elsewhere in New England. In 1819, Maine separated from Massachusetts and set out to adopt its own constitution.[258] During the debate, pro-establishment forces sought to introduce amendments that would have empowered the legislature to require attendance at public worship, much like Massachusetts had done.[259] They were promptly rebuffed. As one legislator put it, although "he had no objection to declare it to be the duty of man to worship God . . . he would by no means clothe the Legislature with authority to

[252] See Cobb, supra note 246, at 513 (discussing the 1816 law); Greene, supra note 172, at 467–68 (same).

[253] See Mark Weston Janis, Connecticut 1818: From Theocracy to Toleration, 52 Conn. L. Rev. 1701, 1703–04 (2021) (quoting Conn. Const. of 1818, art. VII, § 1).

[254] See Greene, supra note 172, at 468 (stating that after Connecticut's repeal of the church-attendance penalty, "[t]he people were at last free, not only to worship as they chose, but when they chose, or to omit worship").

[255] Vt. Const. of 1777, ch. 1, § 3, *reprinted in* 6 The Federal and State Constitutions, supra note 131, at 3737, 3740.

[256] Id.

[257] Shelby M. Balik, Equal Right and Equal Privilege: Separating Church and State in Vermont, 50 J. Church & State 23, 29–30, 37 (2008).

[258] Marc M. Arkin, Maine, *in* Church-State Relations, supra note 208, at 373, 378.

[259] Id. at 378–79.

enforce, by penalties, the performance of that duty."[260] "Religion is in its nature personal . . . and not subject to human laws, which by their severe penalties commonly make hypocrites and bigots."[261]

Citizens in New England were slower to reject laws mandating church attendance than communities in other parts of the country. And in the middle states like Pennsylvania or Delaware, mandatory attendance at worship was never part of the legal landscape.[262] Nonetheless, the debate over Article III and similar measures underscores a fundamental point. For writers like Backus, Philanthropos, Leland, and others, laws requiring attendance at public worship were objectionable even when they contained wide-ranging exemptions, because such schemes still assumed a power to mandate acts of worship that government did not and could not possess. We cannot know how widely those arguments were accepted. But the decline of church-attendance laws across New England suggests those claims may have played an important role. And the evidence suggests a similar conclusion with respect to the other area of the country that had mandated attendance at worship—the former Anglican colonies.

3. Virginia and the Former Anglican Colonies

In Virginia, South Carolina, and Georgia, proponents of religious freedom also engaged in a successful campaign to discontinue church-attendance laws that had existed before the Revolution. And here too, arguments about government's limited power to enforce religious duties seem to have been central to the debate. Nonetheless, the way that story unfolded—especially in Virginia—occurred slightly differently than in New England.

As already noted, as early as 1699, Virginia adjusted its church-attendance law to explicitly incorporate the Act of Toleration, thus exempting dissenters covered under its terms.[263] Later, in 1744, the colony's church-attendance law dropped explicit mention of the Act of Toleration, but nonetheless retained an exemption for anyone who could demonstrate he or she "hath been at divine service at any other church or

[260] Jeremiah Perley, The Debates, Resolutions, and Other Proceedings of the Convention of Delegates, Assembled at Portland on the Eleventh, and Continued Until the Twenty-Ninth Day of October, 1819, for the Purpose of Forming a Constitution for the State of Maine 73 (Portland, A. Shirley 1820).

[261] Id. The outcome of the debate is recorded in Arkin, supra note 258, at 380.

[262] See supra note 155 and accompanying text.

[263] See supra note 174 and accompanying text.

chappel than his or her own [Anglican] parish."[264] With the arrival of the Baptists and Presbyterians in large numbers, however, local authorities began to use that law and others as ready-at-hand means of persecution, much as they had done with Quakers nearly a century before.[265]

The main strategy involved rigorously construing the law's exemption requirements. For instance, although neither the Act of Toleration nor English practice demanded it, authorities in Virginia required dissenting ministers and congregants to obtain a license from the General Court in Williamsburg, which met only twice a year.[266] Dissenters also had to collect signatures from fellow congregants, convince two different local magistrates to certify the congregation's existence, then later find a local Anglican minister to confirm they subscribed to the required articles of faith.[267] According to William Fristoe, a contemporary Baptist minister, "thro' the whole process . . . from the beginning to the end, obstructions and difficulties lay in the way," and the possibility of escaping punishment "was left uncertain and precarious."[268] Although the law

[264] An Act, to Explain and Amend an Act, Intituled, an Act for the Effectual Suppression of Vice, and Restraint and Punishment of Wicked, Blasphemous, and Dissolute Persons, 18 Geo. 2 c. 2, § 4 (1744), *reprinted in* 5 The Statutes at Large; Being a Collection of All the Laws of Virginia (Richmond, W.W. Gray 1819), supra note 130, at 225, 226; see also 2 Virginia's Mother Church (1952), supra note 129, at 372 (noting the removal of reference to the Act of Toleration).

[265] According to one observer writing between 1696 and 1698, Virginia had "few or no Dissenters . . . except three or four meetings of Quakers, and one of Presbyterians." Henry R. McIlwaine, The Struggle of Protestant Dissenters for Religious Toleration in Virginia 30 (Herbert B. Adams ed., Balt., Johns Hopkins Press 1894) (quoting An Account of the Present State and Government of Virginia, § 11, *in* Collections of the Massachusetts Historical Society for the Year 1798, at 124, 162 (Bos., John B. Eastburn, 2d ed. 1835)). By the late eighteenth century, "dissenters were likely between one-fifth and one-third (if not a bit more) of the white population." John A. Ragosta, Wellspring of Liberty: How Virginia's Religious Dissenters Helped Win the American Revolution and Secured Religious Liberty 20–21 (2010).

[266] Ragosta, supra note 265, at 18; William Fristoe, A Concise History of the Ketocton Baptist Association 70 (Staunton, William Gilman Lyford 1808). As McIlwaine notes, although early dissenters like Presbyterian ministers Josias Mackie and Francis Makemie had successfully obtained licenses through county courts, by 1750 the General Court claimed "entire jurisdiction" over this matter. McIlwaine, supra note 265, at 30–31, 52. McIlwaine continues:

> The reason for such a course is evident. The General Court consisted of the Governor and his Council; and the Council, made up of the leading representatives of the office-holding aristocracy of the colony, was naturally inclined toward the repression of all innovations both in Church and in State proceeding from the masses.

Id. at 52.

[267] Ragosta, supra note 265, at 18–19.

[268] Fristoe, supra note 266, at 75.

formally excused Protestant dissenters, authorities used their discretion to make obtaining an exemption difficult, expensive, and often impossible.

Dissenters in Virginia responded to these difficulties in different ways. Initially, Presbyterians sought licenses for their preachers and meeting houses while contesting add-ons to the exemption process. Presbyterian minister Samuel Davies even took his case to England and received an opinion from the Lords of Trade affirming the application of the Act of Toleration to the colonies.[269] Meanwhile, many Baptists refused to obey Virginia's laws regulating worship as a matter of principle, suffering prosecutions and imprisonment as a result.[270] Eventually, however, both groups coalesced around a more radical position. And in doing so, they went beyond criticizing limited aspects of Virginia's church-attendance scheme. Instead, like Backus and Philanthropos, they rejected the whole idea that government could issue commands requiring worship in the first place.

The initial catalyst was revolution. In 1776, following America's declaration of independence from Great Britain, Virginia—like many other states—embarked on organizing a new form of government, including a Declaration of Rights. George Mason, a leading Virginia politician, introduced a provision stating that "all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience."[271] In all likelihood, the provision's emphasis on the "*fullest* toleration" was intended to oblige dissenters' requests that the state rescind its burdensome licensing requirements consistent with the "true spirit" of the Act of Toleration.[272]

James Madison went much further. As Madison saw it, "[t]oleration belonged to a system where [there] was an established Church, and where a certain liberty of worship was granted, not of right, but of grace; while the interposition of the magistrate might annul the grant."[273] Accordingly, Madison successfully proposed replacing Mason's language of

[269] See Curry, supra note 136, at 99–100.

[270] See H.J. Eckenrode, Separation of Church and State in Virginia 37–40 (1910) (describing different attitudes between Baptists and Presbyterians).

[271] See Carl H. Esbeck, Disestablishment in Virginia, 1776–1802, *in* Church-State Relations, supra note 208, at 139, 140.

[272] A Petition of Several Persons of the County of Lunenberg (Feb. 12, 1772), *in* Charles F. James, Documentary History of the Struggle for Religious Liberty in Virginia 33, 33 (1900); see also Petition of the Presbytery of Hanover (Nov. 11, 1774), *in* James, supra, at 42, 43–46 (requesting that the legislature reject various licensing and meeting requirements).

[273] Cobb, supra note 246, at 492; Esbeck, supra note 271, at 140–41.

"toleration" with a provision declaring that "all men are equally entitled to the full and free exercise of [religion] accord'g to the dictates of Conscience."[274]

To modern ears, Madison's proposal is notable because the phrase "free exercise of religion" anticipates the language of the Free Exercise Clause of the First Amendment. But it is important to understand that for Madison and others, free exercise and disestablishment were complementary concepts. As Professor Jack Rakove observes, both concepts reflected a denial of the state's claimed power to "regulate religious behavior," emphasizing instead that "a government exercise[s] only those powers that the people had delegated to it."[275] In substituting "free exercise" for "toleration," Madison's proposal suggested that all citizens possessed equal liberty to practice their religion. But just as fundamentally, it represented a rejection of the idea that the government possessed power to mandate religious worship as a matter "of right," even if it also extended "grace" to dissenters.

Others were quick to follow Madison's lead. Follow the Declaration's passage, petitions flowed in from various counties asking the assembly to end Virginia's religious establishment once and for all. The most notable was a petition from Presbyterians in Hanover County.[276] Like others, the petition called for a repeal of "all laws now in force . . . which countenance religious domination," presumably including the state's church-attendance law.[277] In doing so, however, the Hanover Presbyterians did not focus on discrete instances of persecution as some earlier petitions had done.[278] Instead, like Backus and Philanthropos in

[274] Esbeck, supra note 271, at 141–42.

[275] Jack N. Rakove, Beyond Belief, Beyond Conscience: The Radical Significance of the Free Exercise of Religion 68 (2020); see also Thomas E. Buckley, Church and State in Revolutionary Virginia, 1776–1787, at 18 (1977) ("Toleration, given or withheld at the pleasure of the legislature, implied the ultimate power of government over the exercise of conscience.").

[276] Memorial of the Presbytery of Hanover, Virginia (Oct. 24, 1776), *reprinted in* The Sacred Rights of Conscience: Selected Readings on Religious Liberty and Church-State Relations in the American Founding 269, 269 (Daniel L. Dreisbach & Mark David Hall eds., 2009). Buckley notes this petition was easily "the longest and most carefully worded" of those submitted. See Buckley, supra note 275, at 26.

[277] Memorial of the Presbytery of Hanover, supra note 276, at 270. For other petitions, see James, supra note 272, at 68–75.

[278] See James, supra note 272, at 69–70; see also Baptist Memorial (June 20, 1776), *reprinted in* James, supra note 272, at 65, 65 (requesting various "religious privileges, which they have not yet been indulged with in this part of the world").

New England, the Hanover Presbyterians focused on the government's limited power:

> [T]he only proper objects of civil Government are the . . . security of the life, liberty, and property of the Citizens . . . . But . . . the duty which [they] owe [their] Creator and the manner of discharging it can only be directed by reason and conviction, and is no where cognizable but at the Tribunal of the Universal Judge.[279]

From this vantage point, Virginia's church-attendance law and related acts were improper not just because they resulted in individual experiences of coercion; had the state simply modified its licensing regime, that problem could have been solved. Rather, the problem was that mandating attendance at worship exceeded the government's rightful authority. Laws compelling attendance at state-sponsored worship were impermissible—exemptions or no—because they assumed a power on the part of government to require acts of religious devotion that, by their nature, an individual could never delegate to the judgment of others.

