NEUTRALITY WITHOUT A TAPE MEASURE: ACCOMMODATING RELIGION AFTER *AMERICAN LEGION*

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In *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, Justice Kennedy famously criticized the endorsement test as requiring judges to "us[e] little more than intuition and a tape measure."[1] Because the endorsement test focused on the number of secular symbols, whether they created unique focal points and their proximity to any religious imagery,[2] Justice Kennedy contended that it fostered "a jurisprudence of minutiae,"[3] which was "flawed in its fundamentals and unworkable in practice."[4] His criticisms of the endorsement test highlighted an ongoing disagreement between and among the Justices regarding the meaning of the Establishment Clause, a dispute that traced its origins all the way back to *Everson v. Board of Education* in which the Court invoked Thomas Jefferson's "wall of separation" between church and state.[5] While all of the Justices have agreed that the Establishment Clause requires the government to be neutral with respect to religion, they disagree adamantly about what "neutrality" requires.

For those who advocate for a strict separation between church and state, the "wall must be kept high and impregnable."[6] Atop the wall, the Justices keep watch for "the slightest breach" of neutrality,[7] guarding against, what history had shown to be, the dangerous intersection of the secular and religious realms: "[The Establishment Clause's] first and most immediate purpose

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1. Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 675 (1989) (Kennedy, J., concurring in part and dissenting in part).

2. *Id.* at 598 (majority opinion) ("The *Lynch* display composed a series of figures and objects, each group of which had its own focal point. . . . Here, in contrast, the crèche stands alone: it is the single element of the display on the Grand Staircase.").

3. *Id.* at 674 (Kennedy, J., concurring in part and dissenting in part).

4. *Id.* at 669.

5. Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

6. *Id.*

7. *Id.*

rested on the belief that a union of government and religion tends to destroy government and to degrade religion."[8] To avoid such a union, the government must remain neutral "between religion and religion, and between religion and nonreligion."[9] On this view, religion is largely a private affair left to the conscience of the individual to be followed (or not): "religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."[10] The government, therefore, generally must stay out of religion, avoiding not only an establishment of religion, but also any favoritism that "mak[es] adherence to a religion relevant in any way to a person's standing in the political community."[11] These concerns ultimately gave rise to the *Lemon* and endorsement tests,[12] which policed neutrality through the lens of a reasonable observer who was aware of the history and tradition of the community and, therefore, could assess whether the challenged action had the purpose or effect of promoting or favoring religion.

Another set of Justices concluded that the Religion Clauses had a very different purpose. The Religion Clauses singled out religion for special protection, recognizing and safeguarding an individual's right of conscience.[13] As a result, the government needed to remain neutral between and among religions because each individual owed a duty to his God that transcended his obligation to the secular authority. Madison made this point directly in his *Memorial and Remonstrance Against Religious Assessments*:

> Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if 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.[14]

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8. Engel v. Vitale, 370 U.S. 421, 431 (1962).

9. Epperson v. Arkansas, 393 U.S. 97, 104 (1968); *see also Everson*, 330 U.S. at 18 ("[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers . . . .").

10. *Engel*, 370 U.S. at 432.

11. Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

12. Lemon v. Kurtzman, 403 U.S. 602 (1971); Lynch v. Donnelly, 465 U.S. 668 (1984).

13. *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1151–52 (1990).

14. James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 2 (1785), *reprinted in Everson*, 330 U.S. app. at 64.

For its part, the Establishment Clause precluded the government's establishing a particular religion or coercing individuals to compromise their consciences and adhere to one specific faith.[15] But the Establishment Clause could—and in some circumstances should—accommodate religion to acknowledge, respect, and (perhaps even) promote the duty that different religious adherents owed to their God. For the accommodationists on the Court, our Nation's history of religion in the public sphere not only confirms that the Establishment Clause does not require neutrality between religion and nonreligion, but also supports replacing the reasonable observer with a history and tradition test. Moreover, the government's noncoercive recognition and accommodation of religion have the additional salutary effects of fostering toleration, respect, and civic virtue.

This article argues that in recent years the Roberts Court has moved decidedly towards the accommodationist view of neutrality—providing greater protection for the free exercise of religion and a correspondingly narrower view of the limits that the Establishment Clause imposes on government-religion interactions. The Court's recent decision in *American Legion v. American Humanist Ass'n*[16] confirms this shift, repudiating *Lemon* and the endorsement test in the context of longstanding religious monuments, symbols, and practices. What test the Court will use to ensure neutrality going forward is less clear. Although seven Justices agreed that the *Lemon* and endorsement tests no longer hold sway in this context, the case spawned seven different opinions, including five concurrences setting out different Establishment Clause standards. A careful review of these opinions, though, reveals that a majority of the Court takes the Religion Clauses to require neutrality only between and among religions, not between religion and nonreligion. And the article contends that this is true regardless of how many religious and secular references there are and how close they are to one another (i.e., there is no spatial tape measure) and regardless of how long the government has engaged in the facially religious expression (i.e., there is no temporal tape measure). As Justice Gorsuch puts the point in his *American Legion* concurrence, "what matters when it comes to assessing [facially religious government speech] . . . is not its age but its compliance with ageless principles."[17]

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15. *See* 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*.").

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

17. *Id.* at 2102 (Gorsuch, J., concurring).

The first section of the article considers the development of the Court's diverging views on neutrality, analyzing the jurisprudential underpinnings of both the strict(er) separationist and accommodationist positions. Those favoring the wall of separation model articulated in *Everson* rely on the history of religious establishments in the sixteenth and seventeenth centuries and the growing pluralism to argue that the Establishment Clause requires neutrality between religions as well as between religion and nonreligion. These concerns found expression in *Lemon* and the endorsement test. As the accommodationists on the Court noted repeatedly, though, criticisms of these Establishment Clause tests abounded among the Justices on the Court, the lower courts, and legal scholars. In their place, the accommodationists drew on a different aspect of the country's history—the numerous and ongoing references to the Divine in the public square. This history of events at and subsequent to the founding demonstrated the meaning of the Establishment Clause—the Establishment Clause could not require neutrality between religion and nonreligion because religious references were and remain widespread in the public square.

The second section explores the Court's commitment to neutrality between and among religions, which is evident in the Roberts Court's recent decisions broadening Free Exercise protections (including *Tandon v. Newsom* and the recent statement of four Justices in *Kennedy v. Bremerton School District*[18] indicating a willingness to reconsider *Employment Division v. Smith*) and in *American Legion*'s movement towards an Establishment Clause test rooted in history and tradition. Both of these changes demonstrate that the majority neither views religious exercise as a wholly private endeavor nor takes noncoercive state-religion interactions to corrupt government or religion. Rather, *American Legion* emphasizes that the government may accommodate religious expression in the public square to "further the ideals of respect and tolerance embodied in the First Amendment."[19] Thus, going forward, the Roberts Court is poised to allow for greater noncoercive church-state interactions in the public square and to do so for a reason that frequently is overlooked—to promote morality and civic virtue for the good of the individual religious believer and the Nation as a whole. Contrary to the history of division and strife that frequently marked the strict separationist accounts of the Religion Clauses, the accommodationists on the Court view noncoercive

18. Tandon v. Newsom, No. 20A151, 2021 WL 1328507, at *1 (Apr. 9, 2021) (per curiam); Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634 (2019) (statement respecting the denial of certiorari).

19. *Am. Legion*, 139 S. Ct. at 2090.

religious expression in the public square as consistent with our country's history and tradition.

I. THE MEANING AND SCOPE OF THE ESTABLISHMENT CLAUSE DEPENDS ON WHICH OF THE CONFLICTING VIEWS OF NEUTRALITY THE COURT APPLIES IN A PARTICULAR CASE

In Federalist No. 51, Madison addressed a central concern confronting the Nation in the wake of the weaknesses inherent in the Articles of Confederation and Perpetual Union—how to ensure that the federal government had sufficient power to effectively govern the people without itself succumbing to the pitfalls of unbridled power:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[20]

While Madison relied primarily on structure to cabin governmental overreach—"split[ting] the atom of sovereignty"[21] and subdividing power between and among the three branches[22]—structure alone could not guarantee the government's ability to control the religious dissidents who founded the United States. The enumerated powers in Article I, Section 8 provided the federal government with broad authority to regulate the people,[23] who, as Hamilton explained, were "the only proper objects of government."[24] The British monarchy and other governments had had broad power over their citizens, yet dissenters still generated civil discord and unrest, even civil

20. THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 2003).

21. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

22. THE FEDERALIST NO. 51, *supra* note 20, at 320 ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.").

23. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

24. THE FEDERALIST NO. 15, *supra* note 20, at 105 (Alexander Hamilton).

wars.[25] Accordingly, Madison recognized the need for an additional way to deal with such "factions," which he defined as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[26]

Madison believed that the diffusion of power (between dual sovereigns and among the branches of government), coupled with the broad scope of the Republic,[27] would help regulate the "passions" and "interests" of political and religious groups even in the absence of a bill of rights.[28] Madison's concern was to protect the rights of others as well as the "aggregate interests of the community" (i.e., the public good or general welfare) by allowing persons with different views to express and pursue their beliefs: "[S]ecurity for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects."[29] While Madison viewed these protections as implicit in the constitutional design, the Founders made them express in the First Amendment. The Speech and Religion Clauses served to protect expression (including religious speech) generally[30] and religious belief and practice specifically, creating a rich marketplace for speech as well as a broad arena in which religious sects could "flourish according to the zeal of [their] adherents and the appeal of [their]

25. *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1513–17 (1990); *see also* Everson v. Bd. of Educ., 330 U.S. 1, 8–9 (1947) ("The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy.").

26. THE FEDERALIST NO. 10, *supra* note 20, at 72 (James Madison).

27. *Id.* at 78 ("Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens . . . .").

28. David F. Epstein, *Remarks on The Federalist No. 10*, 16 HARV. J.L. & PUB. POL'Y 43, 47 (1993).

29. THE FEDERALIST NO. 51, *supra* note 20, at 321; *see also* Statement of James Iredell from North Carolina State Convention (July 30, 1788), *in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 62, 67–68 (Neil H. Cogan ed., 1997) (explaining that "there is no cause of fear that any one religion shall be exclusively established" given the diversity of religious beliefs among the citizenry); Zorach v. Clauson, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being. . . . We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.").

30. Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) ("Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.").

dogma."[31] The free exercise of religion enabled religious individuals to believe, worship, and practice according to the dictates of their particular faiths: "Madison's vision—freedom for all religion being guaranteed by free competition between religions—naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs."[32] For Madison, then, the free exercise of religion was to be protected "in every case where it does not trespass on private rights or the public peace,"[33] that is, whenever it is not "adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[34] The freedom to follow one's own religious convictions would, in turn, reduce the "common impulse" to force one's views on others or to mandate a particular religion's (or a particular idea's) place in the market.[35] Thus, free exercise served at least two important purposes. First, it protected the rights of all religious believers from intrusion from others and second, in so doing, promoted the stability of the larger social order (the "aggregate interests of the community") by reducing (and hopefully alleviating) the violence and bloodshed that so concerned the Enlightenment thinkers: "The happy result of the Madisonian solution is to achieve *both* the unrestrained practice of religion in accordance with conscience (the desire of the religious 'sects') *and* the control of religious warfare and oppression (the goal of the Enlightenment)."[36]

Of course, the ability of each religious sect to grow and to flourish required a *free* marketplace, one in which the government did not control entry into (or

31. *Zorach*, 343 U.S. at 313. Thomas Jefferson put the point this way: "[T]hat the opinions of men are not the object of civil government, nor under its jurisdiction; that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy, which at once destroys all religious liberty . . . ; and finally, that truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them." THOMAS JEFFERSON, A Bill for Establishing Religious Freedom (1779), *reprinted in* 2 THE WORKS OF THOMAS JEFFERSON, 438, 440–41 (Paul Leicester Ford ed., 1904).

32. Larson v. Valente, 456 U.S. 228, 245 (1982).

33. Letter from James Madison to Edward Livingston (July 10, 1822), *in* 9 THE WRITINGS OF JAMES MADISON 98, 100 (Gaillard Hunt ed., 1901).

34. THE FEDERALIST NO. 10, *supra* note 20, at 72 (James Madison).

35. *Id.*; *see also* Gibson v. Fla. Legis. Investigation Comm., 372 U.S. 539, 576 (1963) (Douglas, J., concurring) ("By the First Amendment we have staked our security on freedom to promote a multiplicity of ideas, to associate at will with kindred spirits, and to defy governmental intrusion into these precincts.").

36. THE FEDERALIST NO. 10, *supra* note 20, at 72 (James Madison); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1516 (1990).

exit from) the market.[37] As *Larson* put the point, "such equality would be impossible in an atmosphere of official denominational preference,"[38] that is, in a society where the government could (1) establish a specific, preferred religion and/or (2) exclude disfavored religions. Thus, to promote the robust free exercise of religion, the Establishment Clause required, at a minimum, that the government—both federal and state—remained "neutral" between and among religious sects: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[39] As *Zorach* explained, the Court similarly held that "[t]he government must be neutral when it comes to competition between sects."[40]

Not surprisingly, then, there has been widespread agreement among the Justices on the United States Supreme Court that the Free Exercise and Establishment Clauses work together to safeguard religious exercise while alleviating the violence and bloodshed that concerned the Enlightenment thinkers. But that unanimity dissipates quickly when it comes to determining what level of neutrality the Establishment Clause requires of the government in the public sphere. While the "prohibition" against discriminating "between religion and religion . . . is absolute,"[41] Justices have disagreed as to whether non-discrimination among religious sects exhausts the neutrality that the Establishment Clause commands. Given the importance of religion to the country and to those who espouse it, such disagreement is understandable. James Madison recognized that challenges would arise regarding the proper interaction between government and religion: "[In calling for separation,] I must admit moreover that it may not be easy, in every possible case, to trace the line of separation between the rights of religion and the Civil authority

37. Justice O'Connor captured this concern in her concurrence in *McCreary*: "In the marketplace of ideas, the government has vast resources and special status. Government religious expression therefore risks crowding out private observance and distorting the natural interplay between competing beliefs. Allowing government to be a potential mouthpiece for competing religious ideas risks the sort of division that might easily spill over into suppression of rival beliefs. Tying secular and religious authority together poses risks to both." McCreary Cnty. v. ACLU of Kentucky, 545 U.S. 844, 883 (2005) (O'Connor, J., concurring).

38. Larson v. Valente, 456 U.S. 228, 245 (1982).

39. *Id.* at 244.

40. Zorach v. Clauson, 343 U.S. 306, 314 (1952); *see also* Epperson v. Arkansas, 393 U.S. 97, 104, 106 (1968) ("The First Amendment mandates governmental neutrality between religion and religion. . . . [T]he State may not adopt programs or practices . . . which 'aid or oppose' any religion. . . . This prohibition is absolute.") (citation omitted); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) ("The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief.").

41. *Epperson*, 393 U.S. at 104.

with such distinctness as to avoid collisions & doubts on essential points."[42] And the Court's Establishment Clause cases have borne this out. Starting with *Everson* in 1947 and continuing up through *American Legion*, the Court has taken the Establishment Clause to require neutrality between religion and nonreligion (except when it has not) and has employed *Lemon* and the endorsement test to safeguard that protection (except when it applied another test). The result has been "an Establishment Clause jurisprudence in shambles . . . render[ing] the constitutionality of [facially religious government speech] anyone's guess."[43]

A. Everson *and its Progeny Interpreted the Establishment Clause to Require Neutrality Between Religion and Nonreligion, Thereby Broadening its Scope*

In adopting a presumption of constitutionality for longstanding religious monuments, symbols, and practices, the majority in *American Legion* rejected *Lemon* and the endorsement test, for which Justices Ginsburg and Sotomayor advocated in dissent. Their dissent echoed the dissent of Justices Stevens and Ginsburg in *Van Orden v. Perry*, which had proposed the inverse of the *American Legion* presumption—"a strong presumption against the display of religious symbols on public property"[44]—based on Jefferson's and *Everson*'s "wall of separation between church and state."[45] The foundation for this "metaphorical wall" is grounded in the Establishment Clause's demand of "religious neutrality." The government can neither "differentiat[e] among religious sects" nor favor religion over nonreligion.[46] On this view, religious expression in the public sphere is constitutionally problematic because it "runs

42. Letter from James Madison to Rev. Adams (1832) *in* 5 THE FOUNDERS' CONSTITUTION 107 (Philip B. Kurland & Ralph Lerner eds. 1987); *see also McCreary Cnty.*, 545 U.S. at 874–75 ("The First Amendment contains no textual definition of 'establishment,' and the term is certainly not self-defining.").

43. Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 565 U.S. 994, 994–95 (2011) (Thomas, J., dissenting from denial of certiorari).

44. Van Orden v. Perry, 545 U.S. 677, 708 (2005) (Stevens, J., dissenting).

45. *Id.* at 709. As Justice Stevens notes in his dissent, members of the Court agree that there must be *some* level of separation of church and state but diverge over what "separation" entails. *See, e.g.*, *Zorach*, 343 U.S. at 312–13 (explaining that "[w]e are a religious people whose institutions presuppose a Supreme Being" while acknowledging that "[t]here cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated"). Thus, the debate over the scope of neutrality also can be viewed as a disagreement over the required degree of separation of church and state.

46. *Van Orden*, 545 U.S. at 709–10 (Stevens, J., dissenting); *see also* Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (stating that neither federal nor state governments "can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs").

the risk of 'offend[ing] nonmembers of the faith being advertised as well as adherents who consider the particular advertisement disrespectful.'"[47] The Establishment Clause "by demanding neutrality between religious faith and the absence thereof . . . shores up an individual's 'right to select any religious faith or none at all.'"[48]

The division between the Justices in *American Legion* and *Van Orden*, though, traces its origin back to the Court's earliest applications of the Establishment Clause to church-state interactions. In the nineteenth and early twentieth century, the Supreme Court decided only a few Establishment Clause cases.[49] That began to change in the mid-twentieth century, though, as the Court began exercising more searching judicial review of fundamental rights, including religious freedom. With the spread of religious pluralism, members of the public and the Court began to question the propriety of facially religious government monuments, symbols, and practices—forms of government expression that had not generated (much) controversy when Protestant Christianity was the dominant religion. The Supreme Court directly entered the fray in 1947 in *Everson* in which a local board of education, acting pursuant to a New Jersey statute, reimbursed parents for the transportation costs on public buses to and from schools, including private Catholic schools.[50]

Justice Black, writing for the majority in *Everson*, interpreted the Establishment Clause based on the historical events, documents, and discussions that led to its adoption, setting up an ongoing debate over the proper history—and, therefore, the proper meaning—of that Clause.[51]

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47. *Van Orden*, 545 U.S. at 708 (Stevens, J., dissenting) (alteration in original) (quoting Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 651 (1989) (Stevens, J., concurring in part and dissenting in part)).

48. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2105 (Ginsburg, J., dissenting) (quoting Wallace v. Jaffree, 472 U.S. 38, 53 (1985)).

49. *See* Bradfield v. Roberts, 175 U.S. 291 (1899) (holding that a federal appropriation to a hospital that an order of Catholic nuns operated and used to serve the general public did not violate the Establishment Clause); Davis v. Beason, 133 U.S. 333 (1890) (ruling that an Idaho territorial requirement that voters and office holders must swear an oath that they do not believe in polygamous marriage was not an establishment of religion); Terrett v. Taylor, 13 U.S. (9 Cranch) 43 (1815) (ruling that a Virginia statute that had confirmed the Episcopal Church's ownership of church lands following its disestablishment did not constitute an establishment).

50. Everson v. Bd. of Educ., 330 U.S. 1, 3 (1947).

51. The scholarship surrounding the meaning of the Establishment Clause is extensive. This article chronicles the Court's interpretation of that Clause, not the ongoing scholarly debate. For a more detailed discussion of the original meaning of the Establishment Clauses, see, among other sources, DONALD L. DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT (2010); PHILIP HAMBURGER, SEPARATION OF

Everson viewed the Establishment Clause as the Founders' response to the state-sponsored churches before and during the colonization of America that had bred "turmoil, civil strife, and persecutions" as they sought "to maintain their absolute political and religious supremacy."[52] Those who fled such persecution and settled the American colonies were all too willing to establish their own faith as *the* religion "which all, whether believers or non-believers, would be required to support and attend."[53] But such compulsory support of one faith clashed directly with the concomitant commitment to freedom of thought[54] and the desire "for liberty of conscience to all,"[55] which applied to believers and non-believers alike. These views found expression in Madison's Memorial and Remonstrance, which *Everson* summarized as holding:

> [T]hat a true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions.[56]

And Jefferson enshrined these principles in the Virginia Bill of Religious Liberty, which stated, among other things, that

> Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either . . . ; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical. . . . That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor

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CHURCH AND STATE (2004) (describing the origin and evolution of the concept of separation of church and state); ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (Baker Books 1988) (1982); and LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (Univ. of N.C. Press, 2d ed. 1994) (1986).

52. *Everson*, 330 U.S. at 8–9.

53. *Id.* at 10.

54. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'") (citation omitted).

55. Letter from James Madison to William Bradford, Jr. (Jan. 24, 1774), *in* 1 WRITINGS OF JAMES MADISON 18, 21 (Gaillard Hunt ed., 1900).

56. *Everson*, 330 U.S. at 12.

> shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief. . . .[57]

According to *Everson*, "the First Amendment . . . had the same objective and w[as] intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute."[58]

Extrapolating from this history, the majority provided its (now famous) summary of the Establishment Clause's meaning:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.[59]

And the Court generalized these requirements through its (also famous) pronouncement that the Establishment Clause "was intended to erect 'a wall of separation between Church and State,'"[60] with the secular on one side (the State) and religion (the Church) on the other. To ensure this separation, the government could not discriminate between and among religions (which would threaten to "establish" one sect over others), but it also could not "aid all religions" against those who did not believe (which would favor religion over nonreligion).[61] For the wall of separation—whatever its exact height, length, and thickness—"requires the state to be a neutral in its relations with groups of religious believers and non-believers."[62] Neutrality "does not

57. An Act for Establishing Religious Freedom (October, 1785), *in* 12 WILLIAM WALLER HENING, STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS IN VIRGINIA 84, 84–86 (photo. reprt. 1907) (Richmond, 1823).

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

59. *Id.* at 15–16.

60. *Id.* at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1879)).

61. *See* Torcaso v. Watkins, 367 U.S. 488, 495 (1961) ("Neither [the State nor the Federal Government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers. . . .").

62. *Everson*, 330 U.S. at 18.

require the state to be [religious believers'] adversary,"[63] only that the government does not favor or promote religion. In *Everson*, that meant the board of education could "extend[] its general State law benefits to all its citizens without regard to their religious belief"[64] because such a generally applicable law treated believers and nonbelievers the same. Given that everyone could claim the benefits of the program, the New Jersey program did not constitute even "the slightest breach" of Jefferson's "high and impregnable" law.[65]

Five years later in *Engel v. Vitale*, the Court relied on this same history of turbulent church-state relations to strike down a government-created nondenominational prayer that was recited daily in a public school.[66] The Establishment Clause was adopted to avoid the problems that historically attended the intersection of government and religion: "Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion."[67] Such unhappy (and perhaps unholy[68]) alliances also revealed "that governmentally established religions and religious persecutions go hand in hand."[69] The *Engel* Court did not adopt a specific "establishment" test; rather, it concluded that, at a minimum, the Establishment Clause must prohibit state-created prayers within the context of public schools:

> [T]he constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country 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.[70]

By the early 1960s, *Everson*'s view requiring neutrality between religion and nonreligion had become entrenched: "[T]his Court has rejected unequivocally the contention that the Establishment Clause forbids only

63. *Id.*

64. *Id.* at 16.

65. *Id.* at 18.

66. Engel v. Vitale, 370 U.S. 421, 426, 429 (1962) (discussing "the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval").

67. *Id.* at 431.

68. *Id.* at 432 (noting "that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate").

69. *Id.*

70. *Id.* at 425.

governmental preference of one religion over another."[71] Instead, under the "twofold protection" of the Religion Clauses, "the state cannot forbid, neither can it perform or aid in performing the religious function. The dual prohibition makes that function altogether private."[72] Given that religion was separated from the public sphere, it was a private matter outside the reach of the government:

> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard.[73]

Lemon extolled the same theme, contending that religion "must be a private matter for the individual, the family, and the institutions of private choice."[74] History confirmed that the effect of the government's injecting itself into religious affairs was the conflict and upheaval identified in *Everson*. To remedy such conflict, the Court had to keep the secular and religious realms separate, leaving religion to the private and government to the public: "[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."[75] To do that, though, the government had to remain neutral between and among religions as well as between religion and nonreligion: "[T]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."[76] And the Court could enforce neutrality by requiring the government to have "a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[77]

Given that the Religion Clauses were meant to remove intolerance and hostility related to religion, a natural extension of the nondiscrimination

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71. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 216 (1963).

72. *Id.* at 218 (quoting Everson v. Bd. of Educ., 330 U.S. 1, 52 (1947) (Rutledge, J., dissenting)).

73. *Id.* at 226.

74. Lemon v. Kurtzman, 403 U.S. 602, 625 (1971). Justice Brennan echoed this view in his *Marsh* dissent. Marsh v. Chambers, 463 U.S. 783, 802 (1983) (Brennan, J., dissenting); *see also* Lee v. Weisman, 505 U.S. 577, 608–09 (Blackmun, J., concurring) (quoting Zorach v. Clauson, 343 U.S. 306, 313 (1952)) ("Keeping religion in the hands of private groups minimizes state intrusion on religious choice and best enables each religion to 'flourish according to the zeal of its adherents and the appeal of its dogma.'").

75. Illinois *ex rel*. McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948).

76. Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

77. *Schempp*, 374 U.S. at 222.

principle was to prevent the same negative consequences between religion and nonreligion. After all, the freedom to believe and not to believe, like the freedom to speak and to remain silent, "are complementary components of the broader concept of 'individual freedom of mind.'"[78] By accommodating religion in the public realm, the government "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[79] To avoid such an outcome, the Court had to "recogni[ze] . . . that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among 'religions'—to encompass intolerance of the disbeliever and the uncertain."[80] As a result, by the mid-1980s, the central Establishment Clause question transformed into whether the government was endorsing religion or a specific religious belief[81] (i.e., whether the government was "send[ing] a message to nonadherents that they are outsiders, not full members of the political community"[82]), not whether the specific governmental action was consistent with the history and traditions surrounding religious expression by the government. As Justice Blackmun put the point in *County of Allegheny*, "[p]erhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to 'the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.'"[83] As three of the endorsement test Justices put the point in their *Lee v. Weisman* concurrence, "[a] government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some."[84] The Establishment Clause was meant to avoid the negative consequences that result when the government "align[s] itself with any one" religion or religion generally[85]—the "anguish,

78. Wooley v. Maynard, 430 U.S. 705, 714 (1977) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

79. *Barnette*, 319 U.S. at 642.

80. Wallace v. Jaffree, 472 U.S. 38, 54 (1985).

81. *See id.* at 60–61 (quoting Lynch v. Donnelly, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring)) ("For whenever the State itself speaks on a religious subject, one of the questions that we must ask is 'whether the government intends to convey a message of endorsement or disapproval of religion.'").

82. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

83. Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 590 (1989) (quoting *Jaffree*, 472 U.S. at 52); *see also* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 27–28 (1989) (Blackmun, J., concurring in judgment) (noting that "government may not favor religious belief over disbelief" or adopt a "preference for the dissemination of religious ideas").

84. Lee v. Weisman, 505 U.S. 577, 606–07 (1992) (Blackmun, J., concurring).

85. *Id.* at 608.

hardship and bitter strife"[86] as well as the "taint[]" of a "corrosive secularism" that comes with being the government's favored religion.[87]

In *Lee*, Justice Souter acknowledged the differing views of neutrality in the Court's Establishment Clause cases, but he did not believe that "a case has been made" that would "warrant reconsideration of our settled law." He also recognized "the force of some of the arguments supporting a 'coercion' analysis of the [Establishment] Clause" but "could not adopt that reading without abandoning our settled law," which traced its origins to *Everson*.[88] According to Justice Souter, government-religion interactions dating back to the founding "prove only that public officials, no matter when they serve, can turn a blind eye to constitutional principle."[89] Thus, the endorsement test jurists continued to argue that neutrality meant that "the State may not favor or endorse either religion generally over nonreligion or one religion over others."[90] This broader sense of neutrality—precluding the government from "favor[ing] one religion over another, or religion over irreligion"—was designed

> not only to protect the integrity of individual conscience in religious matters, but to guard against the civic divisiveness that follows when the government weighs in on one side of religious debate; nothing does a better job of roiling society, a point that needed no explanation to the descendants of English Puritans and Cavaliers (or Massachusetts Puritans and Baptists).[91]

Accordingly, by the time the Court decided *McCreary County v. ACLU of Kentucky*, the concern with avoiding the divisions sparked by religion merged with the desire to preserve the precedents advocating for a broader view of neutrality, which had guided the courts for nearly sixty years.[92] Of course, during that same period, the Court did not always heed that guidance (as *Marsh* and *Van Orden* demonstrate), the criticisms of *Lemon* and the endorsement test multiplied,[93] and the accommodationists continued to champion a

86. Engel v. Vitale, 370 U.S. 421, 429 (1962).

87. Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985).

88. *Lee*, 505 U.S. at 618 (Souter, J., concurring).

89. *Id.* at 616 n.3.

90. *Id.* at 627.

91. McCreary Cnty. v. ACLU of Kentucky, 545 U.S. 844, 875–76 (2005) (citations omitted).

92. *Id.* at 877 (noting that even if the dissent's historical account was exhaustive "there would, of course, still be the question of whether the historical case could overcome some 60 years of precedent taking neutrality as its guiding principle").

93. For a list of criticisms levelled by members of the Supreme Court, lower court judges, and various academics, see Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2081 nn.13–15 (2019).

narrower view of neutrality—one that would take center stage in *American Legion*.

B. For the Accommodationists, History and Tradition Show That the Establishment Clause Requires Only Neutrality Between and Among Religious Sects

Despite its popular appeal, not everyone on the Court was enamored with Jefferson's wall of separation metaphor or with *Lemon*'s three-part test. Just five years after *Everson*, the Court articulated a different basis for an understanding of the Establishment Clause in *Zorach v. Clauson*.[94] In upholding a "released time" program that allowed students to leave school grounds during the school day to receive religious instruction, the Court suggested a narrower view of the separation that the Establishment Clause demanded between church and state, one that did not mandate a separation "in every and all respects."[95] After all, a complete separation would make "the state and religion . . . aliens to each other—hostile, suspicious, and even unfriendly."[96] And such a relationship was inconsistent with the various church-state interactions in our Nation's traditions and practices. Thus, instead of focusing on the history of violence, conflict, and oppression that flowed from state-established religion in the pre-Revolutionary War period that was so important in *Everson*, the *Zorach* Court highlighted the numerous historical contacts between the government and religion—from police and fire protection for religious groups to legislative prayers, appeals to God at Presidential Inaugurations, Thanksgiving Day proclamations, "so help me God" in courtroom oaths, and a host of other "references to the Almighty that run through our laws, our public rituals, our ceremonies."[97] This history revealed that "[w]e are a religious people whose institutions presuppose a Supreme Being."[98] But given that our institutions were rooted in the Divine, the Constitution cannot and does not demand a strict and absolute demarcation between church and state. Rather, all that is required is "an attitude on the part of government that shows no partiality to any one [religious] group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma."[99] On this view, the government may accommodate religion by

94. Zorach v. Clauson, 343 U.S. 306 (1952).
95. *Id.* at 312.
96. *Id.*
97. *Id.* at 312–13.
98. *Id.* at 313.
99. *Id.*

"encourag[ing] religious instruction or cooperat[ing] with religious authorities by adjusting the schedule of public events to sectarian needs."[100] Such actions are consistent with the Establishment Clause because they "follow[] the best of our traditions."[101]

The contrast between *Everson* and *Zorach* is stark. The different views on neutrality translate into fundamentally different understandings of the Establishment Clause's commands, which, in turn, entails different roles for the judiciary. Under *Everson*, the courts must be active, policing the wall to ensure that it is "kept high and impregnable" to preclude even "the slightest breach."[102] Under *Zorach*, on the other hand, courts do not need to be so interventionist. The Establishment Clause permits the government to be "[]friendly" toward religion; it does not require the "government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."[103] The historical practices cited in *Zorach* illustrate constitutionally permissible efforts to do just that—"to widen the effective scope of religious influence." Given that the government can accommodate noncoercive religious practices and traditions, the Establishment Clause mandates neutrality only between and among religions, not between religion and non-religion (which the Free Exercise protects): "The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction."[104] But the government can accommodate the many practices of the religious people who founded the government and its institutions.

Zorach did not supplant *Everson*, but it articulated a different historical perspective from which to challenge the strict separationist view. In his dissent in *Engel v. Vitale*, Justice Stewart took issue with *Everson*'s wall of separation metaphor, noting that it is "a phrase nowhere to be found in the Constitution."[105] Instead of looking to "the history of an established church in

100. *Id.* at 314.

101. *Id.*

102. Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

103. *Zorach*, 343 U.S. at 312, 314.

104. *Id.* at 314; *see also* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring) ("[U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.").

105. Engel v. Vitale, 370 U.S. 421, 445–46 (1962) (Stewart, J., dissenting).

sixteenth century England or in eighteenth century America," Justice Stewart argued that the Establishment Clause must be understood in relation to the history identified in *Zorach*, "the history of the religious traditions of our people, reflected in countless practices of the institutions and officials of our government."[106] This alternative historical perspective contrasted with *Everson*'s prediction of gloom and doom whenever church and state intermingled. According to Justice Stewart, the government could accommodate and acknowledge religion in the public sphere where such practices "follow the deeply entrenched and highly cherished spiritual traditions of our Nation."[107] And in *Marsh v. Chambers*, a majority of the Court adopted this history and tradition approach: "From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom."[108] In so doing, *Marsh* ignored *Lemon* and carved out (what Justice Brennan characterized in dissent as) an exception to the Establishment Clause.[109] But this history and tradition test was not simply an exception to a general rule; it was a fundamentally different way of interpreting the Establishment Clause. As in *Zorach*, the meaning of the Establishment Clause was not to be found in the Founders' rejecting an established church (as in England) but in the actual practices and traditions that the Founders adopted: "[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress."[110] Given that the government could start its sessions with legislative prayer, coupled with the other historical evidence showing government-religion interactions, the Establishment Clause could not require complete neutrality between religion and nonreligion. Provided the government did not "exploit[]" the "prayer opportunity . . . to proselytize or advance any one, or to disparage any other, faith or belief," invocations were a form of "conduct whose . . . effect . . .

106. *Id.* at 446.

107. *Id.* at 450.

108. Marsh v. Chambers, 463 U.S. 783, 786 (1983).

109. *Id.* at 796 (Brennan, J., dissenting). Justice Brennan took this "exception" to be inconsistent with *Lemon* and limited it to legislative prayer: "I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional." *Id.* at 800–01. In *Town of Greece*, the Court unanimously upheld *Marsh*, Town of Greece v. Galloway, 572 U.S. 565, 576–83 (2014); *id.* at 615–17 (Kagan, J., dissenting), and in *American Legion* seven Justices rejected *Lemon* in the context of longstanding monuments, symbols, and practices. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019).

110. *Marsh*, 463 U.S. at 790.

harmonize[d] with the tenets of some or all religions."[111] Thus, *Marsh*, which the Court unanimously affirmed in *Town of Greece v. Galloway*, confirmed that the First Amendment permits the government to accommodate and recognize religion in the public realm:

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.[112]

Absent evidence of coercion—proselytizing, advancement, or disparagement—the Court had no reason to intervene because the religious traditions and practices did not pose any "real threat" to Establishment Clause principles, only "mere shadow."[113]

One year later, in *Lynch v. Donnelly*, the Court referred to Jefferson's wall as a "reminder" that the Establishment Clause precludes the government's establishing a church or taking actions that amount to an establishment. But the Court noted that "the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."[114] As *Lynch* explained, the Establishment Clause neither imposes "a regime of total separation," nor "require[s] complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."[115] A court-imposed complete separation would display a "callous indifference" or even hostility toward religion, which "would bring us into 'war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.'"[116] In place of the wall, the Court explained that its "interpretation of the Establishment Clause has comported with what history reveals was the

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111. *Id.* at 792, 794–95 (second alteration in original) (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961)).

112. *Id.* at 792.

113. *Id.* at 795 (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring)).

114. Lynch v. Donnelly, 465 U.S. 668, 673 (1984).

115. *Id.* (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973)).

116. *Id.* (first quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952); then quoting McCollum v. Bd. of Educ., 333 U.S. 203, 211–12 (1948)).

contemporaneous understanding of its guarantees,"[117] and, following *Marsh*, highlighted congressional prayer as a "striking example of the accommodation of religious belief intended by the Framers."[118] Thus, the Nation's history "of accommodation of all faiths and all forms of religious expression, and hostility toward none"[119] demonstrated that the Establishment Clause did not require neutrality between religion and nonreligion. Under this interpretation of the First Amendment, "governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith" are permissible unless "in reality, it establishes a religion or religious faith, or tends to do so."[120] Accordingly, "establishment" was to be understood in a narrower sense than what *Lemon* and the wall metaphor suggested: "The real object of the [First] Amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government."[121] The fact that some observers might view the government as aligning itself with religion by including a religious symbol in a display or referencing the Divine in the public square did not, by itself, violate the Establishment Clause because the Court's precedents made "abundantly clear . . . that 'not every law that confers an "indirect," "remote," or "incidental" benefit upon [religion] is, for that reason alone, constitutionally invalid.'"[122] Whereas *County of Allegheny* sought to limit *Marsh* to its "unique history," the accommodationists viewed legislative prayer as one type of religious practice that was consistent with the Establishment Clause and maintained that "[w]hatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion."[123]

Then-Justice Rehnquist incorporated this view of neutrality into his *Wallace v. Jaffree* dissent, providing a detailed historical response to the strict separationist account encapsulated in *Everson*, *Lemon*, and the endorsement test (all of which interpreted the Establishment Clause to require neutrality

117. *Id.*

118. *Id.* at 674.

119. *Id.* at 677.

120. *Id.* at 678.

121. *Id.* (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 728 (1833)).

122. *Id.* at 683 (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973)).

123. Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 669–70 (1989) (Kennedy, J., concurring in part and dissenting in part).

between religion and nonreligion). Based on his review of the historical record, Justice Rehnquist concluded:

> It seems indisputable from these glimpses of Madison's thinking, as reflected by actions on the floor of the House in 1789, that he saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion.[124]

According to Justice Rehnquist, *Everson* was predicated on a mistaken understanding of the history leading to the proposal and ratification of the First Amendment, an error that Justice Rehnquist argued (and Justice Scalia reiterated in his *McCreary* dissent[125]) the Court perpetuated in *Illinois ex rel. McCollum v. Board of Education*, *Engel*, and *School District of Abington Township v. Schempp*.[126] The Establishment Clause precluded "the establishment of a national church, and perhaps the preference of one religious sect over another; but it was definitely not concerned about whether the Government might aid all religions evenhandedly."[127] That "neutrality" did not extend to neutrality "between religion and irreligion" was evident from the (now familiar) litany of interactions between religion and the government at and after the Founding: the Northwest Ordinance, legislative prayers in the House and Senate, paid legislative chaplains, the original and subsequent Thanksgiving Day proclamations, and sectarian Indian education.[128] As Thomas Cooley put the point in Constitutional Limitations:

> But while thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of

124. Wallace v. Jaffree, 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting).

125. *See* McCreary Cnty. v. ACLU of Kentucky, 545 U.S. 844, 889 (Scalia, J., dissenting) ("Nothing stands behind the Court's assertion that governmental affirmation of the society's belief in God is unconstitutional except the Court's own say-so, citing as support only the unsubstantiated say-so of earlier Courts going back no further than the mid-20th century.").

126. McCollum v. Bd. of Educ., 333 U.S. 203 (1948); Engel v. Vitale, 370 U.S. 421 (1962); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963).

127. *Jaffree*, 472 U.S. at 99 (Rehnquist, J., dissenting).

128. *See Jaffree*, 472 U.S. at 100–03 (Rehnquist, J., dissenting). Justice Scalia also recounted the history of public prayer and public recognition of God that various Justices catalogued in *Lynch*, *Marsh*, *Jaffree*, and *Engel*. *See, e.g.*, Lee v. Weisman, 505 U.S. 507, 633–36 (1992) (Scalia, J., dissenting).

> mankind inspires, and as seems meet and proper in finite and dependent beings.[129]

Given that the *Lemon* test and the wall of separation metaphor were predicated on an overly broad conception of neutrality, they often conflicted with the historical practices that accommodated religion. This tension gave rise to inconsistent and unprincipled results,[130] causing the Court to describe *Lemon* as a "guideline[]," [131] "no more than [a] helpful signpost" [132] that was "not easily applied." [133]

Instead of imposing court-made Establishment Clause tests on the government, a majority of the Court began to focus on the "[g]overnment policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage." [134] Such historical recognitions of religion did "not coerce anyone to support or participate in any religion or its exercise" and did "not . . . give direct benefits to a religion in such a degree that it in fact establishes a state religion [or religious faith,] or tends to do so." [135] As the Court noted in *Cutter v. Wilkinson*, benefits to religion "need not 'come packaged with benefits to secular entities.'" [136]

II. THE ROBERTS COURT EXPANDS THE PROTECTION AFFORDED RELIGIOUS BELIEVERS UNDER THE FREE EXERCISE CLAUSE AND NARROWS THE ESTABLISHMENT CLAUSE TO REQUIRE ONLY NEUTRALITY BETWEEN AND AMONG RELIGIONS.

When Chief Justice Roberts joined the Court in 2005, the tension between the competing views of neutrality remained high. At the end of the previous

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129. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 470 (Boston, Little Brown & Co. 2d ed. 1871) (1868).

130. *Jaffree*, 472 U.S. at 108–10 (Rehnquist, J., dissenting).

131. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773, n.31 (1973) (quoting Tilton v. Richardson, 403 U.S. 672, 678 (1971)).

132. Mueller v. Allen, 463 U.S. 388, 394 (1983) (alteration in original).

133. Meek v. Pittenger, 421 U.S. 349, 358 (1975).

134. Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 576 (1989).

135. *Id.*; *see also* 1 ANNALS OF CONG. 730 (1789) (Joseph Gales ed., 1834) (describing "the meaning of the [Religion Clauses] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience"); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (noting that the Religion Clauses "forestall[] compulsion by law of the acceptance of any creed or the practice of any form of worship").

136. Cutter v. Wilkinson, 544 U.S. 709, 724 (2005) (quoting Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 338 (1987)).

term, the Court had issued (what many on both sides had viewed) as conflicting Ten Commandments decisions in *Van Orden* and *McCreary*. *Lemon* and the endorsement test were embattled but still held sway in many Supreme Court and lower court opinions. The accommodationist view governed in *Marsh*, *Lynch*, and *Van Orden* but had not supplanted the wall of separation in all Establishment Clause contexts. The result was "an Establishment Clause jurisprudence in shambles" where the outcome of a religion case frequently was "anyone's guess."[137] The inconsistent results in Religion Clause cases flowed directly from inconsistent and oftentimes ambiguous standards. As a result, the Court could not continue to remain neutral on neutrality. At some point, it would have to move toward a consolidated—and more consistent—view of the Religion Clauses generally and the Establishment Clause in particular. And over the last few terms, the Roberts Court has begun to do just that, broadening the protection given to religious exercise and narrowing the Establishment Clause to require neutrality between and among religions. The net result of these changes appears to be a Religion Clause jurisprudence that safeguards religious minorities and permits more government-religion interaction in the public realm "to foster a society in which people of all beliefs can live together harmoniously"—a goal that is all the more important given the increasing pluralism in our society and the accompanying array of religious, political, and social issues confronting our Nation.

A. The Court's Recent Free Exercise Cases Provide Broad Protection for Religious Dissenters and Suggest a Willingness to Revisit and Possibly Overturn Employment Division v. Smith

While the central focus of this article is on the Establishment Clause under *American Legion*, a few words on free exercise are appropriate given that the Roberts Court's overarching trend has been to provide greater protection for religion under the First Amendment generally. Although the Free Exercise and Establishment Clauses are sometimes in tension with one another, forcing the government to navigate between "the already narrow 'channel between the Scylla [of what the Free Exercise Clause demands] and the Charybdis [of what the Establishment Clause forbids],'"[138] the Roberts Court has highlighted the

137. Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 565 U.S. 994, 994–95 (2011) (Thomas, J., dissenting from denial of certiorari).

138. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 42 (1989) (Scalia, J., dissenting) (alteration in original) (quoting Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 721 (1981) (Renquist, J., dissenting)).

way in which the two clauses mutually reinforce the protection afforded religious believers generally and religious dissenters in particular in our pluralistic society. That the Religion Clauses protect minority religions is not surprising given that religious dissidents founded our Nation. The scope of such protection, though, has become a central question as our diverse Nation has grappled with a wide variety of controversial issues that reveal fundamental disagreements about a host of political, social, and religious issues, from abortion and contraception to same sex-marriage and gender identity. In its most recent decisions, the Roberts Court has indicated that the Constitution affords broad protection to speech and religion to protect all members in our pluralistic society, creating room for all to live, work, and (hopefully) thrive despite the sincere differences on important social, political, and even religious issues. As the Court recently emphasized in *American Legion*, "the ideals of respect and tolerance [are] embodied in the First Amendment,"[139] and "[t]he Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously."[140]

The Free Exercise Clause advances respect, tolerance, and harmony among a diverse and divided populace by guaranteeing the right to pursue one's religious beliefs regardless of how widely or narrowly they are held. As Madison stated, the "[s]ecurity for . . . religious rights . . . consists in the . . . multiplicity of sects."[141] On Madison's view, the more open the society is to different religions and beliefs (including those who do not believe), the more stable and tolerant it will be. Why? Because the "greater variety of parties and interests," the less likely "a majority of the whole will have a common motive to invade the rights of other citizens."[142] If all religious believers are permitted to pursue their own creeds and the government cannot "establish" any one, then no faith has reason to dictate or determine the beliefs of others, no matter how idiosyncratic a religious minority's views might seem to a majority faction. Believers and nonbelievers can hold and pursue differing views without feeling compelled to force others to adopt those views. As the Roberts Court put the point last term in *Bostock v. Clayton County*, free exercise "lies at the heart of our pluralistic society."[143]

Under the Free Exercise Clause, then, "[t]he government may not compel affirmation of religious belief, punish the expression of religious doctrines it

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

140. *Id.* at 2074.

141. THE FEDERALIST NO. 51, *supra* note 20, at 321.

142. THE FEDERALIST NO. 10, *supra* note 20, at 78 (James Madison).

143. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma."[144] The "exercise of religion" includes the profession of religious belief[145] as well as "the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation."[146] Given the variety of religious beliefs and practices among the populace, governmental neutrality is critical to religious liberty. But what does it mean to say that the government must be "neutral" in the Free Exercise context? At a minimum, the Free Exercise Clause "protect[s] religious observers against unequal treatment" and precludes the government from imposing "special disabilities" on individuals or groups based on their "religious status."[147] The government does not act neutrally if it discriminates against religious practitioners based on their religious exercise. As the Court put the point in *Everson*, a State "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation."[148] That is, the government cannot "single out the religious for disfavored treatment" whether they are members of a majority or minority religion.[149]

Under *Cutter v. Wilkinson*, though, the government can favor religion over non-religion in certain circumstances without violating the Free Exercise neutrality principle.[150] Religion-only exemptions (such as RFRA and RLUIPA) are constitutional if they "alleviate[] exceptional government-created burdens on private religious exercise," require courts to "take adequate

144. Emp. Div. v. Smith, 494 U.S. 872, 877 (1990) (citations omitted).

145. Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) ("Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.").

146. *Smith*, 494 U.S. at 877.

147. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533, 542 (1993) (first quoting Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 148 (1987) (Stevens, J., concurring in the judgment); then quoting *Smith*, 494 U.S. at 877).

148. Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (emphasis added).

149. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2020 (2017).

150. Cutter v. Wilkinson, 544 U.S. 709 (2005); *see also Smith*, 494 U.S. at 890 ("[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation . . . ."); Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 329–30 (1987) (upholding Title VII's exemption for the secular nonprofit activities of religious organizations from Title VII's general prohibition on religious discrimination in employment).

account of the burdens a requested accommodation may impose on nonbeneficiaries," and are "administered neutrally among different faiths."[151] Accordingly, the Free Exercise Clause does not require the government to extend religion-only exemptions to non-religious individuals or groups: "Where . . . the government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities."[152] But does the same hold in the opposite direction—do exemptions for similarly situated secular entities require the government to extend such exemptions to religious entities? The Court's most recent Free Exercise cases strongly suggest that the answer to that question is "yes," that *Lukumi* and its progeny safeguard religious practitioners—but not secular entities—from "unequal treatment."[153]

This asymmetrical view of "neutrality" results from the fact that the Constitution is not itself neutral with respect to religion. The first sentence of the First Amendment singles out religion for special (or at least different) treatment, precluding laws that "prohibit[] the free exercise" of religion, not secular activities.[154] Recently, the Roberts Court has emphasized that the Free Exercise Clause protects religion from unequal or disparate treatment. For example, in *Bostock*, which was decided at the end of the October 2019 term, the Court went out of its way to emphasize the importance of protecting religious exercise amid changing social and political norms. The Court held that Title VII of the 1964 Civil Rights prohibited employment discrimination based on sexual orientation and gender identity, but the Court expressed its "deep[] concern[] with preserving the promise of the free exercise of religion enshrined in our Constitution."[155] Even though no religious liberty claim was before the Court, the majority still noted Title VII's statutory exception for religious organizations, how the ministerial exception serves as a bar to certain employment discrimination claims involving religious institutions and their ministers, and the way in which the Religious Freedom Restoration Act (RFRA) "operates as a kind of super statute," possibly displacing "Title VII's commands in appropriate cases."[156] Although the majority did not have to explore how these various provisions interact, it directly connected free

151. *Cutter*, 544 U.S. at 720.
152. *Amos*, 483 U.S. at 338.
153. *Lukumi*, 508 U.S. at 533.
154. U.S. CONST. amend. I.
155. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).
156. *Id.*

exercise and pluralism, observing that certain laws sometimes must give way to protect religious believers.