Initially, dissenters in Virginia scored a temporary victory. A few months after the Hanover Presbyterians submitted their memorial, the Virginia assembly enacted a provision declaring void "every act of parliament" that punished "forbearing to repair to church."[280] But that was hardly the end of the matter. In its final version, the law explicitly reserved the question of whether vestiges of the prior Anglican establishment should survive in modified form.[281] The most notable among these was a proposal for a so-called general assessment.

Prior to 1776, laws in Virginia required each citizen to pay "tithes" exclusively to the Anglican church.[282] Following independence, supporters of establishment may have realized they lacked continued political support for that scheme.[283] So they proposed a general

[279] Memorial of the Presbytery of Hanover, supra note 276, at 270 (emphasis omitted).

[280] An Act for Exempting the Different Societies of Dissenters from Contributing to the Support and Maintenance of the Church by Law Established, and Its Ministers, and for Other Purposes Therein Mentioned, ch. 2, § 1 (1776), *reprinted in* 9 The Statutes at Large; Being a Collection of All the Laws of Virginia 164, 164 (Richmond, J. & G. Cochran 1821).

[281] See id. §§ 4–5, at 165 (explicitly protecting lands and other property belonging to the established church and reserving the possibility of a future tax support through a general assessment).

[282] Mark Storslee, Church Taxes and the Original Understanding of the Establishment Clause, 169 U. Pa. L. Rev. 111, 120–21 (2020) (describing Virginia's church-tax regime).

[283] Buckley, supra note 275, at 35 (suggesting that the general-assessment proposal "may well have been sponsored as a compromise measure").

assessment—a modified tithing system that introduced elements of choice. Most notably, the general assessment bill proposed in 1784 would have allowed citizens a right not only to direct their tithes to their own churches but also the right to avoid tithing altogether and direct payments to education instead.[284] Accordingly, supporters of the assessment argued that the law contained "not 'the smallest coercion'" with respect to religion.[285]

The debate over the general assessment is one of the most famous in American history. For our purposes, however, what matters is the way this debate raised the same fundamental questions about the state's power to mandate religious duties that Article III did in Massachusetts. Like supporters of Article III's church-attendance regime, proponents of the general assessment contended the proposal was well within the state's authority because it did not compel specific "modes of faith and forms of worship."[286] Moreover, as with Article III, the assessment even allowed any objecting citizen to avoid worshipping altogether by providing an exemption directing an objector's tithe toward education rather than a church. Of course, James Madison and other supporters of religious liberty rejected that argument. But less appreciated is the fact that, in doing so, Madison and his allies deployed arguments strikingly similar to those that Backus and Philanthropos would also wield against mandatory church attendance.

Consider Madison's now-famous *Memorial and Remonstrance Against Religious Assessments*. Madison began his *Memorial* by repeating a Lockean claim found in the Declaration of Rights: that religion—"the duty which we owe to our Creator and the Manner of discharging it"—can only be directed "by reason and conviction, not by force or violence."[287] But unlike Locke, Madison insisted that this fact implied much more than a requirement that the state provide exemptions

[284] See A Bill "Establishing a Provision for Teachers of the Christian Religion" (1784), *reprinted in* Buckley, supra note 275, at 188, 188–89. As Professor Esbeck observes, the bill allowed dissenters to opt out of tithing and instead direct their money to "seminaries of learning," meaning "schools of general education." Esbeck, supra note 271, at 152.

[285] See Curry, supra note 136, at 145 (quoting pro-assessment petitions).

[286] Letter from Richard Henry Lee to James Madison (Nov. 26, 1784), *reprinted in* James Madison on Religious Liberty 65, 65 (Robert S. Alley ed., 1985).

[287] James Madison, A Memorial and Remonstrance Against Religious Assessments (1785), *reprinted in* Selected Writings of James Madison 21, 22 (Ralph Ketcham ed., 2006) [hereinafter Madison, Memorial and Remonstrance] (quoting Va. Declaration of Rights art. XVI (1776)).

when mandating its preferred form of worship. Instead, it meant that government had no power to mandate formal worship at all. According to Madison: "It is the duty of every man to render to the Creator such homage, *and such only*, as he believes to be acceptable to him [i.e., to God]."[288] Madison continued:

> [I]f a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal [Sovereign]. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.[289]

According to Madison, no person could actually surrender to government his natural right to worship as conscience directed—"what is here a right towards men, is [also] a duty towards the Creator."[290] Moreover, because such a duty could be fulfilled only through reason and persuasion, not by coercion, it necessarily followed that religion was "wholly exempt" from government's "cognizance"; religion simply lay outside the force of the government's laws.[291] Like Backus and Philanthropos, Madison contended that regulating the choice to worship or not was simply not within the government's power—it was, as the Hanover Presbyterians had put it, "no where cognizable but at the Tribunal of the Universal Judge."[292]

Nor did it matter that the religious duty in question might be trivial. In his *Memorial*, Madison argued that it was "proper to take alarm at the first experiment on our liberties."[293] He went on to compare the proposed general assessment to the British tax on tea that preceded the Revolution,

[288] Id. (emphasis added).
[289] Id.
[290] Id.
[291] Id. Members of the Founding generation understood "cognizance" as describing whether a given subject was within or outside the law's juridical authority. For instance, Samuel Johnson's famous dictionary defined "cognizance" as "[j]udicial notice; trial; judicial authority" and offered examples that spoke of moral evils which "human laws can take no *cognizance* of." See 1 Samuel Johnson, A Dictionary of the English Language, at COG–COH (London, W. Strahan, 2d ed. 1755). For varying views on "no-cognizance" in Madison's thought, see Philip Hamburger, Separation of Church and State 101–07 (2002); Vincent Phillip Muñoz, Religious Liberty and the American Founding: Natural Rights and the Original Meanings of the First Amendment Religion Clauses 111–14 (2022).
[292] Memorial of the Presbytery of Hanover, supra note 276, at 270.
[293] Madison, Memorial and Remonstrance, supra note 287, at 23.

arguing that the assessment similarly symbolized a precedent for tyranny. "Who does not see . . . . [t]hat the same authority which can force a citizen to contribute three pence only . . . may force him to conform to any other establishment in all cases whatsoever?"[294] In New England, Isaac Backus had made a similar point. Contesting Massachusetts's church-tax scheme, Backus rejected the argument that the size of the tithe rendered it trivial, because—big or small—it still represented a capitulation to government's claimed authority to command acts of worship. "It is not the *pence* but the *power* that alarms us," Backus said simply.[295]

The debate over the general assessment was fierce. Ultimately, however, Madison and his evangelical allies prevailed. In December 1785, Madison reintroduced and the assembly soon passed Jefferson's well-known "act 'for Establishing Religious Freedom.'"[296] Following a lengthy preamble, the law announced a sharp prohibition: "[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever. . . ."[297] By banning laws requiring citizens "to *frequent* or support . . . religious worship," the law made plain that citizens in this period viewed mandatory church-attendance laws and mandatory tithing schemes in similar terms. And as in Virginia, citizens in other Anglican colonies that had enacted church-attendance laws followed suit.

As early as 1712, South Carolina had mandated attendance at Anglican worship or "some meeting or assembly of religious worship, tolerated and allowed by the laws of this Province."[298] In 1762, Georgia enacted a nearly identical statute, requiring attendance at an Anglican parish or another church "[t]olerated and allowed by the Laws of England."[299] Yet

[294] Id.; see also Storslee, supra note 282, at 125–27 (discussing the connection between Madison's argument and the tea tax).

[295] Isaac Backus, Government and Liberty Described; and Ecclesiastical Tyranny Exposed (1778), *reprinted in* Backus, A Door Opened, supra note 240, at 345, 359.

[296] Curry, supra note 136, at 146. For more on the struggle and timeline leading up to Madison's proposal, see Buckley, supra note 275, at 144–57.

[297] An Act for Establishing Religious Freedom, ch. 34, §§ 1–2 (1785), *reprinted in* 12 The Statutes at Large; Being a Collection of All the Laws of Virginia 84, 84–86 (Richmond, G. Cochran 1823).

[298] An Act for the Better Observation of the Lord's Day, Commonly Called Sunday, § I (1712), supra note 134, at 396, 396; see also supra note 134 and accompanying text (discussing this law).

[299] An Act for Punishing Vice, Profaneness, and Immorality, and for Keeping Holy the Lords Day, Commonly Called Sunday (1762), supra note 135, at 508, 508. As Professor Joel Nichols points out, a 1759 law applying only to Savannah suggested a similar attitude, insofar as it required constables to apprehend those loitering or causing a disturbance on Sunday "and

by the end of the eighteenth century, both states had gone the other direction. In 1798, Georgia's new constitution prohibited government from compelling anyone "to attend any place of worship contrary to his own faith and judgment" or to "pay [tithes], taxes, or any other rate, for the building or repairing [of] any place of worship, or for the maintenance of any minister or ministry."[300] Likewise, although South Carolina's 1778 constitution declared the "Christian Protestant religion" to be "the established religion of this State," it was silent on compulsory church attendance.[301] In 1790, however, the state's new constitution replaced the elaborate provisions regarding toleration with a simple guarantee of "[t]he free exercise and enjoyment of religious profession and worship."[302]

C. Summary of the Evidence

Following the Revolution, both New England states like Massachusetts and Connecticut and havens of Anglican establishment like Virginia, South Carolina, and Georgia had laws mandating attendance at public worship. Contra Justice Scalia's apparent assumption, those laws all contained exemptions excusing dissenters from worshipping in the established church. What's more, both Article III and Virginia's proposed general assessment included exemptions so permissive that they would have allowed objecting citizens to avoid worshipping altogether. Nonetheless, communities in these different places ultimately rejected even these laws. We cannot know for sure why they did so. But one likely

compel them to go to *some place* of divine worship." See Joel A. Nichols, Georgia: The Thirteenth Colony, *in* Church-State Relations, supra note 208, at 225, 232 (quoting Act for Establishing the Method of Appointing Constables, Ascertaining the Qualifications of Persons to Serve in That Office, and to Point Out the Duties Attending the Same, § XI (Ga. 1759), *reprinted in* 3 Foundations of Colonial America: A Documentary History 2062, 2065 (W. Keith Kavenagh ed., 1973)).

[300] Ga. Const. of 1798, art. IV, § 10, *reprinted in* 2 The Federal and State Constitutions, supra note 131, at 791, 800–01. Notes from the convention indicate that the impetus for this provision may have come from Baptist minister Jesse Mercer or his father Silas Mercer, a Baptist minister who had previously opposed efforts to enact a church-tax law similar to Virginia's proposed general assessment. See Nichols, supra note 299, at 236, 238–39.

[301] See S.C. Const. of 1778, art. XXXVIII, *reprinted in* 6 The Federal and State Constitutions, supra note 131, at 3248, 3255–57.

[302] S.C. Const. of 1790, art. VIII, § 1, *reprinted in* 6 The Federal and State Constitutions, supra note 131, at 3258, 3264. Although South Carolina's revision of the laws in 1872 nominally contained a church-attendance law, as of 1880 an observer noted that "[n]o one that I have met recalls any prosecution under this act." Henry E. Young, Sunday Laws, *in* Report of the Third Annual Meeting of the American Bar Association 109, 139 (Phila., R.C. Markley & Son 1880).

explanation flows from prominent arguments made by supporters of religious liberty.