As *Cutter* and *Bostock* highlight, statutes (such as RLUIPA and Title VII) can accommodate religion, and at times the Free Exercise Clause may even mandate such accommodation, as evident from the ministerial exception. But the Roberts Court appears poised to expand the role that free exercise plays in safeguarding religious practitioners. Justice Gorsuch, who authored the majority opinion in *Bostock*, previously joined the three *Bostock* dissenters in a statement respecting the denial of certiorari in *Kennedy v. Bremerton School District*.[157] In *Kennedy*, a public high school football coach was fired for repeatedly praying on the fifty-yard line after his team's games. The question presented was whether his termination violated his First Amendment speech rights. The four Justices joining the statement agreed that certiorari should be denied in that case given its particular record and posture. Yet they also intimated that they would be open to revisiting *Employment Division v. Smith*, which, in their view, "drastically cut back on the protection provided by the Free Exercise Clause."[158] The language here is important. The Free Exercise Clause "provide[s]" certain "protection," and *Smith* "drastically cut back on" that protection, significantly narrowing the security given free exercise under the First Amendment. Similarly, Justices Thomas and Alito issued another statement respecting the denial of certiorari in *Davis v. Ermold*,[159] which involved the claims of a clerk in Kentucky who refused to issue marriage licenses to same-sex couples in the wake of *Obergefell v. Hodges*.[160] They characterized *Smith* and its progeny as providing an "ungenerous interpretation of the Free Exercise Clause"[161] and worried that *Obergefell* "privilege[d] a novel constitutional right over the religious liberty interests explicitly protected in the First Amendment," which would "have 'ruinous consequences for religious liberty.'"[162] All of this "created a problem that only [the Court] can fix"—presumably by either revisiting *Obergefell*, *Smith*, or both.[163]

Perhaps not surprisingly, this "drastically cut back" and "ungenerous" interpretation of free exercise is predicated on (what at least four Justices take

157. Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634 (2019).

158. *Id.* at 637.

159. Davis v. Ermold, 141 S. Ct. 3 (2020) (mem.).

160. *Id.* at 3; Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (holding that "same-sex couples may exercise the fundamental right to marry in all States").

161. *Davis*, 141 S. Ct. at 4.

162. *Id.* (quoting *Obergefell*, 576 U.S. at 734 (Thomas, J., dissenting)).

163. *Id.*

to be) an improper view of the neutrality that the First Amendment requires. Under *Employment Division v. Smith*, neutral, generally applicable laws that burden religious exercise are subject only to rational basis review: "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[164] If anyone could opt out of neutral, generally applicable laws whenever those laws allegedly conflicted with his religious practice and belief, then the free exercise clause "would . . . make the professed doctrines of religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself."[165] Given the diversity of religions and religious practices,[166] a rule requiring neutral, generally applicable laws to yield to religious exercise "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."[167] Thus, *Smith* concluded that "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[168]

Under the *Smith* regime, then, accommodations for individuals who hold (and act upon) sincerely held religious beliefs do not flow directly from the Free Exercise Clause; rather, accommodations are dependent upon federal and state legislation (e.g., specific issue accommodations like the exemption for conscientious objectors in *Welsh v. United States*[169] or "super statute[s]" like RFRA[170] and the Religious Land Use and Institutionalized Persons Act (RLUIPA)). A potential problem with this interpretation (and one that *Smith* itself recognized) is that it "place[s] at a relative disadvantage those religious practices that are not widely engaged in."[171] Minority religions will have much greater difficulty commanding or enlisting the support of a majority "to

164. Emp. Div. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)). The *Smith* opinion embodies the Lockean position articulated in John Locke's Letter Concerning Toleration: "[T]he private judgment of any person concerning a law enacted in political matters, for the public good, does not take away the obligation of that law, nor deserve a dispensation." JOHN LOCKE, *A Letter Concerning Toleration in* LOCKE ON POLITICS, RELIGION, AND EDUCATION 136 (Maurice Cranston ed., 1st ed. 1965).

165. *Smith*, 494 U.S. at 879 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)).

166. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599, 606 (1961) (plurality opinion) ("[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference.").

167. *Smith*, 494 U.S. at 888.

168. *Id.* at 878–79.

169. Welsh v. United States, 398 U.S. 333, 343–44 (1970).

170. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

171. *Smith*, 494 U.S. at 890.

be solicitous" of their religious practices. Whereas many neutral, generally applicable laws (having been passed by the majority) will not infringe the religious practices of that majority, such laws may directly burden non-mainstream religions. Yet the Free Exercise Clause—and the courts—generally were thought to protect such minority interests:

> Prior to *Smith*, the Free Exercise Clause functioned as a corrective for this bias, allowing the courts, which are institutionally more attuned to the interests of the less powerful segments of society, to extend to minority religions the same degree of solicitude that more mainstream religions are able to attain through the political process.[172]

The *Smith* rule—which leaves minority religions to bear the brunt of neutral, generally applicable laws even though they will have the greatest difficulty securing exemptions for their religious practices—is neither "unavoidable"[173] nor neutral. If some religious groups are subject to substantial burdens without practical recourse while others are not, then the government is not acting neutrally between and among sects; the government is imposing burdens on religious minorities and, in the process, undermining the "[s]ecurity for . . . religious rights" that comes from preserving a "multiplicity of sects."[174] A generous or not-cut-back interpretation of free exercise would take the Free Exercise Clause to ensure at least two things: (1) that religious minorities receive the same protections afforded majority religions and (2) that secular activities are not given greater accommodations than comparable religious exercise.

With respect to the former, the First Amendment may mandate judicial supervision as the Court previously recognized in *Sherbert v. Verner*.[175] The courts' experience with RFRA and RLUIPA indicates that judicial supervision of all sorts of federal actions that impose substantial burdens on religious

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172. McConnell, *supra* note 13, at 1132.

173. *Smith*, 494 U.S. at 890 ("It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.").

174. THE FEDERALIST NO. 51, *supra* note 20, at 321.

175. *See* Sherbert v. Verner, 374 U.S. 398, 409 (1963) (describing how a religious exemption for Seventh-day Adventists "reflects nothing more than the governmental obligation of neutrality in the face of religious differences"), *overruled by* Emp. Div. v. Smith, 494 U.S. 872 (1990), *and superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997) (codified at 42 U.S.C. §§ 2000bb–bb4).

exercise has not "court[ed] anarchy"[176] even though these super statutes provide "expansive protection for religious liberty."[177] The proverbial floodgates have not opened, and the courts have shown that they are "up to the task"[178] of applying a compelling interest test "in an appropriately balanced way."[179] Moreover, many of the regulations imposed on religious exercise have resulted from administrative, not legislative, action. Unelected government officials have adopted policies that are far from solicitous of religion and impose real and significant burdens on religious practitioners.[180] In these situations, the democratic process affords no protection to religious minorities, who must rely on the mercy of unelected officials or hope (and pray) that the Court reconsiders *Smith*. And such prayers may be answered given that (1) at least four Justices take *Smith* to have "drastically cut back on the protection provided by the Free Exercise Clause"[181] and (2) a majority of the Court has acknowledged that the "text of the First Amendment itself," not the vagaries of the political process, "gives special solicitude to the rights of religious organizations."[182] The Court's reconsidering and reversing *Smith* would mark a sea change in its Free Exercise jurisprudence, seeking to promote pluralism by protecting the free exercise of both majority and minority religions[183] instead of conditioning such protection on legislative

176. *Smith*, 494 U.S. at 888.

177. Holt v. Hobbs, 574 U.S. 352, 358 (2015); *see also id.* at 356 (quoting Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 693 (2014)) ("Congress enacted RLUIPA and its sister statute, [RFRA], 'in order to provide very broad protection for religious liberty.'").

178. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 436 (2006); *see id*. ("We reaffirmed just last Term [in Cutter v. Wilkinson, 544 U.S. 709 (2005)] the feasibility of case-by-case consideration of religious exemptions to generally applicable rules.").

179. *Cutter*, 544 U.S. at 722–23.

180. For a discussion of some of the alleged problems with *Smith*, see Brief for Petitioners at 37–52, Fulton v. City of Phila., 141 S. Ct. 230 (2020) (No. 19-123), https://www.supremecourt.gov/DocketPDF/19/19-123/144320/20200527150724005_19-123ts.pdf; *see also* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017 (2017) (reviewing a state grant program instituted by the Missouri Department of Natural Resources); *Holt*, 574 U.S. at 358 (analyzing a grooming policy that the Arkansas Department of Correction adopted); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 696–97 (2014) (evaluating a contraceptive mandate crafted by the Department of Health and Human Services); Stormans, Inc. v. Wiesman, 136 S. Ct. 2433, 2434 (2016) (mem.) (Alito, J., dissenting from denial of certiorari) (discussing a Washington State Board of Pharmacy mandate requiring pharmacies to stock and sell contraceptives).

181. Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (mem.) (Alito, J., dissenting from denial of certiorari).

182. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 189 (2012).

183. *See, e.g.*, Emp. Div. v. Smith, 494 U.S. 872, 894 (O'Connor, J., concurring) (explaining that the Free Exercise clause "does not distinguish between laws that are generally applicable and laws that target particular religious practices"); McConnell, *supra* note 13, at 1116 ("It is odd, given this text, to allow the limitations to swallow up so strongly worded a rule.").

grace. Under such a regime, rational basis would be replaced with strict scrutiny. The government would have to show that a law discriminating between religions (or in favor of nonreligion over religion) was narrowly tailored to a compelling interest, a standard that the government has had difficulty meeting under RFRA and RLUIPA.[184]

The Court's first opportunity to revisit *Smith* occurred during the 2020–21 term in *Fulton v. City of Philadelphia*.[185] *Fulton* raises free speech and free exercise claims in relation to the City's excluding Catholic Social Services (CSS) from its foster care program because CSS could not, based on its religious beliefs, provide written "home study" endorsements for same-sex couples. If the Court reaches the *Smith* issue and rejects its thirty-year-old interpretation of the Free Exercise Clause, it will have to decide what level of scrutiny should apply to free exercise claims—traditional strict scrutiny (used in RFRA and RLUIPA cases) or more of a balancing test (utilized during the *Sherbert-Yoder* regime). A recent string of decisions from the Court's shadow docket, which enjoined state COVID restrictions on religious worship, strongly suggests that, if the Court overturns *Smith*, it will adopt a more robust form of strict scrutiny.[186]

Moreover, the Court's most recent COVID-related decision, *Tandon v. Newsom*, put a religion-friendly spin on *Smith*'s neutral, generally applicable requirement, expanding the protection for religious claimants without overturning *Smith*.[187] In fact, *Tandon* sent shockwaves through the Court's Free Exercise jurisprudence by defining "neutrality" narrowly. Although the Court historically had been reluctant to embrace a specific definition, the *Tandon* majority adopted Justice Kavanaugh's comparator approach in *Roman Catholic Diocese of Brooklyn v. Cuomo*.[188] Under *Tandon*, a regulation is neutral only if it treats *all* comparable secular activities the same as (or less favorably than) religious exercise. Thus, the neutrality principle is violated whenever the government "treat[s] *any* comparable secular activity more favorably than religious exercise."[189] If the government treats a single comparable secular activity better than the religious activity at issue, then the

184. *See, e.g.*, Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 432 (2006); *Burwell*, 573 U.S. at 719; *Holt*, 574 U.S. at 356.

185. Fulton v. City of Philadelphia, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020).

186. *See, e.g.*, Roman Catholic Diocese v. Cuomo, 141 S. Ct. 63 (2020) (per curiam); S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (mem.); High Plains Harvest Church v. Polis, 141 S. Ct. 527 (2020) (mem.); Gateway City Church v. Newsom, 141 S. Ct. 1460 (2021) (mem.).

187. *See* Tandon v. Newsom, No. 20A151, 2021 WL 1328507, at *1 (Apr. 9, 2021) (per curiam).

188. *See id.*; *Cuomo*, 141 S. Ct. at 72–75 (Kavanaugh, J., concurring).

189. *Tandon*, 2021 WL 1328507, at *1.

regulation is not neutral, and strict scrutiny applies. And this is true even when "a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue."[190]

In this way, *Tandon* takes seriously *Lukumi*'s concern with "protect[ing] religious observers against unequal treatment."[191] But the "equality" implicated under the Free Exercise Clause is not the same as that under Equal Protection. Whereas Equal Protection requires that "all persons similarly situated should be treated alike," [192] the Free Exercise Clause safeguards religious exercise from less favorable or hostile treatment while in certain circumstances allowing—and sometimes even requiring—the government to treat religious exercise better than comparable secular activities, e.g., statutory religious exemptions (permissive) and the ministerial exemption (constitutionally mandated), respectively.

In *Tandon*, California precluded at-home religious gatherings of more than three households but did not apply the same restriction to "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants."[193] Religious exercise, therefore, was treated less favorably than certain secular activities. But differential treatment is a necessary but not a sufficient condition to trigger strict scrutiny. The government loses the deference afforded under rational basis only if the secular activities also are *comparable* to at-home religious gatherings. The scope of Free Exercise protection, therefore, depends on whether a religious exercise is deemed comparable to a secular activity, an issue on which the majority and dissent disagreed. The *Tandon* majority articulated a broad, religion-friendly interpretation of comparability. According to the majority, "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue."[194] In the context of COVID, state and local governments are concerned with protecting the health and safety of individuals and impose regulations to reduce the risk of transmission of the virus. An exercise of religion and a secular activity are comparable, then, if they pose the same health risk regardless of the reasons why or the location where individuals come together (e.g., for in-home religious worship or to buy goods at a store): "Comparability is concerned with the risks various activities pose,

190. *Id.* (citing *Cuomo*, 141 S. Ct. at 67 (Kavanaugh, J., concurring)).

191. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

192. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

193. *Tandon*, 2021 WL 1328507, at *2.

194. Id.

not the reasons why people gather."[195] If social distancing guidelines minimize the threat of exposure during secular activities, then religious practitioners must be allowed to gather subject to the same guidelines unless the government demonstrates that the religious exercise is more dangerous even with the guidelines in place: "Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise as well."[196] Absent such a showing, "[t]he only explanation for treating religious places differently seems to be a judgment that what happens there just isn't as 'essential' as what happens in secular spaces. . . . *That* is exactly the kind of discrimination for the First Amendment forbids."[197] While the Free Exercise Clause may permit the government to favor religious exercise over comparable secular activities in certain situations, it does not allow the reverse unless the government can satisfy strict scrutiny.

This capacious interpretation of comparability is at odds with Justice Kagan's narrower view in dissent. For Justice Kagan, comparability requires a court to consider a specific secular analogue to the religious activity at issue, so that both are similar in terms of location, setting, and risk of transmission. If the secular and religious are similarly situated, then the government cannot treat the secular activity more favorably.[198] The regulation in *Tandon* was an easy case for Justice Kagan. California restricted both in-home religious gatherings and in-home secular gatherings to three households. California did not impose such a three-household limit on hardware stores or hair salons[199] nor was it constitutionally obligated to do so. Commercial stores are not comparable to in-home gatherings in that people generally do not spend as much time in commercial settings, homes tend to be smaller and less ventilated, and ensuring mask wearing and social distancing is much harder in

195. *Id.* at *1; *see also Cuomo*, 141 S. Ct. at 69 (Gorsuch, J., concurring) ("No apparent reason exists why people may not gather, subject to identical restrictions, in churches or synagogues, especially when religious institutions have made plain that they stand ready, able, and willing to follow all the safety precautions required of 'essential' businesses and perhaps more besides.").

196. *Tandon*, 2021 WL 1328507, at *2.

197. *Cuomo*, 141 S. Ct. at 69 (Gorsuch, J., concurring); *see also* S. Bay United Pentocoastal Church v. Newsom, 141 S. Ct. 716, 718–19 (2021) (mem.) (statement of Gorsuch, J.) ("Nor, again, does California explain why the narrower options it thinks adequate in many secular settings—such as social distancing requirements, masks, cleaning, plexiglass barriers, and the like—cannot suffice here. Especially when those measures are in routine use in religious services across the country today.").

198. *Tandon*, 2021 WL 1328507, at *2 (Kagan, J., dissenting).

199. Id.

private settings. As a result, because California treated all in-home gatherings (secular and religious) the same and because in-home and commercial settings were not comparable, the dissent would have upheld California's regulation.

Having reached the opposite conclusion—that in-home and commercial settings are comparable—the majority applied strict scrutiny because the regulation treated religious exercise less favorably than secular counterparts and because the Ninth Circuit had not determined that the permitted commercial gatherings posed a lower risk of transmission than the in-home religious gatherings.[200] Under strict scrutiny, the government has the burden "to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID."[201] Where mask mandates and social distancing address the risk of gatherings in commercial establishments, the government must establish "that the religious exercise at issue is more dangerous than those [secular] activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too."[202] The lower courts did not require California to show that its regulation was narrowly tailored, that less restrictive means "could not address its interest in reducing the spread of COVID."[203] Recall that, for the majority, secular and religious activities are comparable if they pose the same risk of transmission regardless of the reasons people have for coming together. By focusing on the government's interest in protecting health and safety, the majority ensures that the government "cannot 'assume the worst when people go to worship but assume the best when people go to work.'"[204]

Accordingly, whether or not *Smith* is overturned, *Tandon* marks an important shift in the Court's Free Exercise jurisprudence, building on *Lukumi* to expand the situations in which strict scrutiny will apply to free exercise challenges.[205] The *Tandon* majority's broad reading of comparability—and correspondingly narrower interpretation of neutrality—reinforces *Bostock*'s recognition that free exercise lies at "the heart of our pluralistic society."

200. *Id.* at *1–2 (per curiam).

201. *Id.* at *1.

202. Id.

203. Id.

204. *Id.* at *2 (quoting Roberts v. Neace, 958 F.3d 409, 414 (6th Cir. 2020) (per curiam)).

205. In *Tandon*, the majority also explained that the government may not automatically moot a case by "withdraw[ing] or modif[ying] a COVID restriction in the course of litigation." *Id.* at *1. Provided that the case is not moot, a religious claimant "remain[s] entitled to such [emergency injunctive] relief where the applicants 'remain under a constant threat' that government officials will use their power to reinstate the challenged restrictions." *Id.* (quoting Roman Catholic Diocese v. Cuomo, 141 S. Ct. 63, 68 (2020) (per curiam)).

Neutrality on this view requires the government to treat religious exercise at least as well as any and all comparable secular activities. Given that many laws and regulations contain one or more exemptions, *Tandon* is likely to subject a wider variety of regulations across the country, expanding the ability of religious practitioners to secure strict scrutiny review of their free exercise challenges.

Whether the Court will overturn *Smith* remains an important question, however. A regulation that is neutral and generally applicable as defined in *Tandon* (e.g., a public accommodations law that does not provide any exemptions, secular or religious) still might impose significant burdens on religious exercise.[206] In such circumstances, does the Free Exercise Clause require the government to satisfy only a deferential form of rational basis—what one might call the "giggle test" under which any non-laughable reason, even one supplied *ex post*, is sufficient? Or should laws that substantially burden religious exercise trigger strict scrutiny regardless whether some other constitutional provision might protect the religious practitioner? Put differently, should an anti-discrimination law, such as the Colorado Anti-Discrimination Act, be subject to strict scrutiny if it substantially burdens Jack Phillips's ability to live his faith through his professional life and even assuming that custom designed wedding cakes are not expressive under the Free Speech Clause?[207]

If *Fulton* answers these questions in the affirmative, it will mark one of the biggest shifts in the Court's Free Exercise jurisprudence in three decades. But it will rest on the broader understanding of free exercise (and the correspondingly narrower view of neutrality) that the Court has articulated in *Tandon*, *Espinoza v. Montana Department of Revenue*, and *Our Lady of Guadalupe School v. Morrissey-Berru*. These cases suggest that the Free Exercise Clause requires the Court to remain watchful, ensuring that the government does not discriminate against religion and its exercise. This is apparent in *Tandon* and the other COVID restriction cases discussed above as well as in *Espinoza v. Montana Department of Revenue*, where the Court held that a state constitutional provision prohibiting religious schools from participating in a school-choice student aid program violated the Free Exercise Clause. Article X, § 6 of the Montana Constitution stated that

206. See, e.g., Scott W. Gaylord, RFRA Rights Revisited: Substantial Burdens, Judicial Competence, and the Religious Nonprofit Cases, 81 MO. L. REV. 655, 705–06, 713–14 (2016).

207. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018).

> [t]he legislature . . . shall not make any direct or indirect appropriation or payment from any public fund or monies . . . for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.[208]

The Court focused on the tension between the no-aid provision and the Free Exercise Clause, which "protects . . . against unequal treatment" and against "laws that impose special disabilities on the basis of religious status."[209] The Montana constitutional provision violated these principles by putting religious groups to an impermissible choice—remain religious and forego participating in the student aid program that was available to everyone else or give up their religious identity and participate in the program.[210] The Court concluded that such a requirement was "odious to our Constitution" because it "disqualif[ied] otherwise eligible recipients from a public benefit 'solely because of their religious character.'"[211] Viewed through the lens of *Tandon*, Missouri "treat[ed] . . . comparable secular [schools] more favorably than religious exercise," thereby "trigger[ing] strict scrutiny under the Free exercise Clause."[212]

In *Our Lady of Guadalupe School v. Morrissey-Berru*, the Court, in a 7–2 decision, confirmed what it had suggested in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*—that the ministerial exception encompasses the right of religious groups to select those, like teachers at religious schools, who instruct and pass on the faith to children: "[I]mplicit in our decision in *Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school."[213] And this is true regardless of the title of the teacher, the level of specialized training required for the position, and the other secular functions that the teacher performs.[214] "What matters, at bottom," the Court instructed,

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208. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2252 (2020).

209. *Id.* at 2254 (quoting *Trinity Lutheran*, 137 S. Ct. at 2021).

210. *Id.* at 2256 (quoting *Trinity Lutheran*, 137 S. Ct. at 2021–22) ("To be eligible for government aid under the Montana Constitution, a school must divorce itself from any religious control or affiliation. Placing such a condition on benefits or privileges 'inevitably deters or discourages the exercise of First Amendment rights.'").

211. *Id.* at 2255 (citation omitted).

212. Tandon v. Newsom, No. 20A151, 2021 WL 1328507, at *1 (Apr. 9, 2021) (per curiam).

213. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2064 (2020).

214. *Id.* at 2064–66.

"is what an employee does."[215] If her duties include teaching the faith, the Free Exercise Clause leaves the employment decision to the organization even though those decisions might conflict with nondiscrimination laws like the Americans with Disabilities Act and the Age Discrimination in Employment Act. Furthermore, the Roberts Court extended statutory protections for religious freedom in *Little Sisters of the Poor v. Pennsylvania*, taking it to be "beyond dispute" that RFRA "applies to all Federal law, and the implementation of that law."[216] When formulating regulations on the scope of the contraceptive mandate, the Court held that the federal agency should have considered the free exercise protection mandated under RFRA.[217]

The Court's recent free exercise cases, therefore, continue the trend of broadening free exercise protection to safeguard religious minorities, who, under *Smith*, lack adequate protection from legislative and executive agency majorities. At the same time, requiring government neutrality (which, under *Tandon*, involves treating religious exercise at least as well as secular activities) promotes respect and tolerance amid our Nation's deep-seated ideological, political, social, and religious differences. If there is room for different views—and a built-in respect for those on all sides of the resulting disagreements—then everyone can coexist and pursue their sincerely held beliefs on important issues of the day, such as sex, marriage, and abortion, without fear of governmental reprisal or punishment. In this way, free exercise works in conjunction with the Establishment Clause to preserve "a society in which people of all beliefs can live together harmoniously."[218]

B. American Legion *Narrows the Establishment Clause to Mandate Neutrality Between Religions, Thereby Allowing the Government to Accommodate Religion More Readily*

As Madison explained in Federalist No. 10, religious factions not only can undermine "the rights of other citizens" (by passing legislation or adopting policies that restrict the free exercise of religious minorities), but also can harm "the permanent and aggregate interests of the community"[219] by generating the types of division and social discord that threaten the public good, which "is

215. *Id.* at 2064.

216. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2383 (2020) (quoting 42 U.S.C. § 2000bb-3(a)).

217. *Id.* ("Moreover, our decisions all but instructed the Departments to consider RFRA going forward.").

218. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074 (2019).

219. *See* THE FEDERALIST NO. 10, *supra* note 20, at 78 (James Madison).

the supreme object to be pursued" by government.[220] The Establishment Clause was meant (at a minimum) to limit the ability of religious factions to establish a national church and impose their teachings on others. Following *Everson*, though, the Court fractured over what else the Establishment Clause meant and what standard best enforced its requirements. The broader the scope of "neutrality," the more judicial monitoring was needed. The narrower its commands, a wider range of church-state interactions were permissible. *Lemon*, the endorsement test, history and tradition, and non-coercion all attempted to encapsulate the demands of the Establishment Clause. And as discussed above, these differing tests led to inconsistency and uncertainty regarding which test to apply in which situations and how to apply a given test. The ongoing debates and criticisms came to a head in *American Legion*, a case involving a cross memorial dedicated to soldiers who gave their lives in service to their country in World War I. The case spawned seven decisions among the nine Justices and touched on no fewer than six different Establishment Clause tests. Yet out of the myriad opinions, a majority of the Court coalesced around at least two important propositions—that *Lemon* no longer applied to longstanding religious monuments, symbols, and practices and that, as history and tradition demonstrated, the Establishment Clause required neutrality only between and among religions. Of course, given that *American Legion* consisted of the majority opinion and five concurrences, the application of these propositions still may not be entirely clear. And it, therefore, remains possible that *Lemon*, which now has been "killed and buried" under the weight of our Nation's historical practices and traditions, may at some point "sit[] up in its grave and shuffle[] abroad . . . stalk[ing the Court's] Establishment Clause jurisprudence once again."[221]

1. American Legion *Embraces a History and Tradition Test for Establishment Clause Cases That Requires Neutrality Only Between and Among Religions and That is Likely to Apply Outside the Context of Longstanding Monuments, Symbols, and Practices*

Against the backdrop of the ongoing dispute among the Justices over the scope of neutrality required under the Establishment Clause, Justice Breyer introduced a new wrinkle into the analysis, one that reverberates throughout *American Legion*. In 2005, shortly before Chief Justice Roberts joined the

220. THE FEDERALIST NO. 45, *supra* note 20, at 286 (James Madison).

221. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment).

Court, Justice Breyer introduced another, related test—the divisiveness test. The majority and plurality opinion cites to Justice Breyer's opinion in *Van Orden* at least seven times, causing the reader to wonder how the concern with division fits within the larger debate over the history and meaning of the Establishment Clause. As it turns out, Justice Breyer's divisiveness test harkens back to *Everson*'s concern with religious strife, which is antithetical to society's "aggregate interests." According to Justice Breyer, the Religion Clauses "seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike."[222] On this view, the dual protections of religion in the First Amendment reflected "an understanding, reached in the 17th century after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens, permits those citizens to 'worship God in their own way,' and allows all families to 'teach their children and to form their characters' as they wish."[223] To achieve this end—"an American Nation free of the religious strife that had long plagued the nations of Europe"[224]—required the "separation of church and state" that would enable "the 'spirit of religion' and the 'spirit of freedom' [to be] productively 'united,' 'reign[ing] together' but in separate spheres 'on the same soil.'"[225] The separation of the religious (church) and secular (state) need not be complete given the "national traditions" of certain religious expression in the public square,[226] but religious expression by the government is precluded if it "would . . . tend to promote the kind of social conflict the Establishment Clause seeks to avoid."[227] Divisiveness brings together *Everson*'s concern with religious turmoil and *Zorach*'s reliance on religious traditions into a fact-intensive test that requires the Court to maintain "separation, but not . . . mutual hostility and suspicion"

222. Van Orden v. Perry, 545 U.S. 677, 698 (2005) (Breyer, J., concurring in the judgment).

223. Zelman v. Simmons-Harris, 536 U.S. 639, 718 (2002) (Breyer, J., dissenting) (quoting CYRIL RADCLIFFE, THE LAW AND ITS COMPASS 71 (1960)).

224. *Id.*; *see also* Paul A. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969) (describing how religious strife was "one of the principal evils that the first amendment sought to forestall"); BARRY A. KOSMIN & SEYMOUR P. LACHMAN, ONE NATION UNDER GOD: RELIGION IN CONTEMPORARY AMERICAN SOCIETY 24 (1993) (noting that the First Amendment was designed "[i]n part to prevent the religious wars of Europe from entering the United States").

225. *Van Orden*, 545 U.S. at 698 (Breyer, J., concurring in the judgment) (second alteration in original) (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 282–83 (Harvey C. Mansfield & Delba Winthrop trans. & eds., Univ. of Chi. Press 2000) (1835)).

226. Justice Breyer contends that his divisiveness test, unlike many of the Court's other Establishment Clause tests, is consistent with the Court's upholding legislative prayer, invocations of and references to God by public officials in public settings, religious references on coins and buildings, and recognition in various forms of religious holidays. *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment).

227. *Id.*

between government and religion through "the exercise of legal judgment."[228] Each case must be analyzed "in light of the basic purposes" of the Free Exercise and Establishment Clauses, "assuring religious liberty and tolerance for all, avoiding religiously based social conflict, and maintaining that separation of church and state that allows each to flourish in its 'separate sphere[].'"[229]

The passage of time—what one might call a temporal tape measure—bears directly on Justice Breyer's analysis. The fact that a religious monument, practice, or symbol has been around for some lengthy (but unspecified) period of time without being challenged "gives rise to a strong presumption of constitutionality"[230] for at least two reasons. First, as more days, months, and years pass without legal challenge from when the religious monument, symbol, or practice started, the inference that the particular religious expression has not caused discord strengthens: "the Cross has stood on the same land for 94 years, generating no controversy in the community until this lawsuit was filed."[231] Justice Breyer makes the point more directly in *Van Orden* where the Ten Commandments monument stood on the Texas Capitol grounds for forty years before any legal objection was raised:

> Hence, those 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to "engage in" any "religious practic[e]," to "compel" any "religious practice[e]," or to "work deterrence" of any "religious belief." Those 40 years suggest that the public visiting the capitol grounds has considered the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of a cultural heritage.[232]

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228. *Id.* at 700.

229. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2091 (2019) (Breyer, J., concurring) (quoting *Van Orden*, 545 U.S. at 698).

230. *Id.* at 2085 (majority opinion).

231. *Id.* at 2091 (Breyer, J., concurring).

232. *Van Orden*, 545 U.S. at 702–03 (Breyer, J., concurring in the judgment) (alteration in original) (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 305 (Goldberg, J., concurring)).

Of course, if the delay in challenging the government's facially religious speech "was due to a climate of intimidation,"[233] then Breyer would be apt to reach a different outcome because that situation would not be a "borderline case;" if the government coerced or intimidated objectors, then it likely would violate other Establishment Clause tests.[234]

Second, requiring the government to remove a monument that has stood unchallenged for a sufficiently long period of time would demonstrate hostility instead of neutrality toward religion: "[O]rdering [the Cross's] removal or alteration at this late date would signal 'a hostility toward religion that has no place in our Establishment Clause traditions.'"[235] Or as Justice Breyer put the point in *Van Orden*:

> [T]o reach a contrary conclusion here, based primarily on the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.[236]

If the temporal tape measure shows that there is enough distance—enough calendar pages have been turned—between the start of the religious expression and the legal challenge, then the presumption of constitutionality adheres. But if the challenge is close in time to the government's initial use of the religious monument, symbol, or practice, then Breyer contends that the Establishment Clause analysis would turn out differently: "[I]n today's world, in a Nation of so many different religious and comparable nonreligious fundamental beliefs, a more contemporary state effort to focus attention upon a religious text is certainly likely to prove divisive in a way that this longstanding, pre-existing

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233. *Id.* at 702; *see also Am. Legion*, 139 S. Ct. at 2091 (Breyer, J., concurring) (noting that "[n]othing in the record suggests that the lack of public outcry 'was due to a climate of intimidation'") (citation to his *Van Orden* concurrence omitted); *id.* ("The case would be different, in my view, if there were evidence that the organizers had 'deliberately disrespected' members of minority faiths . . . .").