Drawing on a radical version of Locke's arguments about the nature of the social contract and biblical claims about God's sole prerogative over conscience, these writers argued that laws requiring attendance at worship were objectionable—with or without exemptions—because they exceeded government's rightful authority. Under this theory, the problem with church-attendance laws was not that they eventually coerced individual citizens. Instead, the problem was that such laws assumed a power to enforce religious duties that citizens did not and could not surrender to government. "Matters of religion lie between God and their own consciences, to whom each man is to give account for *himself*," Philanthropos had reasoned.[303] And because that was so, it naturally followed that no one could "invest their Legislature with [that] power."[304]

Judged by changes in policy, some version of that idea seems to have prevailed in New England, albeit after some struggle. It also played a key role in Virginia and the Anglican colonies, and presumably also in middle states like Pennsylvania and New Jersey that rejected religious establishments from the outset. In all these places, many Americans concluded that the right to worship as each person saw fit was, as Frothingham observed so many decades before, an "unalterable Right."[305]

III. FEDERAL PRACTICE AND SUBSEQUENT DEVELOPMENTS

As we have seen, members of the Founding generation objected to church-attendance laws as exceeding government's rightful authority, whether those laws contained opt-outs or not. Yet even recognizing that point, some important questions remain—both about how far this principle extended, and about the principle's application to contexts like public schools. This Part surveys the evidence with respect to those questions. It begins by examining evidence about the scope and limits of the argument that government lacked the power to command religious observance, focusing especially on federal practice. Having done so, it goes on to explore why application of the Founding-era principle played out as it did with respect to the nation's developing public schools.

[303] Philanthropos, supra note 42.
[304] Id.
[305] Frothingham, supra note 191, at 45–46.

A. The Scope and Limits of the Principle

Members of the Founding generation objected to laws requiring attendance at worship. Yet as we observed at the outset, they did not object to numerous other actions related to government-sponsored religious observance.[306] Beginning in the Continental Congress and continuing after the ratification of the First Amendment, chaplains offered prayers before legislative sessions.[307] Before the Revolution and after, military chaplains conducted worship services and prayed with soldiers.[308] Since George Washington, many presidents have offered proclamations referencing God and urging citizens to engage in days of fasting or thanksgiving.[309] And at the first presidential inauguration, Washington even included what could well be described as a prayer as part of his "first official act" as president.[310] Given the history above, what could explain these practices?

Here again, we cannot know for certain. However, the available evidence suggests a possible answer. On the one hand, members of the Founding generation rejected a claimed power on the part of government to *command* religious observance through coercion-backed laws, consistent with the evidence canvassed above. But in general, they did not object to government declarations *recommending* that citizens engage in worship as their own consciences may dictate, even as some worried about the dangers this distinction sometimes posed.

One early example of this distinction appears in the writings of Eleazar Wheelock, a well-known evangelical Congregationalist minister and the

[306] See supra notes 71–74 and accompanying text.

[307] See Derek H. Davis, Religion and the Continental Congress 1774–1789, at 73–80 (2000).

[308] See 1 Anson Phelps Stokes, Church and State in the United States 267–72 (1950) (describing military chaplains during the Revolution). In 1791, Congress authorized President Washington to appoint a chaplain for the "Military Establishment of the United States." An Act for Raising and Adding Another Regiment to the Military Establishment of the United States, and for Making Farther Provision for the Protection of the Frontiers, ch. 28, § 5, 1 Stat. 222, 222 (1791).

[309] 3 Stokes, supra note 308, at 179–93 (canvassing this practice).

[310] See George Washington, First Inaugural Address (Apr. 30, 1789), *reprinted in* 1 A Compilation of the Messages and Papers of the Presidents, supra note 73, at 51, 52 ("[I]t would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe . . . . In tendering this homage to the Great Author of every public and private good, I assure myself that it expresses your sentiments not less than my own, nor those of my fellow-citizens at large less than either.").

founder of Dartmouth College.[311] In November 1775, New Hampshire's provincial assembly issued a thanksgiving proclamation "recommend[ing]" that ministers and citizens "devote a reasonable Part of [an appointed] Day to the Worship of GOD" to celebrate the burgeoning American resistance.[312] Unaware that such a proclamation had been issued, however, Wheelock had already celebrated a different day of thanksgiving with his congregation according to an announcement issued by Connecticut.[313] When Wheelock declined to celebrate New Hampshire's additional thanksgiving, many accused him of sympathizing with the British.[314] In response, Wheelock published a tract, fittingly entitled *Liberty of Conscience; Or, No King but Christ, in His Church*.[315]

Wheelock began his tract by noting that "Christ's kingdom, that is, his visible church . . . is not of this world" because "only [Christ] can give laws and ordinances to it."[316] Wheelock then explained that, because this was so, it was unacceptable to observe an additional thanksgiving "purely, and only out of obedience and respect to civil authority, or advice of the congress."[317] Nonetheless, Wheelock asserted that New Hampshire's proclamation was permissible because it offered "only counsel, advice and exhortation," as opposed to commands "injoin'd by human authority."[318]

As discussed more below, Wheelock's distinction between a mere "exhortation" to worship versus a command "injoin'd by human authority" appears to have been widely employed in this period. Yet even while invoking this distinction, Wheelock highlighted its perils. "[W]hen civil power encroaches an inch upon Christ's prerogative, a sanctified and

[311] 2 New England Dissent, supra note 169, at 846–47, 883; see Baxter Perry Smith, The History of Dartmouth College 6–9 (Bos., Houghton, Osgood & Co. 1878) (describing Wheelock's background and entry into Congregationalist ministry).

[312] N.H. Provincial Congress, A Proclamation for a Public Thanksgiving (Nov. 4, 1775).

[313] Eleazar Wheelock, Liberty of Conscience; Or, No King but Christ, in His Church, at v–vi (Hartford, Eben. Watson 1775).

[314] 2 New England Dissent, supra note 169, at 846.

[315] See id.; Wheelock, supra note 313, at v–vi.

[316] Wheelock, supra note 313, at 14–16.

[317] Id. at 19.

[318] Id. at 22, 27. In making this argument, Wheelock also distinguished injunctions to worship from governmental commands to cease "*all servile labour, and vain recreations*" on a designated day—usually Sunday. Id. at 21–22. Unlike injunctions commanding attendance at formal worship, Wheelock viewed the latter laws as "only respect[ing] public peace and order." Id. at 21; cf. McGowan v. Maryland, 366 U.S. 420, 434, 437–38, 452 (1961) (discussing other historical examples of this view and upholding Sunday closing laws for similar reasons).

enlightened conscience can never be compelled to a compliance," Wheelock observed.[319] And that was true "whether such attempts be made, by reproach, or threats," or by "stripes."[320]

Wheelock did not clearly explain what drew him and others to the distinction between injunctions to worship and mere recommendations. But one reason may have involved the larger Founding-era theory of government power canvassed above. As we have seen, because Founding-era thinkers believed each person must give an account of himself to God, many also believed citizens could not delegate to government the power to enforce religious duties. But arguably, mere hortatory statements did not depend on the same delegated authority. "[I]t is one thing to perswade, another to command," Locke had famously reasoned.[321] While every individual "has Commission to admonish, exhort, convince another of Error," only the magistrate can "compel with the Sword," because that power derives from "the Force and Strength of all his Subjects."[322] Given Locke's popularity, many Founding-era Americans may have seen the distinction between recommendations and injunctions in similar terms.[323]

Recommendations and commands to worship also differed in their practical effects. Under church-attendance regimes, citizens needed to seek and obtain exemptions to avoid the law's penalties.[324] But recommendations presented no such obligation. Recommendations were invitations to *opt in* to participating in a religious practice, maintaining a default regime in which choices to worship belonged to the citizen alone. By contrast, injunctions to worship assumed a governmental power to mandate religious duties, requiring citizens to *opt out* of worship by seeking governmental permission. Said another way, legal injunctions to worship created a kind of "Mother may I" regime—they placed the onus on citizens to avoid punishment, and in the process, ceded the premise that the government possessed the power to require religious observances through coercion.

Push and pull between commands and recommendations continued in subsequent decades, especially at the federal level. One illustration

[319] Wheelock, supra note 313, at 26.
[320] Id.
[321] Locke, supra note 179, at 14.
[322] Id. at 12, 14.
[323] See supra note 186 and accompanying text (discussing Locke's influence).
[324] See, e.g., supra notes 217, 231, 266–68 and accompanying text.

involves regulations for members of the armed forces. Under the British Articles of War, officers and soldiers were commanded to "diligently frequent Divine Service," with those "wilfully absent" subject to court-martial and fine.[325] By contrast, when the Continental Congress established its own articles of war in 1775 and 1776, it copied many of the British Articles verbatim, but elected only to "earnestly recommend[]" that soldiers and officers attend worship.[326] When Congress enacted rules governing the Army in 1806, it followed the same pattern.[327]

At the same time, tensions surrounding these provisions reveal the complexity of the issue. The Navy offers one example. In 1779, Congress enacted rules instructing naval commanders to "take care, that divine service be performed twice a day," but without any attendance requirement for crew or officers.[328] A year later, however, Congress followed up by stating that commanders should also "cause all, or as many of the ship's company as can be spared from duty, to attend."[329] Congress provided no reason for this change. But regardless, that is what took place.

A similar development occurred at West Point, the nation's first military academy. Notwithstanding Congress's direction that worship among Army officers was to be "earnestly recommended" only,[330] in 1818, the commander at West Point instituted mandatory chapel attendance.[331] Several officers complained that this order was unlawful—in part because it violated their constitutional rights.[332] The Secretary of

[325] British Articles of War of 1765, § 1, art. 1, *reprinted in* William Winthrop, Military Law and Precedents 931, 931 (2d ed. 1920).

[326] See American Articles of War of 1775, art. II, *reprinted in* Winthrop, supra note 325, at 953, 953; American Articles of War of 1776, § 1, art. II, *reprinted in* Winthrop, supra note 325, at 961, 961.

[327] An Act for Establishing Rules and Articles for the Government of the Armies of the United States, ch. 20, art. 2, 2 Stat. 359, 360 (1806) (retaining the language that worship was only "earnestly recommended").

[328] An Act for the Government of the Navy of the United States, ch. 24, § 1, art. 2, 1 Stat. 709, 709 (1799).

[329] An Act for the Better Government of the Navy of the United States, ch. 33, § 1, art. II, 2 Stat. 45, 45 (1800).

[330] Art. II, 2 Stat. at 360.

[331] 2 Herman A. Norton, Struggling for Recognition: The United States Army Chaplaincy 1791–1865, at 28 (1977). Around the same time, it appears the chaplain sometimes offered prayers at morning roll-call and at the end of the day following the parade. See id. at 25. The practice of daily prayers seems to have ebbed and flowed, because in 1840, a new chaplain felt the need to request that the Superintendent "reinstate 'daily and morning prayers.'" Id. at 34–36 (citation omitted).

[332] Albert E. Church, Personal Reminiscences of the Military Academy 61 (West Point, U.S.M.A. Press 1870).

War reportedly replied that he "was farthest from any desire to interfere, in the least, with their conscientious scruples, and would therefore send them where attendance upon Divine service would not be deemed necessary."[333] He subsequently sent all three to frontier posts, apparently to their great disgust.[334] One contemporary observer seems to have questioned the sincerity of these objectors.[335] But at minimum, these incidents suggest that the line between recommendations and commands could be porous, and was not always followed in any event.

Another more significant illustration of the debate over recommendations versus injunctions to worship concerned proclamations for thanksgiving or fasting. These proclamations were common in New England prior to the Founding, and the Continental Congress took up the practice as early as 1775.[336] The proclamations typically called upon citizens to set specific days aside for public worship or fasting, usually for the purpose of seeking divine assistance or offering gratitude for recent triumphs.[337] When doing so, however, the proclamations were usually phrased in an advisory way, declaring that the Congress "recommend" that citizens engage in fasting or thanksgiving and attend public worship.[338] Even with those caveats, however, the matter was sometimes a cause of debate.

The first skirmish occurred in Congress. In September 1789, a member of the House offered a resolution requesting that now-President Washington "recommend to the people . . . a day of public thanksgiving and prayer" for the blessing of establishing a Constitution.[339] Two

[333] Id. The story is also recounted in Stephen E. Ambrose, Duty, Honor, Country: A History of West Point 152 (1966).

[334] Church, supra note 333, at 61; Ambrose, supra note 333, at 152.

[335] Church, supra note 333, at 61 ("It was thought that there was not much conscience in the matter, any way.").

[336] Davis, supra note 307, at 83–84.