234. *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in the judgment). If other Establishment Clause tests apply and lead to a specific result in a given case, then Justice Breyer does not invoke and apply his divisiveness test. *Id.* (joining the majority in finding a primary religious purpose and explaining that in other "fact-intensive cases," "the Court's prior tests provide useful guideposts" but "no exact formula [that] can dictate a resolution").

235. *Am. Legion*, 139 S. Ct. at 2091 (Breyer, J., concurring) (quoting *Van Orden*, 545 U.S. at 704).

236. *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in the judgment).

monument has not."[237] Given the increased number of religious sects as well as the growing diversity of "comparable nonreligious fundamental beliefs," religious expression in the public sphere threatens to undermine, what Justice Breyer identifies as, the main purposes of the Religion Clauses—"assuring religious liberty and tolerance for all, avoiding religiously based social conflict, and maintaining that separation of church and state that allows each to flourish in its 'separate spher[e].'"[238]

The main opinion in *American Legion* cites Breyer's *Van Orden* concurrence multiple times, indicating agreement with certain aspects of his divisiveness analysis. A majority of the Court confirms "that retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones."[239] Justice Breyer highlighted this point in his concurrence: "if the Cross had been erected only recently, rather than in the aftermath of World War I[,]" "[t]he case would be different."[240] The majority also acknowledges that the removal of longstanding religious monuments and practices would demonstrate hostility, not neutrality, toward religion and foment the division along religious lines that the Establishment Clause is meant to avoid: "A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion."[241] And the plurality agreed with Justice Breyer that *Lemon* was unable to account for "the Establishment Clause's tolerance" of legislative prayers, references to the Divine in the public sphere by public officials, religious references on the currency and government buildings, and the government's recognition of the religious components of certain holidays—

237. *Id.* at 703.

238. *Am. Legion*, 139 S. Ct. at 2091 (Breyer, J., concurring) (alteration in original); *see also* Zelman v. Simmons-Harris, 536 U.S. 639, 719–20 (2002) (Breyer, J., dissenting) ("When it decided these 20th–century Establishment Clause cases, the Court did not deny that an earlier American society might have found a less clear-cut church/state separation compatible with social tranquility. Indeed, historians point out that during the early years of the Republic, American schools—including the first public schools—were Protestant in character. Their students recited Protestant prayers, read the King James version of the Bible, and learned Protestant religious ideals. Those practices may have wrongly discriminated against members of minority religions, but given the small number of such individuals, the teaching of Protestant religions in schools did not threaten serious social conflict. The 20th–century Court was fully aware, however, that immigration and growth had changed American society dramatically since its early years.").

239. *Am. Legion*, 139 S. Ct. at 2085 (majority opinion).

240. *Id.* at 2091 (Breyer, J., concurring).

241. *Id.* at 2084–85; *see also id.* at 2074 (majority opinion) (quoting *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in the judgment)) (explaining that the Cross's "removal or radical alteration at this date would be seen by many not as a neutral act but as the manifestation of 'a hostility toward religion that has no place in our Establishment Clause traditions'").

which led the plurality to reject *Lemon* in the context of longstanding monuments, symbols, and practices.[242] Consequently, the majority in *American Legion* confirms that divisiveness is one component that the Court can use in its Establishment Clause analysis.

But five Justices in *American Legion* distanced themselves from Justice Breyer's divisiveness analysis in key ways. In their various opinions,[243] Chief Justice Roberts and Justices Alito, Kavanaugh, Thomas, and Gorsuch articulated a narrower conception of the Establishment Clause, one that did not require neutrality between religion and nonreligion. Diverging from Justice Breyer, these Justices did not focus on "nonreligious fundamental beliefs" and did not suggest, let alone require, that government and religion be restricted to "separate spheres." In fact, in his concurrence, Justice Breyer expressly disavowed, any specific "history and tradition test," arguing that history should provide "guidance" when evaluating the constitutionality of a longstanding monument, symbol, or practice but "only after considering its particular historical context and its long-held place in the community."[244] Whereas Justice Breyer doubted that "[a] newer memorial, erected under different circumstances, would . . . necessarily be permissible under this approach,"[245] these five Justices stopped well short of taking either the divisiveness test or Breyer's "exercise of legal judgment" to be dispositive.[246] Instead, Justice Alito and the Chief Justice advocated for "a more modest approach" than *Lemon*'s "grand unified theory of the Establishment Clause," one "that focuses on the particular issue at hand and looks to history for guidance."[247] The plurality took the Court's prayer cases, *Marsh* and *Town of*

242. *Id.* at 2080–81 (plurality opinion) (quoting *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment)). Given that Justices Thomas and Gorsuch rejected the *Lemon* test generally, a majority of the Court (The Chief Justice and Justices Breyer, Thomas, Alito, Gorsuch, and Kavanaugh) have now concluded that *Lemon* does not apply to longstanding religious monuments, symbols, and practices. *Id.* at 2087–88 (plurality opinion), *id.* at 2092 (Kavanaugh, J., concurring), *id.* at 2097 (Thomas, J., concurring in the judgment), *id.* at 2102 (Gorsuch, J., concurring in the judgment).

243. Justice Alito wrote the majority and plurality opinions, which Chief Justice Roberts joined. Justice Kavanaugh joined the majority and plurality but also wrote separately to clarify his views on *Lemon* and the appropriate Establishment Clause test. Justices Thomas and Gorsuch wrote separate opinions concurring in the judgment.

244. *Am. Legion*, 139 S. Ct. at 2091 (Breyer, J., concurring).

245. *Id.*; *see also Van Orden*, 545 U.S. at 703 (Breyer, J., concurring in the judgment) (explaining that, given the greater array of religious views in our Nation, a newer monument is "likely to prove divisive in a way that [a] longstanding, pre-existing monument [would] not").

246. *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring in the judgment).

247. *Am. Legion*, 139 S. Ct. at 2087 (plurality opinion). Justice Kavanaugh joins this section of *American Legion* but, as discussed below, makes it clear in his separate concurrence that history and

Greece to illustrate how history should guide the Court's Establishment Clause analysis:

> [*Marsh*] teach[es] . . . that the Establishment Clause *must* be interpreted "by reference to historical practices and understandings" and that the decision of the First Congress to "provid[e] for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society."[248]

At the time of the founding, the practice of starting legislative sessions with prayer was "new," but the practice was constitutional because such prayers did not constitute an establishment of religion. The historical practice demonstrated that the Founders viewed prayer as an important but "benign acknowledgment of religion's role in society."[249] That is, the Founders' actions revealed the meaning of the Establishment Clause: "[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to [contemporaneous] practice[s]."[250] Moreover, the fact that American society at the founding "was much more religiously homogeneous than ours today" was not dispositive for Justice Alito and Chief Justice Roberts.[251] After all, as the plurality recognized, even though the Nation "was overwhelmingly Christian and Protestant, there was considerable friction between Protestant denominations,"[252] perhaps much more discord than today given the violent and bloody history detailed in *Everson*, *Schempp*, and *Allegheny*. That the Nation had become more pluralistic did not render the Town of Greece's prayer practice, which started in 1999, unconstitutional; rather, "what mattered was that the town's practice 'fi[t] within the tradition long followed in Congress and the state legislatures.'"[253] Stated differently,

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tradition provide a separate basis—not just guidance—for upholding the constitutionality of religious monuments, symbols, and practices (provided there is no coercion).

248. *Id.* at 2087 (third alteration in original) (emphasis added) (quoting *Town of Greece*, 572 U.S. at 576).

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

250. Marsh v. Chambers, 463 U.S. 783, 790 (1983); *see also* Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (explaining that the Establishment Clause should be interpreted to "compor[t] with what history reveals was the contemporaneous understanding of its guarantees").

251. *Id.* at 2088.

252. *Id.*

253. *Am. Legion*, 139 S. Ct. at 2088–89 (alteration in original) (quoting *Town of Greece*, 572 U.S. at 577).

Justice Alito and Chief Justice Roberts seem unwilling to take the religious pluralism, which our nation's history and traditions have fostered, to render longstanding (or even more recent) religious displays and practices that share in that history and tradition unconstitutional: "Where categories of monuments, symbols, and practices with a longstanding history follow in that tradition, they are likewise constitutional."[254] Although the Court states that "retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones,"[255] it does not hold that new religiously expressive monuments are presumptively unconstitutional or that local, state, and federal governments are precluded from engaging in facially religious expression only if their forebearers did so. Instead, the Chief Justice and Justice Alito indicate that any practice that advances the principles embodied in legislative prayer "respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans"—are constitutional.[256]

Justice Kavanaugh joins the *American Legion* opinion in full and, therefore, agrees with the plurality's views. But contrary to Justice Breyer, Justice Kavanaugh expressly states that "the Court today applies a history and tradition test in examining and upholding the constitutionality of the Bladensburg Cross."[257] In place of *Lemon* and presumably the endorsement test, Justice Kavanaugh distills the Court's various Establishment Clause cases down "to an overarching set of principles."[258] These principles demonstrate that the Establishment Clause is not violated:

> If the challenged government practice is not coercive *and* if it (i) is rooted in history and tradition; or (ii) treats religious people, organizations, speech, or activity equally to comparable secular people, organizations, speech, or

254. *Id.* at 2089.

255. *Id.* at 2085.

256. *Id.* at 2089. As discussed above, Justice Breyer disavows this position in his concurrence. As discussed below, Justice Kavanaugh's multifactor test is consistent with this position, and Justices Gorsuch and Thomas adopt a history and tradition test.

257. *Id.* at 2092; *see also id.* at 2091 (Breyer, J., concurring) (denying Justice Kavanaugh's and Justice Gorsuch's claims that the Court effectively "adopt[ed] a 'history and tradition test' that would permit any newly constructed religious memorial on public land").

258. *Id.* at 2093 (Kavanaugh, J., concurring).

> activity; or (iii) represents a permissible legislative accommodation or exemption from a generally applicable law . . . .[259]

Accordingly, the Bladensburg Cross is an easy case for Justice Kavanaugh. The Cross is constitutional because "[t]he practice of displaying religious memorials, particularly religious war memorials, on public land is not coercive and is rooted in history and tradition."[260] The Cross is not coercive (because passive symbols do not force anyone to do anything), and there is a well-established tradition of employing religious images in monuments and memorials. Thus, the Cross is constitutional.

Justice Thomas takes the first conjunct of Justice Kavanaugh's set of principles to be determinative and, consequently, does not reach the history and tradition issue. For Justice Thomas, "actual legal coercion" is the hallmark, "[t]he *sine qua non* of an establishment of religion."[261] And such legal coercion involves "coercion of religious orthodoxy and of financial support by force of law and threat of penalty."[262] History and tradition enter the analysis to illuminate the meaning of the Establishment Clause at the time of its adoption: "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."[263] The plaintiff in *American Legion* could not make the requisite showing because "[t]he local commission has not attempted to control religious doctrine or personnel, compel religious observance, single out a particular religious denomination for exclusive state subsidization, or punish dissenting worship."[264] Rather, all the commission did was "display[] a religious symbol on government property," a passive symbol that comports with the variety of religious expression in which the Founders engaged.[265]

For his part, Justice Gorsuch agrees that religious monuments, symbols, and practices that comport with our Nation's history and traditions are

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259. *Id*. Justice Kavanaugh views this "overarching set of principles" as providing a "safe harbor" for government actions falling within these categories. *Id.* Government actions or practices falling outside this safe harbor "must be analyzed under the relevant Establishment Clause principles and precedents." *Id.* at n.*.

260. *Id.* at 2093.

261. *Id.* at 2096 (Thomas, J., concurring in the judgment).

262. *Id.* (quoting Lee v. Weisman, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting)).

263. *Id.*

264. *Id.*

265. *Id.* ("[T]he commission has done something that the founding generation, as well as the generation that ratified the Fourteenth Amendment, would have found commonplace . . . .").

constitutional.[266] What he is concerned about is the plurality's suggestion that such constitutionality might somehow depend on how long the religious expression has been in the public sphere—on the application of Justice Breyer's temporal tape measure. To qualify for *American Legion*'s presumption of constitutionality, a religiously expressive monument must have been around for a sufficient number of days, months, and years. But how many are sufficient? Justice Gorsuch surmises that "94 years is enough" but wonders whether "the Star of David monument erected in South Carolina in 2001 to commemorate victims of the Holocaust, or the cross that marines in California placed in 2004 to honor their comrades who fell during the War on Terror" would qualify for the presumption.[267] The uncertainty regarding the proper amount of time introduces the same ambiguity and threat of inconsistency that plagued *Lemon*. To see why, consider the similarities between the temporal tape measure and the Sorites paradox, which is sometimes referred to as the paradox of the heap (from the Greek word "soros," meaning "pile" or "heap"). If one grain of sand does not constitute a heap, then two do not; if two do not, then three do not; and so on until we reach the point where a million (or other large number of) grains do not. And, of course, the puzzle also runs in the other direction: take one grain of sand away from a heap, and you still have a heap; take another grain away, and the heap remains; and keep going until a heap of one grain remains. But this leads to an absurdity—that any number of grains constitutes a heap and that no number of grains makes a heap.

Age, in the context of longstanding or old monuments, provides the same type of vague guideline and, not surprisingly leads to the same "absurd" result. If a ninety-four-year-old monument is old enough for the Court's presumption of constitutionality, then a ninety-three-year-old monument is, if a ninety-two-year-old monument is, then so is one that is ninety-one; and keep taking away a year until a new monument qualifies for the presumption. Of course, if one runs the temporal tape measure in the other direction, then if a one-year-old monument is not a longstanding monument, then a two-year-old monument is not, if a two-year-old monument is not, then neither is a monument erected three years ago; and no matter how many years you add, the monument does not qualify for the presumption. Thus, a monument that has stood for any number of years is longstanding, and a monument is never longstanding no matter how long it has been around. The reasoning at each step seems (and is)

266. *Id.* at 2102 (Gorsuch, J., concurring in the judgment) ("I agree . . . that the monument before us is constitutional in light of the nation's traditions.").

267. *Id.*

sound, but the chain of reasoning results in a contradiction. And given that anything follows from a contradiction, such a temporal measure is apt to lead to inconsistent results as courts struggle to place religious monuments, symbols, and practices on the vague continuum (from new to longstanding). As Justice Gorsuch and the plurality explain, though, these were some of the central problems with *Lemon*, which devolved into a "'jurisprudence of minutiae' that leaves [government officials] to rely on 'little more than intuition and a tape measure' to ensure the constitutionality of public holiday displays."[268] This, in turn, led to a "'doctrine . . . in such chaos' that lower courts have been 'free to reach almost any result in almost any case.'"[269]

In *Hosanna-Tabor*, the Court considered—and rejected—a similar temporal standard when deciding whether an employee was a "minister" under the ministerial exception. Whereas the EEOC and the Sixth Circuit took "the relative amount of time [the employee] spent performing religious functions as largely determinative," the majority disagreed: "The issue before us, however, is not one that can be resolved by a stopwatch."[270] Instead, the Court looked to the "ageless principles" embodied in the Religion Clauses—"the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments" and "the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions."[271]

Focusing on a temporal measure diverts the Court's attention from what really matters—the timeless meaning of the Religion Clauses—to a subjective and (perhaps) arbitrary determination regarding how long is long enough. The First Amendment analysis should focus on "whether the challenged practice fits 'within the tradition of this country,'"[272] not on how close a religious symbol is to a secular one or how long the challenged monument or activity has been going on. If the challenged government action would not have

268. Skoros v. City of New York, 437 F.3d 1, 15 (2d Cir. 2006) (quoting Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 674–75 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part)).

269. *Am. Legion*, 139 S. Ct. at 2101 (Gorsuch, J., concurring) (quoting Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 119 (1992)); *see, e.g.*, Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 565 U.S. 994, 994–95 (2011) (Thomas, J., dissenting from denial of certiorari) (decrying the Court's rejecting "an opportunity to provide clarity to an Establishment Clause jurisprudence in shambles," a jurisprudence that "has confounded the lower courts and rendered the constitutionality of displays of religious imagery on government property anyone's guess").

270. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 193–94 (2012); *Am. Legion*, 139 S. Ct. at 2102 (Gorsuch, J., concurring).

271. *Id.* at 188–89.