[337] See, e.g., id. at 85 (quoting Monday, June 12, 1775, *in* 2 Journals of the Continental Congress 1774–1789, at 87, 87 (Worthington Chauncey Ford ed., 1905)); id. at 86–87 (quoting Saturday, Nov. 1, 1777, *in* 9 Journals of the Continental Congress 1777–1789, at 854, 854–55 (Worthington Chauncey Ford ed., 1907)).

[338] See, e.g., id. at 85 (quoting Monday, June 12, 1775, *in* 2 Journals of the Continental Congress 1774–1789, supra note 337, at 87, 87); see also id. at 86–87 (quoting Saturday, Nov. 1, 1777, *in* 9 Journals of the Continental Congress 1777–1789, supra note 337, at 854, 854–55) (using "recommended")).

[339] 1 Annals of Cong. 949 (Sept. 25, 1789) (Joseph Gales ed., 1834). There are two printings of the first two volumes of the Annals of Congress. This page citation and those following are taken from the second printing with the running head "Gales & Seaton's history of debates in

members of the House objected.[340] Most notably, Thomas Tucker of South Carolina argued that such a resolution involved "a religious matter" with which the "Congress have nothing to do . . . [and] is proscribed to us."[341] "If a day of thanksgiving must take place," Tucker reasoned, "let it be done by the authority of the several States."[342]

Tucker did not reference the Establishment Clause explicitly. But given that the debate took place the same day that Congress approved the language of the First Amendment, it is at least plausible that he viewed his objection as related.[343] Even if this is what Tucker meant, however, his view did not prevail. Appealing to biblical support for thanksgiving days as well as "the practice of the late [Continental] Congress," other members defended the resolution and it carried seemingly without additional discussion.[344] And accordingly, George Washington issued a proclamation in which he "recommend[ed]" that citizens offer thanks to God, including thanks for "the civil and religious liberty with which we are blessed."[345]

Subsequent events reveal the debate was not universally settled. Thomas Jefferson famously declined to issue thanksgiving proclamations, and James Madison later explained he did so only hesitatingly. Yet even here, their explanations point to the wide acceptance of the distinction between laws enjoining worship versus mere recommendations.

In 1808, a New York clergyman named Samuel Miller requested that Jefferson consider "by Proclamation, to *recommend*" a day of fasting and prayer.[346] Jefferson responded with a lengthy letter politely declining the request. He acknowledged that Miller "only proposed that I should *recommend*, not prescribe a day of fasting & prayer," and that such a request was consistent with "the practice of my predecessors," i.e., past

Congress." Readers with the alternative printing with the running head "History of Congress" can find these passages by referring to the date.

[340] Id. at 949–50.

[341] Id. at 950; see Davis, supra note 307, at 89.

[342] 1 Annals of Cong. 950 (Sept. 25, 1789) (Joseph Gales ed., 1834).

[343] See Davis, supra note 307, at 89–90.

[344] 1 Annals of Cong. 950 (Sept. 25, 1789) (Joseph Gales ed., 1834).

[345] George Washington, U.S. President, Thanksgiving Proclamation (Oct. 3, 1789), *reprinted in* 4 The Papers of George Washington: Presidential Series 131, 131–32 (Dorothy Twohig ed., 1993).

[346] Letter from Samuel Miller to Thomas Jefferson (Jan. 18, 1808), *microformed on* The Thomas Jefferson Papers at the Library of Congress, Series 1, Reel 40 (Libr. of Cong.).

presidents.[347] But according to Jefferson, even a recommendation would "*indirectly* assume . . . an authority" that the Constitution precluded.[348] He continued:

> It must be meant . . . that this recommendation is to carry some authority, and to be sanctioned by some penalty on those who disregard it; not indeed of fine and imprisonment, but of some degree of proscription perhaps in public opinion. And does the change in the nature of the penalty make the recommendation the less *a law* of conduct for those to whom it is directed?[349]

Jefferson acknowledged that a recommendation did not actually "prescribe a day of fasting & prayer" or "enjoin[] . . . an act of discipline" in the standard sense.[350] But he nonetheless suggested that it may still impose a "penalty on those who disregard it" by means of "proscription perhaps in public opinion."[351]

At least arguably, Jefferson's letter offered a position approximating Justice Kennedy's indirect coercion idea.[352] So far as I am aware, however, Jefferson's letter is the only writing in this period to do so clearly. Moreover, the fact that Jefferson felt compelled to justify his refusal by arguing that public disapproval might transform a recommendation into "*a law* of conduct for those to whom it is directed" indicates that even Jefferson acknowledged the widespread distinction between recommendations and injunctions, albeit while trying to expand the latter's boundaries.[353]

Unlike Jefferson, Madison issued no fewer than four proclamations recommending days of thanksgiving or fasting as president, following the tradition set out by Washington and Adams.[354] Reflecting on the practice later, however, he expressed misgivings. In his *Detached Memoranda*, Madison offered several criticisms of proclamations of this type—that they "nourish the erronious idea of a *national* religion," for instance, or

[347] Letter from Thomas Jefferson to Samuel Miller (Jan. 23, 1808), *reprinted in* 11 The Works of Thomas Jefferson 7, 7–9 (Paul Leicester Ford ed., 1905).

[348] Id. at 8.

[349] Id.

[350] Id.

[351] Id.

[352] See supra notes 85–90 and accompanying text (summarizing Justice Kennedy's theory).

[353] Letter from Thomas Jefferson to Samuel Miller, supra note 347, at 8.

[354] See Elizabeth Fleet, Madison's "Detached Memoranda," 3 Wm. & Mary Q. 534, 562 n.54 (1946) (listing Madison's proclamations).

that they risk "narrow[ing] the recommendation to the standard of the predominant sect."[355] He also argued, similarly to Jefferson, that such proclamations "imply a religious agency," contrary to the idea that government "can in no sense, be regarded as possessing an advisory trust from their Constituents in their religious capacities."[356]

Scholars have tended to focus on these passages from the *Detached Memoranda*. But arguably more illuminating is a letter Madison penned to Edward Livingston around this same period. Madison reiterated his objection to executive proclamations of thanksgivings and fasts, but with a notable caveat—"so far at least as they have spoken the language of *injunction*, or have lost sight of the equality of *all* Religious Sects in the eye of the Constitution."[357] He then explained that, with respect to his own proclamations, he was "careful to make [them] absolutely indiscriminate, and merely recommendatory."[358] "In this sense, I presume," Madison reasoned, "you reserve to the Government a right to *appoint* particular days for religious worship . . . without any particular sanction *enforcing* the worship."[359]

On Madison's view, actions like thanksgiving proclamations presented significant dangers. Yet the most fundamental concern seems to have been that such proclamations never proceed further than being "recommendatory" only.[360] And in fact, Madison ended his discussion in the *Detached Memoranda* with the same point. Having expressed several misgivings about thanksgiving proclamations, Madison explained that he nonetheless decided to issue them during his presidency.[361] Yet he intentionally employed "a form & language . . . meant to deaden as much as possible any claim of political right to enjoin religious observances."[362] By "expressly" emphasizing "the voluntary compliance of individuals,"[363] Madison hoped that actions like these would never go so

[355] James Madison, Detached Memoranda, *reprinted in* Fleet, supra note 354, at 536, 560–61.

[356] Id. at 560.

[357] Letter from James Madison to Edward Livingston (July 10, 1822), *reprinted in* 2 The Papers of James Madison, Retirement Series 542, 543 (David B. Mattern, J.C.A. Stagg, Mary Parke Johnson & Anne Mandeville Colony eds., 2013).

[358] Id.

[359] Id.

[360] Id.

[361] Madison, Detached Memoranda, supra note 355, at 562.

[362] Id.

[363] Id.

far as to provide—as he wrote to Livingston—any "sanction *enforcing* the worship."[364]

So how exactly did members of the Founding generation distinguish between recommendations and commands to worship on a practical level? Here again, conclusions are necessarily tentative. But the sources offer at least three clues.

First and most obviously, the distinction between "enjoining" worship versus a mere "recommendation" did not depend solely on the presence or absence of exemptions. As we have already seen, supporters of religious liberty in both New England and places like Virginia viewed laws mandating worship as outside the government's power, even where the laws' opt-outs were so broad they allowed dissenters to avoid worshipping altogether.[365] The mere fact that a law exempted objectors was not sufficient to quell objections that it exceeded government's rightful authority, at least where other features were present.

Second, the content of the government instruction was relevant. In his letter to Livingston and his *Detached Memoranda*, Madison noted that in his thanksgiving proclamations, he was careful to avoid "the language of *injunction*,"[366] instead emphasizing "the voluntary compliance of individuals."[367] The same was true of thanksgiving proclamations issued by other presidents and by the Continental Congress, which consistently used the language of "recommend," and were understood as hortatory only.[368] This was also true of early statutes regulating worship in the Army and Navy, albeit with some later complications.[369] While far from dispositive, these sources indicate that the more a governmental action assumed the cast of a directive, the more it risked becoming an impermissible command to worship.

Third, a forbidden command to worship often included reference to some punishment, either explicit or implicit. For instance, Madison viewed it as relevant that a proclamation lacked reference to "any particular sanction *enforcing* the worship."[370] Likewise, Jefferson indicated that he objected to thanksgiving proclamations because,

[364] Madison, Letter to Livingston, supra note 357, at 543.
[365] See supra notes 218–24 , 276–79, 284–92, and accompanying text.
[366] Madison, Letter to Livingston, supra note 357, at 543.
[367] Madison, Detached Memoranda, supra note 355, at 562.
[368] See supra notes 336–38, 360–64 and accompanying text.
[369] See supra notes 325–35 and accompanying text.
[370] Madison, Letter to Livingston, supra note 357, at 543.

notwithstanding their supposedly advisory character, they nonetheless involved "sanction[] by some penalty," even if only popular condemnation.[371] As we have observed, some aspects of Jefferson's argument appear to have been idiosyncratic to him. Still, it seems clear the Founding generation did not view the relevant penalties as limited to the basest coercive measures like fines or whipping. Instead, the principle against threatened punishment seems to have also encompassed at least some attempts to condition benefits on a willingness to worship.

One important example occurred in South Carolina. In 1704, Anglican forces in the colony passed a law requiring members of the colony's House of Commons to have "received the Sacrament of the Lord's Supper according to the rites and usage of the Church of England" in the preceding year or else to receive the sacrament before taking office.[372] The law announced a fine for representatives who failed to conform and allowed the assembly to replace any non-conforming member.[373] The dissenters recruited Daniel Defoe—the eventual author of *Robinson Crusoe*—to recite their grievances.[374] "[T]he making Men uneasy for the sake of any Opinion that they hold in Matters of Religion . . . is *Persecution*," Defoe insisted. That was so, he continued, "[w]hether [citizens] are made uneasy by inflicting any Corporal or Pecuniary Punishment, or by depriving them of any Privilege; and whether that Privilege be Power, Honour, or Reputation."[375]

Admittedly, this principle extended only so far. Although several states resisted conditioning benefits or civil privileges on a willingness to engage in worship, some maintained religious tests or oath requirements

[371] Letter from Thomas Jefferson to Samuel Miller, supra note 347, at 8.

[372] An Act for the More Effectual Preservation of the Government of This Province, § I (1704), *reprinted in* 2 The Statutes at Large of South Carolina, supra note 134, at 232, 232–33. This law mirrored the Test and Corporation Acts in England, which limited eligibility for membership in Parliament to members of the Anglican church. See McConnell, Establishment, supra note 50, at 2113 (describing these laws).

[373] An Act for the More Effectual Preservation of the Government of This Province, §§ IV–V (1704), *reprinted in* 2 The Statutes at Large of South Carolina, supra note 134, at 232, 234–35.

[374] Brinsfield, supra note 133, at 23, 33–34.

[375] Daniel Defoe, The Case of Protestant Dissenters in Carolina 8–9 (London 1706). Likewise, Virginia's famous Act for Establishing Religious Freedom condemned "bribing with a monopoly of [worldly] honours and emoluments, those who will externally profess and conform" to the state-sponsored religion and declared that no citizen's religious opinions should "diminish, enlarge, or affect their civil capacities." An Act for Establishing Religious Freedom, ch. 34, §§ 1–2 (1785), *reprinted in* 12 The Statutes at Large; Being a Collection of All the Laws of Virginia 84, 85–86 (Richmond, G. Cochran 1823).

well into the nineteenth century.[376] Still, even these more limited protections indicate that, whatever their precise contours, sanctions for failure to worship considered relevant at the Founding sometimes included the denial of benefits or other legal rights, as well as fines or more obviously coercive measures.

B. The Emergence of Public Schools

This brings us to another important aspect of the problem regarding coerced worship—the gradual development of public schools. Obviously, a full recounting of that history is beyond what we can accomplish here. But a basic discussion is necessary for a simple reason. Although many members of the Founding generation rejected government attempts to command attendance at state-sponsored worship, it is also true that at the Founding and continuing thereafter, many schools required students to engage in prayer or devotional Bible reading. Likewise, several early state universities required chapel attendance or daily prayer.

From one vantage point, the fact that these early schools required prayer appears in tension with Founding-era claims about government's inability to require acts of worship.[377] And indeed, in other contexts like legislative prayer, the Supreme Court has sometimes said that a historical practice may be considered constitutional where it is part of a long tradition "that was accepted by the Framers and has withstood the critical scrutiny of time and political change."[378] But the story of how public schools in America developed provides reason to question whether this logic can justify government-mandated school prayer today.

To understand why, begin with early state universities. Following the Revolution, several legislatures undertook efforts alongside prominent

[376] See, e.g., Pa. Const. of 1776, art. II, *reprinted in* 5 The Federal and State Constitutions, supra note 131, at 3081, 3082 (declaring that no one "who acknowledges the being of a God, [can] be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship"); N.J. Const. of 1776, art. XIX, *reprinted in* 5 The Federal and State Constitutions, supra note 131, at 2594, 2597 (declaring that "no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles"); see also Gerard V. Bradley, The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself, 37 Case W. Rsrv. L. Rev. 674, 681–87 (1987) (documenting religious tests for office-holding in early America).

[377] See, e.g., Driver, supra note 36, at 240–41 (suggesting that history cannot support the *School Prayer Cases* because "[t]he nation's earliest public schools were rife with compelled student prayers").

[378] Town of Greece v. Galloway, 572 U.S. 565, 577 (2014) (citation omitted).

local citizens to found universities.[379] And in many cases, these early universities included mandatory attendance at chapel or daily prayer as part of the curriculum. In 1795, for instance, trustees governing the newly formed University of North Carolina required students to attend morning and evening prayers as well as chapel on Sunday, punishing nonattendance through reports to parents.[380] Beginning around the same time, leaders at the University of Georgia instituted a similar policy.[381]

Requiring university students to attend daily prayer appears to have garnered little public controversy. But given the context, that is hardly surprising. At the Founding, many believed religion was essential to the proper education of children.[382] And prominent legal sources of the time understood schoolmasters as acting *in loco parentis*, possessing the "portion of the power of the parent committed to [the schoolmaster's] charge."[383] Contemporary observers may have seen requiring attendance at university prayer and chapel services as carrying out that charge, in a setting where parental control was at its ebb. But that unique circumstance is not easily transferable to modern controversies.

Students attending universities in the Founding Era were frequently as young as fourteen and often lived many miles from their parents.[384] What's more, new state universities were often located in rural places, some even lacking churches for students to attend.[385] Those facts cast

[379] See John R. Thelin, A History of American Higher Education 41–49 (2d ed. 2011) (describing the post-Revolution explosion in colleges).

[380] Academic Laws and Regulations of the University of North Carolina, 1795, *in* 3 A Documentary History of Education in the South Before 1860, at 26, 26–30 (Edgar W. Knight ed., 1952) [hereinafter Documentary History of Education] (setting out the 1795 regulations); see Thelin, supra note 379, at 45 (noting the time of the university's founding). In 1802, the university's trustees adjusted the rules to punish nonattendance at prayer "according to the aggravation of his offence." Excerpt from Board of Trustees Minutes, December 3, 1802 [Containing the Rule Prohibiting Students From Buying on Credit], *in* Records of the Board of Trustees of the University of North Carolina (Call No. #40001) 17, 21 (Univ. Archives, Univ. of N.C. at Chapel Hill).

[381] E. Merton Coulter, College Life in the Old South: As Seen at the University of Georgia 61–62 (3d ed., Univ. of Ga. Press 1973) (1928) (describing these rules); see Laws of the College of Georgia, ch. 3 (1803), *in* Transcript of Minutes of the Senatus Academicus, Part 1, 1799–1842, at 34, 38–39 (Univ. of Ga. Librs. 1976).

[382] See, e.g., Nathan S. Chapman, Forgotten Federal-Missionary Partnerships: New Light on the Establishment Clause, 96 Notre Dame L. Rev. 677, 729–30 (2020) (documenting the view that "[r]eligious morality, through education" was essential to sustaining a republic).

[383] 1 Blackstone, supra note 127, at *441.

[384] Thelin, supra note 379, at 18.

[385] In Chapel Hill, for instance, trustees had mandated chapel attendance at the university when "the Chapel services were all, or nearly all, that were accessible" in terms of worship. 1

doubt on the idea that the example of early state universities can justify school prayer today. Unlike modern government-backed school prayer, prayer policies at early state universities are probably best seen as religious accommodations—they allowed students far from home to practice religion where otherwise doing so would have been difficult or impossible, and in a situation where parents lacked any reasonable means of requiring religious instruction themselves.[386] But that rationale has far less force where a school day lasts a matter of hours and parents maintain overarching day-to-day control over their children.

There is also an additional consideration here. Today, we view state universities as governmental actors possessing coercive state power.[387] But in the Founding period, early state universities were "more nearly private than public."[388] Very often, these universities received only occasional funds from the state.[389] And the charters of these universities frequently "treated them as if they were private incorporations," with management "delegated to a corporate group."[390] In North Carolina, for instance, rules about daily prayer were promulgated by self-perpetuating private trustees who managed many aspects of university life.[391] Quite possibly, requiring chapel attendance did not arouse concerns about government-coerced worship in part because, early on, these universities looked more like private or semi-private institutions. And if so, that too provides a reason to treat analogies to modern school-prayer policies with caution.

For at least these reasons, the practice of prayer in early state universities is a tenuous basis for justifying government-mandated school

Kemp P. Battle, History of the University of North Carolina: From Its Beginning to the Death of President Swain, 1789–1868, at 713–14 (1907).

[386] Cf. Lupu & Tuttle, supra note 8, at 254 (noting that the military chaplaincy "facilitates religious observance" in a context where service members are "isolated from ordinary opportunities to worship").

[387] See, e.g., NCAA v. Tarkanian, 488 U.S. 179, 192 (1988) ("A state university without question is a state actor.").

[388] John S. Brubacher & Willis Rudy, Higher Education in Transition: A History of American Colleges and Universities, 1636–1968, at 145 (2d ed. 1968); see also George Thomas, The Founders and the Idea of a National University: Constituting the American Mind 106–07 (2015) (exploring the complexity of the public/private distinction and its application to universities in early America).

[389] Brubacher & Rudy, supra note 388, at 146.

[390] Id. at 145–46; see also Coulter, supra note 381, at 35 (explaining that trustees at the University of Georgia were "a self-perpetuating closed corporation").

[391] 3 Documentary History of Education, supra note 380, at 26–30; Battle, supra note 385, at 6.

prayer today. And indeed, although the matter is not beyond dispute, the facts suggest a similar conclusion with respect to public elementary and secondary education. In early America, many schools providing basic education included prayer or devotional Bible reading in the curriculum.[392] But here too, the differences between our world and the Founding Era are significant.

As we know them today, many primary and secondary public schools exhibit at least three features. They are (1) government-run institutions; (2) holding a monopoly or near monopoly on state funding; and (3) backed by compulsory attendance laws and in-school coercion administered by government officials.[393] But at the Founding and for decades after, few if any schools fit that description. Overwhelmingly, primary and secondary schools were makeshift philanthropies, organized by parents or churches in response to local needs.[394] Moreover, "no schooling was entirely free, tax-supported, or compulsory."[395] In many rural areas, citizens desiring a school would pay for the erection of a building in their neighborhood, select trustees for the school, and then seek to support it through private tuition and sometimes limited public funds.[396] In cities, children attended fee-paying schools organized by private groups or church-run schools.[397] And in places like Massachusetts, local religious establishments supervised township schools.[398] In short, public schools as we conceive them today simply did not exist. And

[392] Warren A. Nord, Religion & American Education: Rethinking a National Dilemma 64–65 (1995).

[393] See Robert N. Gross, Public vs. Private: The Early History of School Choice in America 20–23 (2018) (noting monopolistic aspects of the development of modern public schools); see id. at 62–82 (discussing the development of compulsory attendance laws in early modern public schools).

[394] See, e.g., Carl F. Kaestle, Pillars of the Republic: Common Schools and American Society, 1780–1860, at 3–4 (1983) (noting that elementary education "was accomplished through parental initiative and informal, local control of institutions").

[395] Steven K. Green, The Second Disestablishment: Church and State in Nineteenth-Century America 254 (2010).

[396] Kaestle, supra note 394, at 26–27; John Webb Pratt, Religion, Politics, and Diversity: The Church-State Theme in New York History 160 (1967) (describing New York's early schools).

[397] Kaestle, supra note 394, at 51–52 (describing urban fee-paying schools); J.P. Wickersham, A History of Education in Pennsylvania 178 (Lawrence A. Cremin ed., 1969) (describing the development of neighborhood "pay" or "subscription" schools alongside church-run schools).

[398] Sherman M. Smith, The Relation of the State to Religious Education in Massachusetts 82–83 (1926). As of 1789, the minister associated with the local establishment inspected the school and approved the teacher. Id. at 83.

accordingly, the question whether prayer and devotional Bible reading could be required in such schools was just not clearly presented.

To be sure, things did not stay that way. As the nineteenth century unfolded, supporters of the common-school movement sought to replace the local patchwork of neighborhood and denominational schools with a system of centralized, government-run schools.[399] And following the influence of reformers like Horace Mann, many of these schools required so-called "nonsectarian" religious exercises, like recitations of the Lord's Prayer or devotional readings from the King James Bible.[400] Supporters of this approach believed that requiring these practices allowed the Bible to "speak for itself" and enabled children to "kneel at a common altar," unencumbered by warring doctrines or interpretations.[401]

The distinction between "sectarian" and "nonsectarian" religious exercises satisfied many Protestants determined to require religious observance in public schools.[402] But the distinction presented obvious problems. Most basically, it rested on a flawed premise. Requiring children to read the New Testament and say Christian prayers was not "nonsectarian"; it was Christian worship, and thus unacceptable to Jews and other religious minorities.[403] The distinction between "sectarian" and "nonsectarian" exercises also ignored the nation's growing Roman Catholic population. Catholics objected to using the Protestant King James Bible rather than its Catholic counterpart, the Douay Bible, and to other aspects of the Protestant-centric curriculum.[404] Moreover, because Catholic religious texts like the Douay Bible included commentary from church leaders, barring "sectarian" sources often meant barring Catholic

[399] See Kyle Duncan, Secularism's Laws: State Blaine Amendments and Religious Persecution, 72 Fordham L. Rev. 493, 502–04 (2003) (describing the common-school movement).

[400] See John C. Jeffries, Jr. & James E. Ryan, A Political History of the Establishment Clause, 100 Mich. L. Rev. 279, 300–01 (2001); Duncan, supra note 399, at 503. For more on Mann's influence on this debate and the common-school movement, see Feldman, supra note 15, at 72–84.

[401] Twelfth Annual Report of the Board of Education 131 (Bos., Dutton & Wentworth 1849); see also Feldman, supra note 15, at 72 (noting Mann's authorship of this part of the report).

[402] Jeffries & Ryan, supra note 400, at 299.