272. *Am. Legion*, 139 S. Ct. at 2102 (Gorsuch, J., concurring in the judgment).

constituted an establishment to those who approved and ultimately ratified the First Amendment, then it is constitutional today and whenever it started:

> [W]hat matters when it comes to assessing a monument, symbol, or practice isn't its age but its compliance with ageless principles. The Constitution's meaning is fixed, not some good-for-this-day-only coupon, and a practice consistent with our nation's traditions is just as permissible whether undertaken today or 94 years ago.[273]

In place of a spatial or temporal measure, Justice Gorsuch advocates for doing what the plurality ultimately did: analyzing a facially religious monument, symbol, or practice "for its consistency with 'historical practices and understanding' under *Marsh* and *Town of Greece*."[274] Although four Justices "blanch at its prospect,"[275] Justice Gorsuch takes this to be the necessary implication of the plurality's rejection of *Lemon* and its reliance on *Marsh* and *Town of Greece*.

A facially religious monument, symbol, or practice either constitutes an establishment of religion or it does not. Intervening events, such as the length of time the government expression has been around, may provide additional reasons for preserving it, but the age itself does not bear on the central question: whether the monument, symbol, or practice is consistent with our Nation's history and traditions. If it is, then the religious expression is only "a benign acknowledgment of religion's role in society."[276] As Justice Kennedy explained in his *County of Allegheny* dissent, "[w]hatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion."[277] If, on the other hand, the religious monument, symbol, or practice "has been exploited to proselytize or advance any one, or to disparage any other, faith or belief," then it violates the neutrality between and among religions that the Establishment Clause requires.[278] But given the well-documented history of the government's engaging in religious expression in the public square, the

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273. *Id.*

274. *Id.*

275. *Id.* (noting that Justices Breyer, Kagan, Ginsburg, and Sotomayor either authored or joined opinions in *American Legion* that rejected a "history and tradition" test).

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

277. Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 543, 670 (1989) (Kennedy, J., concurring in part and dissenting in part).

278. Marsh v. Chambers, 463 U.S. 783, 794–95 (1983).

Establishment Clause does not mandate neutrality between religion and nonreligion.

Although Justice Gorsuch wrote only for himself and Justice Thomas, there appear to be five votes on the Court for a history and tradition test. As discussed above, history and tradition is an express part of Justice Kavanaugh's proposed test, and the line of prayer cases on which the plurality relies rests firmly upon such a historical approach. For example, while Justice Breyer emphasized that the Ten Commandments monument on the Texas Capitol grounds in *Van Orden* had stood unchallenged for 40 years,[279] the plurality did not consider the age of the monument to be a central concern, focusing instead on "the strong role played by religion and religious traditions throughout our Nation's history."[280] In fact, the plurality invoked *Zorach* to support the proposition that the government need not obstruct efforts to increase religion in the public sphere: "[W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."[281] For the plurality, what confirmed the constitutionality of the Texas display was the longstanding history of religious expression by the government generally and the specific tradition that the Ten Commandments "played . . . in our Nation's heritage."[282]

Similarly, in *Marsh*, neither the sixteen years during which Reverend Palmer gave the invocations at the start of Nebraska's legislative sessions nor the 100-year-practice of such prayers in Nebraska were dispositive. Rather, the Court, without nary mention of *Lemon*, grounded the constitutionality of legislative prayer in our Nation's history and tradition:

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the

279. Van Orden v. Perry, 545 U.S. 677, 702 (2005) (Breyer, J., concurring in the judgment) (taking the fact that "40 years passed in which the presence of this monument, legally speaking, went unchallenged" to be "determinative here").

280. *Id.* at 683 (plurality opinion).

281. Zorach v. Clauson, 343 U.S. 306, 314 (1952) (quoting *Van Orden*, 545 U.S. at 684).

282. *Van Orden*, 545 U.S. at 688.

> people of this country. As Justice Douglas observed, "[w]e are a religious people whose institutions presuppose a Supreme Being."[283]

Furthermore, the displays challenged in *County of Allegheny* had been in place only four to five years before the lawsuit was filed, but the dissenters, whose opinion the *Town of Greece* majority cites, did not take the age of the displays to be relevant, let alone dispositive. Instead, the dissenters explained "that the meaning of the [Establishment] Clause is to be determined by reference to historical practices and understandings" and that the Establishment Clause must be interpreted to "permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion."[284] And the majority in *Town of Greece* did the same thing, taking *Marsh* to "teach[] . . . that the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'"[285] After all, the constitutionality of the prayer policy that the Town of Greece initiated in 1999 was predicated not on the age of this particular practice but on its being "a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change."[286] Regardless of their start date, the prayers were constitutional because they "fit[] within the tradition long followed in Congress and the state legislatures," a tradition that "our history and tradition have shown . . . could 'coexis[t] with the principles of disestablishment and religious freedom.'"[287]

Thus, if Justice Gorsuch is correct that *Marsh* and *Town of Greece* now provide the proper lens through which to adjudge the constitutionality of *all* religiously expressive monuments, symbols, and practices, then the age of the specific governmental expression—"[w]hether . . . old or new"—does not matter.[288] If the monument, symbol, or practice "fits 'within the tradition' of

283. *Marsh*, 463 U.S. at 792 (alteration in original) (quoting *Zorach*, 343 U.S. at 313).

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

285. Town of Greece v. Galloway, 572 U.S. 565, 576 (2014) (quoting *Cnty. of Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in part and dissenting in part)).

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

287. *Town of Greece*, 572 U.S. at 577–78 (second alteration in original) (quoting *Marsh*, 463 U.S. at 786).

288. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2101 (2019) (Gorsuch, J., concurring in the judgment). In *Jaffree*, Justice Rehnquist concluded that "[h]istory must judge whether it was the Father of his Country in 1789, or a majority of the Court today, which has strayed from the meaning of the

this country"[289] (i.e., comports with our Nation's history and traditions), then it is constitutional today as well as when it was started: "what matters when it comes to assessing a monument, symbol, or practice isn't its age but its compliance with ageless principles."[290] A temporal standard for facially religious government expression would set up a perverse race against the clock—encouraging would-be plaintiffs to challenge the monument, symbol, or practice before too much time passes—to preclude the Court's newly fashioned presumption of constitutionality from attaching[291] and to illustrate the alleged divisiveness of the government's expression.[292] If one objection is insufficient ninety-four (*American Legion*) or forty (*Van Orden*) years after the fact, why should one objection (or two or three) closer in time be sufficient to invalidate a practice or tradition that, if given a few more years, would qualify for a presumption of constitutionality? As Justice Gorsuch points out, the challenged action either is or is not constitutional, and the duration of the government's speech does not address *that* issue.

Moreover, there may be many people who are offended by or disagree with the religiosity of the monument, symbol, or practice at issue in a particular case: "In a large and diverse country, offense can be easily found. Really, most every governmental action probably offends *somebody*."[293] But the speech and Religion Clauses of the First Amendment do not equip an

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Establishment Clause." Wallace v. Jaffree, 472 U.S. 38, 113 (Rehnquist, J., dissenting). If Justice Gorsuch is correct, then the current Court has sided with President Washington and now takes the Establishment Clause to allow, among other things, "public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God." *Id.* (quoting 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, 64, 64 (1897)).

289. *Am. Legion*, 139 S. Ct. at 2102 (Gorsuch, J., concurring in the judgment) (quoting *Town of Greece*, 572 U.S. at 577).

290. *Id.*

291. *See, e.g.*, *id.* (wondering "where exactly in the Constitution does this presumption come from" and noting that "[t]he plurality does not say, nor does it even explain what work its presumption does").

292. *See, e.g.*, *id.* at 2091 (Breyer, J., concurring) ("[T]he Cross has stood on the same land for 94 years, generating no controversy in the community until this lawsuit was filed."); Van Orden v. Perry, 545 U.S. 677, 702 (2005) (Breyer, J., concurring) (taking the fact that "40 years passed in which the presence of this monument, legally speaking, went unchallenged" as "determinative here").

293. *Am. Legion*, 139 S. Ct. at 2103 (Gorsuch, J., concurring in the judgment). In *Marsh*, Justice Brennan's dissent argued that "[t]he controversy between Senator Chambers and his colleagues" had led to excessive entanglement, "split[ting] the Nebraska Legislature precisely on issues of religion and religious conformity." Marsh v. Chambers, 463 U.S. 783, 799–800 (1983) (Brennan, J., dissenting). Such disagreement or offense did not make out an Establishment Clause violation in *Marsh* or *American Legion.*

offended viewer with a heckler's veto;[294] rather, the First Amendment insulates speech, including the government's noncoercive forms of religious expression, from the veto power of majority and minority factions to promote the virtues discussed above, "mutual respect, tolerance, self-rule, and democratic responsibility."[295] Thus, "an 'offended viewer' may 'avert his eyes' or pursue a political solution,"[296] but he may not object to a practice and in doing so preclude that practice simply because he is offended or has different religious beliefs.[297] As the dissent explained in *County of Allegheny* with respect to religious holiday displays, "[p]assersby who disagree with the message conveyed by these [crèche and menorah] displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech."[298] By itself, speech—whether secular or religious—does not force the listener to do anything: "The Framers were indeed opposed to coercion of religious worship by the national Government; but, as their own sponsorship of nonsectarian prayer in public events demonstrates, they understood that '[s]peech is not coercive; the listener may do as he likes.'"[299] The government speech doctrine confirms that the government "is entitled to say what it wishes"[300] and "to select the views that it wants to express"[301] provided its speech does not contravene other

294. *See* Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 134–35 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation. . . . Speech cannot be . . . punished or banned, simply because it might offend a hostile mob."); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 119 (2001) ("We decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive."); Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 779–80 (1995) (O'Connor, J., concurring in part and concurring in the judgment) ("[B]ecause our concern is with the political community writ large, the endorsement inquiry is *not about the perceptions of particular individuals* or saving isolated nonadherents from . . . discomfort.") (emphasis added) (citations omitted); Bible Believers v. Wayne Cnty., 805 F.3d 228, 252 (6th Cir. 2015) ("Simply stated, the First Amendment does not permit a heckler's veto.").

295. *Am. Legion*, 139 S. Ct. at 2103 (Gorsuch, J., concurring in the judgment).

296. *Id.* (quoting Erznoznik v. Jacksonville, 422 U.S. 205, 212 (1975)).

297. *See, e.g.*, McCreary Cnty. v. ACLU of Kentucky, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting) ("With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.").

298. Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 664 (1989) (Kennedy, J., concurring in part and dissenting in part).

299. Lee v. Weisman, 505 U.S. 577, 642 (1992) (Scalia, J., dissenting) (citation omitted).

300. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

301. Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009) (discussing government speech in the context of a Ten Commandments monument); *see also* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550,

constitutional protections such as the Establishment Clause.[302] "Indeed, it is not easy to imagine how government could function if it lacked this freedom."[303] But facially religious government speech that comports with the history and tradition of religion in the public square and does not proselytize or disparage other sects is constitutional.[304]

One other point bears mentioning. The Court's reliance on history and tradition as the Establishment Clause guide undermines the use of the reasonable observer test. The way in which individuals, no matter how reasonable, interpret a monument, symbol, or practice does not tell us what the Establishment Clause meant at the founding. As the widespread use of religious symbols and practices confirms, the Establishment Clause does not require neutrality between religion and nonreligion. As a result, the endorsement test's reliance on a "reasonable observer" is misplaced. After all, a nonreligious individual might understandably believe that legislative prayer, Thanksgiving proclamations, national days of prayer, "In God We Trust" on the currency, Ten Commandments images in monuments and on government buildings, and a host of other religious expression send a message that the government favors religion or gives it special solicitude. Whether that practice is constitutional, however, depends on the meaning of the Establishment Clause, not an observer's affront at religion in the public square: "Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."[305] Instead, history and tradition reveal the contemporaneous meaning of that Clause and provide a more objective measure of constitutionality than a judge's assessment of the hypothetical and mythical reasonable observer, who must consider the

574 (2005) (Souter, J., dissenting) ("To govern, government has to say something, and a First Amendment heckler's veto of any forced contribution to raising the government's voice in the 'marketplace of ideas' would be out of the question.").

302. In *Pleasant Grove City*, Justice Scalia noted in his concurrence that the Ten Commandments monument in the park did not violate the Establishment Clause based on *Van Orden*, in which a plurality held that "the Ten Commandments 'have an undeniable historical meaning' in addition to their 'religious significance.'" *Pleasant Grove City*, 555 U.S. at 483 (Scalia, J., concurring) (quoting Van Orden v. Perry, 545 U.S. 677, 690 (2005)).

303. *Id.* at 468.

304. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 794–95 (1983) ("The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."); Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 664 (1989) (Kennedy, J., concurring in part and dissenting in part) ("There is no realistic risk that the crèche and the menorah represent an effort to proselytize or are otherwise the first step down the road to an establishment of religion.").

305. *Van Orden*, 545 U.S. at 690.

placement and interaction of different items as well as the vintage of the challenged government action.

2. American Legion*'s Narrower View of Neutrality Reinforces the Founders' Belief That Public Encouragement of Religion and Morality Promotes Civic Virtue and Good Government*

At the time of the founding, the general support for religion in the public square was connected to the widely held view that religion was directly connected to civic virtue. Religious beliefs and practices (i.e., "free exercise") fostered a virtuous citizenry, who, in turn, helped to maintain and preserve republican institutions and norms. As Madison recognized, if men were Angels or if Angels governed our affairs, then the task of organizing and running the government would be (relatively) easy. But when "a government . . . is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[306] The more virtuous the citizenry and the government officials, the more likely the government would regulate itself wisely, government officials would have the moral authority to govern, and the people would accept their governance. In Federalist No. 1, Alexander Hamilton noted the importance of character and virtue to the entire constitutional enterprise:

> [I]t seems to have been reserved to the people of this country, *by their conduct and example*, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.[307]

Only a moral people would work to keep the norms required for self-government, putting "the permanent and aggregate interests of the community" above narrow self-interest or personal gain.[308] And the Founders believed that religion and morality were directly linked. As President Washington put the point in his Farewell Address, "reason and experience both forbid us to expect that National morality can prevail in exclusion of religious

306. THE FEDERALIST NO. 51, *supra* note 20, at 319.

307. THE FEDERALIST NO. 1, *supra* note 20, at 27 (Alexander Hamilton) (emphasis added).

308. THE FEDERALIST NO. 10, *supra* note 20, at 72 (James Madison).

principle."[309] Thus, although the First Amendment precluded the establishment of religion, it did not prevent the government's encouraging religion. Justice Story espoused this position in his 1833 Commentaries on the Constitution of the United States:

> Probably at the time of the adoption of the constitution, and of the [First] Amendment . . . the general, if not universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship.[310]

Thomas Cooley, whose "eminence as a legal authority rivaled that of Story,"[311] embraced the same view:

> This public recognition of religious worship, however, is not based entirely, perhaps not even mainly, upon a sense of what is due to the Supreme Being himself as the author of all good and of all law; but the same reasons of State policy which induce the government to aid institutions of charity and seminaries of instruction will incline it also to foster religious worship and religious institutions, as conservators of the public morals, and valuable, if not indispensable, assistants to the preservation of the public order.[312]

And Story and Cooley both echoed John Adams, who famously observed that "[o]ur Constitution was made only for a moral and religious people" and is "wholly inadequate to the government of any other."[313]

This sentiment pre-dated the Constitution. For example, Massachusetts's 1780 Constitution expressly connected religion and morality:

> As the happiness of a people and the good order and preservation of civil government essentially depend upon piety, religion, and morality[,] . . . the legislature shall . . . authorize and require, the several towns, parishes, precincts, and other bodies-politic or religious societies to make suitable

309. George Washington, *Farewell Address* (Sept. 19, 1796), *reprinted in* 35 WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745–1799, 214, 229 (John C. Fitzpatrick ed., 1940).

310. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1868, at 726 (Boston, Hilliard, Gray, and Co. 1833).

311. Wallace v. Jaffree, 472 U.S. 38, 105 (1985) (Rehnquist, J., dissenting).

312. COOLEY, *supra* note 129, at 470.

313. Letter from John Adams to Massachusetts Militia (Oct. 11, 1798), *in* 9 THE WORKS OF JOHN ADAMS 228, 229 (Charles Francis Adams ed. 1854).