[403] See, e.g., Dierenfield, supra note 9, at 29 (recounting these objections); Naomi W. Cohen, Jews in Christian America 79–80 (1992) (similar).

[404] See Jeffries & Ryan, supra note 400, at 300; see also Duncan, supra note 399, 505–06 (providing a sophisticated discussion of these objections).

religious materials from schools.[405] Accordingly, these religious minorities fiercely objected to forced worship in public schools from the beginning.

The first stage of the controversy involved disputes over funding. At the Founding and for several decades after, governments across the United States provided funding for church- and synagogue-run schools, seemingly without controversy.[406] But over time, many jurisdictions began to increase funding for government schools requiring basic Protestant religious instruction and decrease or ban funding for private denominational schools, which—here too—opponents labeled "sectarian."[407] The impact on poor religious minorities was profound. "Is it not . . . hard and unjust," wrote one Catholic petition, that "the poorest man amongst us . . . cannot have the benefit of education for his child without sacrificing the rights of his religion and conscience?"[408] Jews and other religious minorities lodged similar objections.[409]

These protests fell on deaf ears. Rather than acknowledging that providing funding only for government-run, essentially Protestant schools had coercive effects on religious minorities, supporters insisted taxpayer-supported education was a gratuitous benefit. "Protestants founded these schools, and they have always been in a majority," reasoned one observer. "Were the Roman Catholics forced to send their children to these schools, their complaints would be well grounded; but there is no compulsion; they . . . should not therefore complain."[410] If Catholics and other religious minorities did not like the religious exercises in new public schools, they could simply go elsewhere. But for many families—then as now—financial limitations barred that option.

Once exclusive funding made it impossible for most families to escape public schools, religious minorities openly resisted religious exercises in the classrooms. Here too, however, their protests often met stark and

[405] See, e.g., Vincent P. Lannie & Bernard C. Diethorn, For the Honor and Glory of God: The Philadelphia Bible Riots of 1840, 8 Hist. Educ. Q. 44, 58 (1968).

[406] See Storslee, supra note 282, at 150–69.

[407] See Hamburger, supra note 291, at 219–29 (documenting the change in New York); Steven K. Green, The Bible, the School, and the Constitution: The Clash that Shaped Modern Church-State Doctrine 20 (2012) (documenting similar changes elsewhere).

[408] Address of the Roman Catholics to Their Fellow-Citizens of the City and State of New York (1840), *reprinted in* William Oland Bourne, History of the Public School Society of the City of New York 331, 336 (N.Y.C., Wm. Wood & Co. 1870).

[409] Board of Assistant Aldermen, Document No. 80 (1840), *reprinted in* Bourne, supra note 408, at 722, 722.

[410] Lannie & Diethorn, supra note 405, at 59.

sometimes brutal opposition. In a famous case in Boston, for instance, a judge upheld a public-school headmaster's decision to beat a Catholic child with a cane for refusing to recite the Protestant version of the Ten Commandments, even though the child was simply obeying his father's instructions.[411] In another case, a court upheld a Catholic child's expulsion from a public school in Maine, insisting that—contrary to the family's position—reading the Protestant Bible was a nonsectarian exercise to which no one could reasonably object.[412] In Philadelphia, anti-Catholic riots in 1844 killed as many as 45 people, ostensibly in part over "whether Catholic children could be released from the classroom during Bible reading."[413] The conflict was so acute that some religious minorities eventually argued that, "[h]owever unnatural it may be," religion must be separated from public education "in order to guard inviolate the rights of conscience."[414]

As the foregoing discussion illustrates, requiring religious exercises in public schools garnered resistance from the beginning. But even more, the history recounted above provides significant reason to doubt that requiring so-called "nonsectarian" religious observance is a practice flowing from—or even compatible with—earlier Founding-era understanding. Whereas many in the Founding generation insisted that government had no power to command a religious observance irrespective of its content or significance, later nineteenth-century advocates of public-school prayer endorsed a much different view: government could surely require acts of worship, provided those acts were nonsectarian.[415]

The practice of requiring religious exercises in schools appears never to have achieved anything like ubiquitous acceptance, even during its heyday. As early as 1840, citizens at a mass meeting in St. Louis decided against including religious exercises in the city's inaugural public

[411] Commonwealth v. Cooke, 7 Am. L. Reg. 417, 417–19, 426 (Mass. Police Ct. 1859).

[412] Donahoe v. Richards, 38 Me. 379, 406 (1854); Green, supra note 407, at 36–39 (describing the background of the case and its reasoning).

[413] Jeffries & Ryan, supra note 400, at 300; Lannie & Diethorn, supra note 405, at 65–88, 103 n.93.

[414] Sentinel, "Common Schools," Cath. Herald (Phila.), Apr. 12, 1838, at 117. Historians speculate that Sentinel may have been Francis Kenrick, the Roman Catholic bishop of Philadelphia. See Lannie & Diethorn, supra note 405, at 49.

[415] Twelfth Annual Report of the Board of Education, supra note 401, at 131 (recognizing that under Massachusetts's public-school system, "the children of all the different denominations are brought together" through state coercion for "services of religion," but defending the practice so long as "the Bible is allowed to speak for itself").

schools.[416] In 1869, the Cincinnati Board of Education famously passed a resolution prohibiting Bible reading in that city's public schools.[417] By 1896, a survey conducted by the federal Commissioner of Education found that only 14 cities in the western United States reported Bible reading in public schools, and only 11 reported prayer out of 49 responding.[418]

The Supreme Court has sometimes looked to "unambiguous and unbroken" historical practice dating from the Founding to validate activities like legislative prayer.[419] But as to government-mandated public-school prayer, that argument is much more difficult to sustain. At the Founding, the idea that religion was essential to education existed harmoniously with the belief that government lacked power to command worship, because education was almost universally a private affair. But as government-run schools emerged, conflict between those principles became acute. Supporters of public schools tried to avoid the problem by arguing that only "nonsectarian" religious exercises could be required.[420] But that position was flawed from the outset. Government-mandated public-school prayer of the kind we know today originated later in the nineteenth century, and in a context in which claimed Protestant hegemony papered over the system's serious shortcomings. And at the very least, that makes an argument justifying the policy based on historical practice highly contestable.

IV. IMPLICATIONS

Members of the Founding generation rejected laws that assumed an authority on the part of government to command religious worship.[421] At the same time, however, they viewed certain governmental practices like

[416] R. Laurence Moore, Bible Reading and Nonsectarian Schooling: The Failure of Religious Instruction in Nineteenth-Century Public Education, 86 J. Am. Hist. 1581, 1585 (2000). Estimates of how many schools actually *engaged* in prayer or Bible reading differ from estimates of districts that permitted it. See David Tyack, Thomas James & Aaron Benavot, Law and the Shaping of Public Education, 1785–1954, at 164 (1987) (noting that as of the late nineteenth century, surveys indicated that roughly three-quarters of American school districts "permitted" school-sponsored Bible reading).

[417] See Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 272–73 (1963) (Brennan, J., concurring).

[418] Moore, supra note 416, at 1586.

[419] Town of Greece v. Galloway, 572 U.S. 565, 576 (2014) (quoting Marsh v. Chambers, 463 U.S. 783, 792 (1983)).

[420] See supra note 402 and accompanying text.

[421] See supra Section II.B.

thanksgiving proclamations differently, at least in part because these invitations to worship were "recommendatory" only.[422]

This Part outlines some implications of this evidence for modern controversies. It suggests first that, whatever else this evidence indicates, a proper understanding of Founding-era arguments has the potential to place the *School Prayer Cases* on firmer footing, and for reasons the Court has so far mostly ignored. Having explored that point, this Part goes on briefly to explore potential implications for other controversies involving government-sponsored religious observance, both inside and outside of public schools.

A. The School Prayer Cases

Recall that in *Engel v. Vitale* and *School District of Abington Township v. Schempp*, the Supreme Court held the Establishment Clause forbids school-sponsored prayer and devotional Bible reading in public schools, regardless of whether the government provides opt-outs for dissenters.[423] The Court has struggled to articulate a convincing rationale for that holding—especially one that comports with Founding-era "historical practices and understandings."[424] But the discussion above may offer a different way forward.

At the Founding, citizens rejected laws requiring attendance at state-sponsored worship. Moreover, as we have seen, they did so even when those laws offered exemptions—either providing dissenters the right to attend their own churches, or in cases like Massachusetts and Virginia, the right to avoid worshipping altogether.[425] From this perspective, the presence or absence of exemptions was not dispositive. What mattered was the government's claimed power to command acts of worship. Moreover, whatever the limits to that principle, it clearly applied to governmental actions that took the form of directives and threatened punishments, regardless of how permissively those systems functioned in practice.

In *Engel* and *Schempp*, the Court focused mainly on the bare fact of government religious expression or the indirect coercion experienced by

[422] See supra Section III.A.

[423] See supra note 7 and accompanying text.

[424] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

[425] See supra Subsections II.B.2, II.B.3.

students.[426] In doing so, however, it gave short shrift to the considerations that many in the Founding generation considered most relevant—namely, the nature of the government action at work and its implications about a claimed power to require worship. In both *Engel* and *Schempp*, the relevant jurisdictions had compulsory attendance laws and a public-school financial monopoly that made attendance at public schools mandatory for nearly all families.[427] And in both cases, the government had mandated as a matter of policy that, once in public school, each child attend prayer or devotional Bible reading under threat of punishment.

In *Schempp*, Pennsylvania law required that "[a]t least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day."[428] Recitation of the Lord's Prayer and the Pledge of Allegiance followed.[429] The Supreme Court stated in passing that "[p]articipation . . . is voluntary,"[430] apparently because the law provided that objecting students could opt out by submitting a "written request" from a parent or guardian to school officials.[431] But there was no question that, as a rule, students were expected to attend prayer and devotional Bible reading as part of the official school day under pain of punishment.[432] Moreover, because these exercises took place "under the authority of the local school authorities and during school sessions," school policy obliged teachers to enforce attendance where no official exemption had been granted.[433]

[426] See supra Sections I.A, I.B. (describing these rationales).

[427] See Engel v. Vitale, 191 N.Y.S.2d 453, 465 (N.Y. Sup. Ct. 1959) (noting that under New York law, "[a]ttendance of minors from seven to sixteen years of age upon full time day instruction is compulsory"); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 210–11 (1963) (referencing a similar Pennsylvania law); see also id. at 241 (Brennan, J., concurring) (noting that "[t]he public schools are supported entirely, in most communities, by public funds—funds exacted not only from parents, nor alone from those who hold particular religious views, nor indeed from those who subscribe to any creed at all").

[428] *Schempp*, 374 U.S. at 205 (quoting 24 Pa. Stat. and Cons. Stat. Ann. § 15-1516 (West 1961)).

[429] Id. at 207–08.

[430] Id. at 207.

[431] Id. at 205.

[432] See Schempp v. Sch. Dist. of Abington Twp., 201 F. Supp. 815, 820 (E.D. Pa. 1962) (finding as a matter of fact that "[t]he attendance of each student at the ceremony of the Bible reading is compulsory unless the student produces a written excuse from his or her parent or guardian").

[433] Id. at 819; see also id. at 817 (observing that a teacher who failed to obey the statute's requirement with respect to daily Bible reading "may have his contract of employment terminated"). The consolidated case of *Murray v. Curlett* contained similar allegations. 179

The same was true in *Engel*. The Regents Prayer had been composed by the New York Board of Regents and adopted by the Board of Education of Union Free School District No. 9 in New York, located in Long Island.[434] The Board's adopting resolution commanded that the Regents Prayer "be said daily in our schools," and directed the District Principal "that this be instituted as a daily procedure to follow the Salute to the flag."[435] Here, as in *Schempp*, school officials eventually added a policy allowing children to be excused by written request of a parent.[436] Nonetheless, here too, government policy established that "[d]uring the saying of the prayer, no student is permitted to leave the classroom" without a valid excuse, and that doing so would have been a basis for punishment.[437]

Arguably, nothing more than the facts recited above was needed to decide the *School Prayer Cases*—at least if Founding-era "historical practices and understandings" are the guide.[438] Like Founding-era church-attendance laws, the policies at issue in *Engel* and *Schempp* commanded attendance at state-sponsored worship—here, prayer and devotional Bible reading—through a combination of general attendance laws and in-school policies. Moreover, as with historic church-attendance laws, they clearly did so under pain of penalty, notwithstanding the possibility of exemptions. And as a result, the policies in *Engel* and *Schempp*

A.2d 698, 699–700 (Md. 1962). For more on the background of the *Schempp* litigation, see generally Douglas Laycock, Edward Schempp and His Family, 38 J. Sup. Ct. Hist. 63 (2013).

[434] Engel v. Vitale, 370 U.S. 421, 422–23 (1962).

[435] Certified Extract from Minutes of Board of Education, Union Free School District No. Nine (July 8, 1958), *reprinted in* Transcript of Record at 40, Engel v. Vitale, 370 U.S. 421 (1962) (No. 468).

[436] See *Engel*, 370 U.S. at 438 (Douglas, J., concurring) (referencing the exemption). After being sued, the Board claimed it had always been its policy that "no child was to be required or encouraged to join in the prayer against his or her wishes." Engel v. Vitale, 191 N.Y.S.2d 453, 468 (N.Y. Sup. Ct. 1959). But this policy was "not specifically incorporated in the Board's resolution, or otherwise publicized." Id. It was not until the case was litigated that the Board added an explicit exemption policy to its resolution. For more on the litigation in *Engel*, see Thomas C. Berg, The Story of the School Prayer Decisions: Civil Religion Under Assault, *in* First Amendment Stories 193, 201–12 (Richard W. Garnett & Andrew Koppelman eds., 2012) (surveying the history of *Engel* from its litigation in New York trial court to the U.S. Supreme Court).

[437] Petition, Read in Support of Petitioners' Motion, Supreme Court of the State of New York ¶ 10, *reprinted in* Transcript of Record at 11, 14, Engel v. Vitale, 370 U.S. 421 (1962) (No. 468); see also *Engel*, 191 N.Y.S.2d at 468 n.39 (noting this allegation in petitioner's complaint and its consistency with the affidavit of the president of the Board of Regents).

[438] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

necessarily implied a power on the part of government to command performance of religious duties. From this vantage point, the *School Prayer Cases* were not primarily about government speech or student peer pressure. Instead, they were a straightforward application of Founding-era views about government's lack of power to mandate acts of worship.

Admittedly, one might contest these conclusions. After all, the idea that the *School Prayer Cases* are a proper application of Founding-era views regarding government's inability to mandate worship is an exercise of constitutional construction—an effort to apply historic convictions to new circumstances not existing at the time.[439] Yet given the nature of Founding-era arguments against coerced worship, there is a plausible argument that the *School Prayer Cases* reflect a faithful application of that understanding, albeit transplanted into a new context. Moreover, the most obvious counterarguments are all highly debatable.

Consider first the argument from historical practice. It is true that prayer and devotional Bible reading were common in at least some mid-nineteenth-century schools. But as we have seen, requiring prayer and Bible reading in government schools was not part of an unambiguous practice "accepted by the Framers," in the way a practice like legislative prayer arguably was.[440] On the contrary, public schools as we know them today simply did not exist at the Founding.[441] Moreover, even acknowledging that by the mid-nineteenth century many public schools required religious exercises, that practice was widely contested from the outset, and depended on a distinction between "sectarian" and "nonsectarian" activities with little foothold in Founding-era understanding.[442] In this context, pointing to late-breaking historical practice is probably not a convincing reason to ignore the principled Founding-era view that government lacks power to command a religious observance.

Next, consider the nature of the religious observance. At the Founding, debates over mandatory religious worship revolved around activities like tithing and mandatory church attendance. And understandably, one might wonder whether comparatively trivial activities like requiring students to

[439] See Randy E. Barnett & Evan D. Bernick, The Letter and the Spirit: A Unified Theory of Originalism, 107 Geo. L.J. 1, 10–13 (2018) (discussing the distinction between "interpretation" and "construction").

[440] *Town of Greece*, 572 U.S. at 576–77.

[441] See supra notes 377–98 and accompanying text.

[442] See supra notes 400–18 and accompanying text.

say a brief prayer or recite a Bible passage should be treated the same way. Recall, however, that for members of the Founding generation, the idea that a particular religious practice might be trivial or de minimis was not a good reason to allow the government power to require it. "Who does not see," Madison observed, "[t]hat the same authority which can force a citizen to contribute three pence only . . . may force him to conform to any other establishment in all cases whatsoever?"[443]

For Founding-era supporters of religious liberty, providing government authority to mandate even a trivial religious duty was a precedent for tyranny. That principle isn't threatened by allowing students to engage in voluntary religious exercise, say by permitting moments of silence in classrooms or opening school meeting rooms to religious groups alongside others.[444] But allowing government officials to decide which acts of worship are "minor" or "trivial" enough to be required is a different matter entirely—it places decisions about when and how to worship in the hands of government, rather than with private persons. And it was that claimed power that Founding-era supporters of religious liberty firmly rejected.

Finally, one might defend the school-prayer policies in *Engel* and *Schempp* by noting they contained opt-outs for dissenters. But as the history above suggests, that is not a convincing rejoinder either. In questioning the validity of the *School Prayer Cases*, Justice Scalia implied that such exemptions were not present in historic church-

[443] See Madison, Memorial and Remonstrance, supra note 287, at 186; see also supra note 295 and accompanying text (discussing a similar argument by Isaac Backus). Professor McLoughlin has suggested in passing that Isaac Backus would not have "approved" of the *School Prayer Cases*, apparently because Backus issued "no recorded statement" on whether religious training in New England township schools was proper or not. William G. McLoughlin, Isaac Backus and the Separation of Church and State in America, 73 Am. Hist. Rev. 1392, 1400, 1411 & n.49 (1968). But Professor McLoughlin's comment fails to acknowledge the vast difference between public schools today and schools at the Founding, and it may exaggerate Backus's sympathy for cultural Puritanism in any event. See supra notes 394–98 and accompanying text; Stanley Grenz, Issac Backus—Puritan and Baptist 5 n.9 (1983); Nicholas P. Miller, The Religious Roots of the First Amendment: Dissenting Protestants and the Separation of Church and State 108 & n.58 (2012).

[444] See generally Douglas Laycock, Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers, 81 Nw. U. L. Rev. 1 (1986) (providing one classic exposition of these issues). For a thoughtful analysis of moment-of-silence laws and criticism of the Court's precedent in this area, see Michael W. McConnell, Accommodation of Religion, 1985 Sup. Ct. Rev. 1, 42–50 (1986); cf. Wallace v. Jaffree, 472 U.S. 38, 40, 60–61 (1985) (striking down a moment-of-silence law on case-specific grounds).

attendance laws.[445] But with due respect to Justice Scalia, that understanding was incomplete. It is true that in the seventeenth century, laws commanding church attendance often required universal participation.[446] But by the time of the Founding, those laws contained opt-outs for dissenters, including some that allowed objectors to avoid worshipping altogether. Yet as we have seen, Founding-era supporters of religious liberty roundly rejected those laws too.[447]

Here, it is important not to overstate the point. The Founding generation never confronted the precise problem of government-mandated school prayer presented by cases like *Engel* and *Schempp*. As a result, conclusions here proceed by way of analogy—inquiring whether Founding-era convictions, understood at a modest level of generality, reasonably apply to new circumstances like modern, mandatory school prayer. And inevitably, that interpretive exercise involves an act of judgment that history can inform but not ultimately dictate. Yet even conceding as much, there is a plausible argument that the *School Prayer Cases* flow naturally from well-trodden Founding-era convictions. And indeed, proceeding along those lines goes some way toward solving larger puzzles surrounding the cases too.

Consider first the riddle surrounding the Pledge of Allegiance. As we've already observed, one puzzle surrounding Justice Kennedy's indirect coercion rationale is its inability to explain the Court's differential treatment of the Pledge of Allegiance and similar practices. If mere exemptions are insufficient to dispel "peer pressure" such that all government-led school prayer must be prohibited, why wouldn't the same be true with respect to many other school activities, including the Pledge of Allegiance?[448] The Founding-era focus on government power provides a different answer.

On a Founding-era understanding, the problem with government-led school prayer is not primarily about peer pressure. Instead, the problem is that government possesses no power to mandate an act of worship in the first place. Yet that same objection does not arise as to matters like the Pledge, at least as it existed under *Barnette* without the current reference

[445] Lee v. Weisman, 505 U.S. 577, 640–42 (1992) (Scalia, J., dissenting) ("[A]ll persons were required to attend church and observe the Sabbath.").

[446] See supra Section II.A.

[447] See supra Section II.B.

[448] See supra notes 100–04 and accompanying text (canvassing this problem).

to "under God."[449] Under the Free Speech Clause, government is usually permitted to speak the messages it wishes and sometimes require others to do so, provided it leaves space for each individual's "freedom of mind."[450] But the same is not true with respect to prayer or other devotional activities. On the logic of the Founding-era view, government exceeds its authority from the moment it assumes power to command an act of worship through a coercion-backed rule, and only secondarily when it eventually applies that rule to coerce an unwilling dissenter.[451] And that is why exemptions in the context of government-mandated school prayer simply won't do. When it comes to required acts of worship, the constitutional harm is a claimed governmental authority to enforce religious duties. As a result, remedying the problem usually requires setting aside the rule, not merely exempting specific individuals.

This point leads directly to a second, more general one. In *Engel* and again in *Schempp*, the Court famously suggested that—even if government-led school prayer may involve indirect coercion—"[t]he Establishment Clause . . . does not depend upon any showing of direct governmental compulsion."[452] In uttering that statement, the Court seemed to assume that the bare existence of government religious speech was sufficient to violate the Clause. On the other hand, Justice Scalia and Justice Thomas have gone the other direction, seemingly suggesting that a dissenter must prove she has suffered individualized coercion—a showing arguably impossible to meet where a policy requiring prayer contains exemptions.[453]

The Founding-era approach offers a third way forward. From this perspective, *Engel*'s statement about coercion not being a necessary

[449] In 1954, Congress added the phrase "under God" to the Pledge. Joint Resolution of June 14, 1954, Pub. L. No. 83-396, 68 Stat. 249. For an insightful discussion of the current Pledge's resemblance to a compelled religious observance, see Douglas Laycock, Comment, Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty, 118 Harv. L. Rev. 155, 227–31 (2004).

[450] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 636–37 (1943). Additionally, parents possess independent free-exercise rights to withdraw their children from school activities at odds with their faith, arising out of the "long recognized . . . rights of parents to direct 'the religious upbringing' of their children." Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020) (quoting Wisconsin v. Yoder, 406 U.S. 205, 213–14 (1972)).

[451] As a result, for Article III-standing purposes, a claimant probably needs to show that she is subject to prosecution under a school-prayer policy absent an exemption, or alternatively that applying for an exemption counts as a concrete and imminent harm.

[452] Engel v. Vitale, 370 U.S. 421, 430 (1962); see Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223 (1963).

[453] See supra notes 25–29 and accompanying text.

element of the Establishment Clause was questionable, at least insofar as it implied that *all* government religious speech violates the Constitution. At the same time, *Engel* was arguably correct in saying that, at least under the Founding-era understanding, no "showing of *direct* governmental compulsion" is necessary.[454] Contrary to Justice Scalia's suggestion in *Lee v. Weisman*, for many in the Founding generation, the propriety or impropriety of laws mandating acts of worship did not turn on whether such laws succeeded in coercing an unwilling dissenter. Instead, what mattered was whether the law in fact commanded a religious observance on pain of penalty, whatever exemptions it also provided. Again, the focus is on the governmental power being asserted, not its ultimate effect on any discrete individual. Thus, while not fully resolving the role of coercion in Establishment Clause jurisprudence, a focus on Founding-era history may provide another way to understand it—one that centers our attention on the limits of government power rather than the experience of any individual dissenter.

B. Related Issues and Unresolved Questions

Here, however, there is more to be said. If the *School Prayer Cases* are defensible on a Founding-era understanding, what might that understanding say about other, related issues?

One obvious question involves governmental efforts to command prayer by conditioning valuable benefits on attendance at formal worship, rather than threatening more traditional penalties. In the period leading up to the Founding, compulsory church-attendance laws typically imposed fines and similar punishments for non-compliance.[455] But what if government instead conditioned monetary benefits or other important privileges on a citizen's willingness to attend church, albeit a church of their choice?

Although the Supreme Court has never spoken clearly to the issue, it seems sensible to conclude that conditioning important entitlements on a recipient's willingness to worship violates the Establishment Clause.[456] As Justice Scalia correctly observed with respect to the Free Exercise Clause, "[w]hen the State makes a public benefit generally available, that

[454] *Engel*, 370 U.S. at 430 (emphasis added).

[455] See supra notes 128–35, 141–47 and accompanying text.

[456] The most relevant modern case is probably *Torcaso v. Watkins*, 367 U.S. 488, 495–96 (1961) (striking down Maryland's religious test for public office).

benefit becomes part of the baseline against which burdens on religion are measured."[457] In the modern welfare state, denials of benefits can often burden religious exercise just as significantly as traditional coercive penalties. There is little reason to think limitations on coerced religious observance ought to function any differently.

But there is also a harder version of this question. In *Lee v. Weisman*, the Court held that the Establishment Clause forbade offering prayers at a graduation ceremony, even where attendance was non-mandatory.[458] As we have seen, Justice Kennedy resolved the case by pointing to "indirect coercion."[459] But in passing, Justice Kennedy also observed that "in our culture high school graduation is one of life's most significant occasions," and the school's policy forced a student to choose between attendance at prayer or "forfeiture of those intangible benefits."[460] From this perspective, the problem in *Lee* was not "peer pressure." Instead, the problem was that the school's policy created an unconstitutional condition: attend a state-sponsored worship service or forfeit the valuable benefit of attending your graduation.[461]

Taking a historical approach, it seems doubtful that a claimed right to attend an event—standing alone—can be the basis for invalidating public prayer. At the Founding and continuing thereafter, prayers accompanied sessions of Congress, presidential inaugurations, and similar events which citizens both then and now claim a right to attend.[462] Condemning all those practices under an unconstitutional-conditions rationale is untenable, especially when they generally cohere with the Founding-era distinction between recommendations and injunctions to worship. To argue otherwise would be to transform the unconstitutional-conditions doctrine into a heckler's veto over basically all forms of public prayer.

Still, this may not be the end of the matter. Although it is implausible to extend the unconstitutional-conditions doctrine to all or even most public events, it is also true that historical religious establishments sometimes conditioned personal honors on attendance at state-sponsored worship in ways that were fiercely contested. In England, for instance, the

[457] Locke v. Davey, 540 U.S. 712, 726 (2004) (Scalia, J., dissenting).
[458] Lee v. Weisman, 505 U.S. 577, 588 (1992).
[459] Id. at 592–93.
[460] Id. at 595.
[461] For an illuminating discussion of the case from this vantage point, see Michael Stokes Paulsen, *Lemon* is Dead, 43 Case W. Rsrv. L. Rev. 795, 825–29 (1993).
[462] See supra notes 71–74 and accompanying text.

Test and Corporation Acts limited office-holding to those who professed membership in the established church and received the sacrament of the Lord's Supper there.[463] Likewise, when pro-establishment forces introduced a similar measure in South Carolina, individuals like Daniel Defoe argued that such measures were clearly "Punishments," in part because they conditioned otherwise available "Marks of Honour and high Trusts" on a willingness to worship as the government directed.[464] One might argue the school policy in *Lee* imposed the same kind of choice, albeit as to a different, more modern "Mark[] of Honour."[465] On this view, events like graduation are *sui generis*, insofar as the event itself is a unique personal honor in a way that the vast majority of other events are not.

Here, I take no hard line on which understanding of *Lee* is correct. But regardless, the basic point remains. Whatever the principle's precise contours, there is good reason to think government may not command attendance at worship through the threatened denial of at least some benefits, not just through traditionally coercive means.

Another problem involves questions about how the Founding-era approach might limit actions by individual government actors, rather than by a representative body. In the *School Prayer Cases*, state legislatures or school boards had enacted formal policies requiring attendance at worship, making the governmental assertion of power obvious. But what about actions by individual government officials acting alongside or apart from formally enacted laws? This issue raises what is probably the most difficult set of questions surrounding government-sponsored prayer. Nonetheless, the analysis above may offer some helpful hints.

The first involves instances in which government officials leverage a preexisting coercive rule as a means of requiring prayer. Recall that, for many in the Founding generation, government possessed no power to require attendance at state-sponsored worship, even with opt-outs, because government simply lacked the power to command religious duties in the first instance.[466] That theory arguably forbids official policies requiring public-school students to attend opening exercises that include prayer. But read most sensibly, it also extends to other situations where a

[463] See supra note 372 and accompanying text (describing these laws).
[464] Defoe, supra note 375, at 9.
[465] Id.
[466] See supra notes 196–99, 222–41, 279, 288–92 and accompanying text.

government official employs an otherwise unrelated rule to accomplish the same purpose.

For example, imagine a public school with no requirement that students engage in prayer, but a teacher who nonetheless begins each class with prayer while telling students participation is voluntary. On a superficial level, the teacher's action might be seen as purely hortatory, since no official policy enforcing prayer exists. But as a matter of law, the teacher gained authority to assemble students in the first place only by means of a coercive governmental command that students attend public school and attend his classes, which the teacher then appropriated to require acts of worship.[467] That captive-audience consideration renders the teacher's practice highly suspect, whether or not a formal policy requiring prayer exists.[468]

To be sure, there are complications lurking here. In the example discussed above, the teacher directed students to pray by essentially creating an add-on to existing rules coercing attendance. But what if no such circumstance obtains? If a public-school teacher prays with students at an after-school club meeting on school grounds, for instance, what lines does the Constitution draw?

Here again, the differences between the Founding-era context and ours make conclusions necessarily speculative. But one possible way forward involves the widely accepted distinction at the Founding between *commands* or *injunctions* to worship and mere *recommendations*. As we have seen, actions by presidents and other government officials inviting citizens to worship or join in fasting or prayer were fairly common at the Founding.[469] Moreover, although people like Madison and Jefferson expressed concern over that practice, they acknowledged its popular acceptance and sought to curb its dangers. And in doing so, Madison suggested several considerations that may be of some use today.

[467] On this point, the context in which the teacher's action takes place is probably significant. See, e.g., Vikram David Amar & Alan E. Brownstein, What Should the Supreme Court Do With Town Board Prayers in *Galloway v. Town of Greece*?: A Liberty-Based Analysis That Bolsters the Second Circuit's Equality-Based Ruling, Justia: Verdict (June 7, 2013), https://verdict.justia.com/2013/06/07/what-should-the-supreme-court-do-with-town-board-prayers-in-galloway-v-town-of-greece [https://perma.cc/J6PN-23SG] (suggesting that government-mandated prayer during the public school day is "particularly dangerous because teachers and administrators have so much discretionary power over the students in their charge").

[468] Cf. Zorach v. Clauson, 343 U.S. 306, 311 (1952) (condemning attempts by teachers to "us[e] their office to persuade or force students to take the religious instruction"); see also Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2431 (2022) (reaffirming this rule).

[469] See supra notes 70–73, 325–56 and accompanying text.

First, Madison suggested that when distinguishing commands from recommendations, it is necessary to ask whether the "form & language" of the relevant action dispelled any claimed right on the part of the government official to command religious duties.[470] Here, Madison viewed it as important that, among other things, the relevant action involved appropriate emphasis on "the voluntary compliance of individuals."[471] Likewise, Madison noted that it was relevant whether the action at issue referenced "any particular sanction *enforcing* the worship."[472] As we have seen, however, the mere fact that a government official announces that participants may exempt themselves is insufficient in itself to carry the day as to that point.[473] Instead, the ultimate question seems to be whether a government official has employed his or her official (and often discretionary) authority to issue commands—or in this instance, *threats*—goading citizens to worship.

Because this inquiry is context-specific, drawing conclusions about individual cases is probably not possible here. It is worth noting, however, that the Court employed something like this approach in *Kennedy v. Bremerton School District*—the praying football coach case—albeit without fully explaining why. In that case, the majority suggested that the coach's practice of praying midfield after games was permissible under the Establishment Clause because of several contextual considerations. The Court noted that the prayers at issue took place while "students were engaged in other activities like singing the school fight song,"[474] that the coach "never 'told any student that it was important that they participate,'"[475] and that the prayers occurred during a time when school officials and others were "free to . . . attend to other personal matters."[476] The Court did not fully explain what united these considerations. But at least plausibly, they all speak to the distinction Madison and others drew between attempts to "enjoin religious observances" through government coercion versus actions that might, at most, amount to invitations or

[470] Madison, Detached Memoranda, supra note 355, at 562.
[471] Id.
[472] Letter from James Madison to Edward Livingston, supra note 357, at 543.
[473] See supra notes 191–99, 228–29, 246–51, 282–92 and accompanying text.
[474] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2425 (2022).
[475] Id. at 2429 (quoting Declaration of J. Kennedy in Support of Motion for Preliminary Injunction, Kennedy v. Bremerton Sch. Dist., No. 16-cv-05694, ¶ 22 (W.D. Wash. Aug. 23, 2016), *reprinted in* Joint Appendix at 167, 170, *Kennedy*, 142 S. Ct. 2407 (No. 21-418)).
[476] Id. at 2415.

something even more benign.[477] That approach condemns government actors that seek to leverage their official role to pressure others to pray. But it quite rightly allows public-school teachers and others to pray with students or private citizens generally where attendance is a matter of private choice unadorned by threats, intimidation, or standing obligation.

Undoubtedly, though, there are dangers lurking here too. In cases where an official's governmental and private roles are blurred, it can sometimes be difficult to distinguish official threats from private invitations or independent private action. In *Kennedy*, for instance, the dissenters argued that because the coach had sometimes prayed with players during official post-game meetings in the past, his unofficial midfield prayers were best interpreted as part of an ongoing effort to "exact religious conformity."[478] The majority was unconvinced by that assertion, in part because the coach had abandoned any practice of praying during team meetings, stating that he was content to carry out his prayer "'while the players were walking to the locker room' or 'bus.'"[479] Nonetheless, if the Founding-era evidence adds anything here, it is probably to direct our attention to factors that may count and the ultimate question at play. When considering independent actions by government officials, the question is whether an official has, by policy or practice, created a coercion-backed rule requiring attendance at worship.

CONCLUSION

In *Engel*, Justice Black famously declared that government-sponsored school prayer is unconstitutional because "religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."[480] That statement is true enough. But in fact, his extemporaneous remark on that June morning may have better captured the heart of the issue: "[T]he right of the people to pray in their own way is not to be controlled by the election returns."[481] For the Founding generation, government had no power to command that citizens attend

[477] Madison, Detached Memoranda, supra note 355, at 562.

[478] *Kennedy*, 142 S. Ct. at 2444 (Sotomayor, J., dissenting) (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 (2000)).

[479] Id. at 2429–30 (quoting Transcript Excerpts from Deposition of J. Kennedy (Aug. 9, 2019), *reprinted in* Joint Appendix at 261, 280, 282, *Kennedy*, 142 S. Ct. 2407 (No. 21-418)).

[480] Engel v. Vitale, 370 U.S. 421, 432 (1962) (quoting Madison, Memorial and Remonstrance, supra note 2, at 187).

[481] Lewis, supra note 4, at 16.

worship or fulfill religious duties, regardless of how tolerant the scheme. That principle provides a new vantage point for thinking about the Court's famous *School Prayer Cases*. And by doing so, it might also provide a starting point for developing a jurisprudence in which "historical practices and understandings" are an important guide.[482]

[482] *Kennedy*, 142 S. Ct. at 2428 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).