> provision, at their own expense, for the institution of the public worship of God and for the support and maintenance of public Protestant teachers of piety, religion, and morality . . . .[314]

And the First Congress reenacted the Northwest Ordinance in 1789, affirming that "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[315] The accommodation of religion was to be encouraged given the importance of maintaining morality in and through the republican form of government: "[T]he right of a . . . government to interfere in matters of religion will hardly be contested by any persons, who believe that piety, religion, and morality are intimately connected with the well being of the state, and indispensable to the administration of civil justice."[316] Thus, the historical record reflects that "[t]here was a very broad consensus that government should foster religion."[317]

In *Everson*, *Engel*, *Schempp*, and *Lemon*, the Court largely ignored this history, emphasizing the negative consequences that had flowed from the coercive intermingling of church and state.[318] The accommodationists, however, began to acknowledge the civic benefits of noncoercive church-state interactions. In his dissent in *Lee*, Justice Scalia explained that "maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate . . . [given] the government's interest in fostering respect for religion generally."[319] That same concern with fostering civic virtue underscores local

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314. MASS. CONST. OF 1780 art. III, pt. 1; *see also* Poughkeepsie Country Journal (Mar. 18, 1778), *reprinted in* 4 COMMENTARIES ON THE CONSTITUTION: PUBLIC AND PRIVATE 409, 410 (John P. Kaminski & Gaspare J. Saladino eds., 1986) ("[H]ere, a very decided majority think (and with them thy friend) that a union of the American States, as exemplified in the new constitution, is friendly to *property*; consistent with *freedom*; and favorable to *morality* and *religion*. Whereas in thy county I am told many think exactly the reverse . . . . I think [the Constitution] also favorable to the morals of the people. For if jealousies, factions, cabals and war have a tendency to corrupt the manners[,] that political situation which prevents jealousies, factions, cabals and war is desirable on a moral account: and if on a moral, certainly on a *religious*."); Elisha Babcock, AM. MERCURY, Jan. 21, 1788 ("The fears of many good and worthy men, men of principle, and honour, are alarmed, lest soon the high departments of the nation should be filled with men of loose principles or no principles at all, as to religion.").

315. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, *discussed in* Wallace v. Jaffree, 472 U.S. 38, 100 (1985) (Rehnquist, J., dissenting).

316. STORY, *supra* note 310, § 1865, at 722.

317. *See* Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS. J. 72, 125 (2005).

318. *See, e.g.*, Engel v. Vitale, 370 U.S. 421, 431 (1962) ("[A] union of government and religion tends to destroy government and to degrade religion.").

319. Lee v. Weisman, 505 U.S. 577, 638 (1992) (Scalia, J., dissenting).

governments' decision that students recite the Pledge of Allegiance at public schools across the country each school day. Although the State cannot require students to recite the Pledge, nothing in the Court's case law prohibits it from compelling students "to observe respectful silence—indeed, even to *stand* in respectful silence—when those who wished to recite it did so."[320] Similarly, in dissent in *McCreary*, Justice Scalia connected religion, morality, and the public good: "Those who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality."[321]

This, of course, is not to say that some (and perhaps many) people will not share the specific religious views encapsulated in a prayer, monument, symbol, or practice in the public square or that others will be offended by such facially religious government expression. But a majority of the current Court is apt to adopt the view espoused in *Town of Greece* that "[o]ffense . . . does not equate to coercion" and that

> [a]dults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum, especially where, as here, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions.[322]

Nor is this surprising given that the "security for civil rights must be the same as that for religious rights."[323] Just as one who is "offended" by the speech of others may "avert his eyes,"[324] so one offended by religious expression may look (or walk) away, seek a political solution, engage in counter speech against the government's practice, or (in the prayer context) volunteer to give an invocation. But the government's tolerating or even encouraging such (noncoercive) religious expression promotes "mutual respect, tolerance, self-

320. *Id.* at 639.

321. McCreary Cnty. v. ACLU of Kentucky, 545 U.S. 844, 887 (2005) (Scalia, J., dissenting); *see also* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 213 (1963) (discussing how "[t]he fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself").

322. Town of Greece v. Galloway, 572 U.S. 565, 589 (2014).

323. THE FEDERALIST NO. 51, *supra* note 20, at 321; *see also* Zorach v. Clauson, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being. . . . We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.").

324. Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975).

rule, and democratic responsibility,"[325] that is, the very virtues that the Founders thought were critical for the government to function well.[326] As the Court put the point in *Lee*, "[t]o endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry."[327] The society need not—and under the Establishment Clause cannot—tolerate government coercion given that "[a] state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed."[328] But as in *American Legion*, if the government is not proselytizing or coercing through its accommodation or use of religious words, symbols, or images, then the Constitution "put[s] the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity."[329]

Thus, for a majority of the current Court, the Establishment Clause is not meant solely (or perhaps even primarily) to avoid friction between church and state; rather, the Establishment Clause protects a believer's duty to her God (by precluding government establishments) and allows noncoercive public recognition of the Divine to foster toleration, respect, and civic virtue.[330] Contrary to *Lemon*, religious exercise for many believers is not "some purely personal avocation that can be indulged entirely in secret."[331] Such intimate and private religious pursuits may promote morality and virtue, but there also are societal benefits that accrue from having the public (comprised of varying faiths and nonbelievers) come together in public acknowledgment of the Divine:

> Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as

325. Am. Legion v. Am. Humanist Ass'n., 139 S. Ct. 2067, 2103 (2019) (Gorsuch, J., concurring in the judgment).

326. *See McCreary Cnty.*, 545 U.S. at 891 (Scalia, J., dissenting) (discussing "the variety of circumstances in which this Court—even *after* its embrace of *Lemon*'s stated prohibition of such behavior—has approved government action 'undertaken with the specific intention of improving the position of religion'") (citation omitted).

327. Lee v. Weisman, 505 U.S. 577, 590 (1992).

328. *Id.* at 592.

329. Cohen v. California, 403 U.S. 15, 24 (1971).

330. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 35–36 (2004) (O'Connor, J., concurring in the judgment) ("It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths.").

331. *Lee*, 505 U.S. at 645 (Scalia, J., dissenting).

> individuals, because they believe in the "protection of divine Providence," as the Declaration of Independence put it, not just for individuals but for societies. . . . One can believe in the effectiveness of such public worship, or one can deprecate and deride it. But the longstanding American tradition of prayer at official ceremonies displays with unmistakable clarity that the Establishment Clause does not forbid the government to accommodate it.[332]

The founding generation "knew the fearsome potential of sectarian religious belief to generate civil dissension and civil strife" that comes from a government's imposing a specific religious tradition on the citizenry and banishing dissenters to exercise their beliefs in the shadows.[333] But their actions reveal that they did not view religion to be, as *Schempp* and *Lemon* suggested, a purely private endeavor: "Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders."[334]

President Washington's Thanksgiving Proclamation demonstrates the importance to the Founders of coming together as a people—even a people of different faiths—to give thanks and supplication to the Divine. In his Thanksgiving Proclamation, which both Houses sought from the President in 1789,[335] Washington selected Thursday, November 26, as a day

> that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country . . . ; for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge; and, in general, for all the great and various favors which He has been pleased to confer upon us.[336]

And even though John Jay and John Rutledge objected to starting the first session of the Continental Congress with prayer because the delegates "were so divided in religious sentiments . . . that [they] could not join in the same act of worship," Samuel Adams summed up (what *Marsh* took to be)[337] the

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332. *Id.*

333. *Id.* at 646.

334. Lynch v. Donnelly, 465 U.S. 668, 675 (1984).

335. Both Houses passed resolutions requesting Washington to issue a Thanksgiving Proclamation to "recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God." 1 Annals of Cong. 90, 914 (1789) (Joseph Gales ed., 1834).

336. 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 (1900).

337. Marsh v. Chambers, 463 U.S. 783, 791–92 (1983) (alteration in original).

response of the Founders in replying that "he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country."[338] The Founders did not view opening prayers (or noncoercive religious expression generally) "as a proselytizing activity or as symbolically placing the government's 'official seal of approval on one religious view.' Rather, the Founding Fathers looked at invocations as 'conduct whose . . . effect . . . harmonize[d] with the tenets of some or all religions.'"[339]

The Court echoed this theme in *Town of Greece* in discussing the prayers—many of which were sectarian—that were addressed to groups that included "many different creeds."[340] Such prayers had salutary effects, bringing people of varying backgrounds together and fostering respect and tolerance between and among believers and religious and nonreligious alike:

> These ceremonial prayers strive for the idea that people of many faiths may be united in a community of tolerance and devotion. Even those who disagree as to religious doctrine may find common ground in the desire to show respect for the divine in all aspects of their lives and being. Our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith.[341]

In this way, *Town of Greece* embraced the Founders' view that the Establishment Clause and the Free Exercise Clause are mutually reinforcing. The Establishment Clause precludes the government's dictating or coercing religious belief and practice (what *Marsh* refers to as "exploit[ing]" the prayer opportunity "to proselytize or advance any one, or to disparage any other, faith or belief")[342] while allowing for public acknowledgment (and even noncoercive encouragement) of religion. The public recognition of religion signals to religious practitioners of all stripes that religious devotion and practice are encouraged and that society as a whole must learn to tolerate and respect religious pluralism, making it all the easier for religious minorities to

338. Letter from John Adams to Abigail Adams (Sept. 16, 1774), *in* FAMILIAR LETTERS OF JOHN ADAMS AND HIS WIFE ABIGAIL ADAMS, DURING THE REVOLUTION 37–38 (Charles Francis Adams ed., 1876).

339. *Marsh*, 463 U.S. at 792 (alteration in original) (first quoting Chambers v. Marsh, 675 F.2d 228, 234 (8th Cir. 1982); then quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961)).

340. Town of Greece v. Galloway, 572 U.S. 565, 584 (2014).

341. *Id.*

342. *Marsh*, 463 U.S. at 794–95; *see Town of Greece*, 572 U.S. at 591–92 ("The town of Greece does not violate the First Amendment by opening its meetings with prayer that comports with our tradition and does not coerce participation by nonadherents.").

freely exercise their faith traditions. Such noncoercive religious expression is not an "'establishment' of religion or a step toward establishment;" rather, "it is simply a tolerable acknowledgment of beliefs widely held among the people of this country," an acknowledgment that safeguards the values that the Religion Clauses were meant to promote.[343]

Consequently, the concern with ensuring that minority religions do not feel "excluded" is met through both the robust protection of free exercise and maintaining neutrality between religions. The latter, though, does not preclude public acknowledgment of religion, which, as *American Legion* explains, can help "foster a society in which people of all beliefs can live together harmoniously."[344] Religious monuments, symbols, and practices did not need to be banished from public discourse; religious persecution and coercion did. After all, the "security for . . . religious rights" was directly linked to "the multiplicity of sects."[345] And a public square that acknowledged both the call of the Divine on the lives of many (perhaps most) of the Nation's citizens and the corresponding duty of those individuals to respond to that call[346] could create a respect and toleration for the differences that previously had divided and separated. In this way, public recognition of the Divine not only promotes the free exercise of religion through "the expression of gratitude to God that a majority of the community wishes to make," but also may "foster among religious believers of various faiths a toleration—no, an affection—for one another."[347]

The Court noted this effect in *Lynch v. Donnelly*, where a crèche was part of a larger display that "engender[ed] a friendly community spirit of goodwill in keeping with the [Christmas] season."[348] Chief Justice Burger made a similar point in his *Jaffree* dissent where he described how the Alabama statute

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343. *Marsh*, 463 U.S. at 793.

344. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074 (2019).

345. THE FEDERALIST NO. 51, *supra* note 20, at 321; *see also* Zorach v. Clauson, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being. . . . We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.").

346. *See, e.g.*, James Madison, Memorial and Remonstrance against Religious Assessments (1785), *in* THE COMPLETE MADISON: HIS BASIC WRITINGS, 299–300 (Saul K. Padover ed., 1953) ("The Religion then of every man must be left to the conviction and conscience of every man . . . because what is here a right towards men, is a duty towards the Creator. 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.").

347. Lee v. Weisman, 505 U.S. 577, 646 (1992) (Scalia, J., dissenting).

348. Lynch v. Donnelly, 465 U.S. 668, 685 (1984). "To forbid the use of this one passive symbol—the crèche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains, would be a stilted overreaction contrary to our history and to our holdings." *Id.* at 686.

allowing prayer or a moment of silence "provides a meaningful opportunity for schoolchildren to appreciate the absolute constitutional right of each individual to worship and believe as the individual wishes. The statute 'endorses' only the view that the religious observances of others should be tolerated and, where possible, accommodated."[349] Facially religious expression in the form of monuments, symbols, or practices can bring individuals from different religious traditions (and possibly even nonreligious persons) together in recognizing the importance of respecting different beliefs and traditions—religious and nonreligious—as well as the role of religion and morality in the history of our Nation.[350] Members of the Court emphasized these salutary effects in *Lee* and *American Legion*. In *Lee*, Justice Scalia emphasized how those from different faith traditions—"[t]he Baptist or the Catholic"—who listened to Rabbi Gutterman's prayers in *Lee* were "inoculated from religious bigotry and prejudice in a manner that cannot be replicated."[351] Similarly, in *American Legion*, the Court emphasized the same "unifying mechanism"[352] of public acknowledgment of the Divine, drawing on the positive impact that prayers and religious monuments could have on differing (and oftentimes opposed) faith traditions such as the Baptists and the Catholics. At the dedication of the Bladensburg Peace Cross, a Catholic priest gave the invocation and a Baptist pastor concluded with a benediction "despite the fact that Catholics and Baptists at that time were not exactly in the habit of participating together in ecumenical services."[353] And even though the passage of time made it impossible to "know for certain what was in the minds of those responsible for the memorial," the Court concluded, based on the history of the ceremony and the monument, that "we can perhaps make out a picture of a community that, at least for the moment, was united by grief and patriotism and rose above the divisions of the day."[354] In this way, the Peace Cross, like the legislative prayers in *Marsh* and *Town of Greece*, "stands out as an example of respect and tolerance for differing views, an honest endeavor

349. Wallace v. Jaffree, 472 U.S. 38, 89–90 (1985) (Burger, C.J., dissenting).

350. *See, e.g.*, 100 CONG. REC. 6348 (1954) (statement of Sen. Homer Ferguson) (sponsoring the addition of "one Nation under God" to the pledge). "It is true that under the Constitution no power is lodged anywhere to establish a religion. This is not an attempt to establish a religion; it has nothing to do with anything of that kind. It relates to belief in God, in whom we sincerely repose our trust. We know that America cannot be defended by guns, planes, and ships alone. Appropriations and expenditures for defense will be of value only if the God under whom we live believes that we are in the right. We should at all times recognize God's province over the lives of our people and over this great Nation." *Id.*

351. *Lee*, 505 U.S. at 646 (Scalia, J., dissenting).

352. *Id.*

353. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2090 (2019).

354. *Id.*

to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans."[355]

CONCLUSION

As a writer once noted, "people who demand neutrality in any situation are usually not neutral, but in favor of the status quo."[356] With respect to religion, the Founders made no such demand. The first two clauses of the First Amendment safeguarded non-establishment and free exercise principles, upending the status quo at the time of the founding by expressly affording protection for religion. The Constitution did not mandate complete neutrality between religion and nonreligion—religious adherents (no matter how idiosyncratic or non-mainstream their beliefs) could pursue their beliefs in their private lives but also within the public sphere. Instead, the First Amendment required only "an attitude on the part of government that shows no partiality to any one [religious] group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma."[357] In fact, as Justice Goldberg explained in his concurrence in *Schempp*:

> The concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.[358]

Although the First Amendment does not mandate complete neutrality between religion and nonreligion, neutrality still serves to delimit the scope of protection under the Religion Clauses. On the Free Exercise front, the Roberts Court recently expanded the protection afforded religious exercise, adopting a specific form of neutrality between secular and religious activities. According to the majority in *Tandon v. Newsom*, if the government "treat[s] *any* comparable secular activity more favorably than religious exercise," the

355. *Id.* at 2089 (plurality opinion).

356. MAX EASTMAN, ENJOYMENT OF POETRY WITH ANTHOLOGY FOR ENJOYMENT OF POETRY 233 (1951) (emphasis omitted).

357. Zorach v. Clauson, 343 U.S. 306, 313 (1952).

358. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

regulation is not neutral, and the government must satisfy strict scrutiny.[359] On this view, a law is neutral only if it treats religion at least as well as comparable secular activities (and perhaps even more favorably as in RFRA and RLUIPA). Whether the Court will go farther and overturn *Smith* remains to be seen, but "neutrality" under *Tandon* now obliges the government to treat secular activities the same as (what *Tandon* calls) "comparable" religious exercise even though the converse is not required.

Neutrality also plays an important role in Establishment Clause cases, but the Court seems in the process of altering its understanding of neutrality in that context as well. In the wake of *American Legion*, a majority of the Court appears ready to embrace the accommodationist view of neutrality. While not adopting a specific test for religious symbols, practices, and monuments that are "newer" (i.e., not longstanding), a majority indicated in *American Legion* that neutrality under the Establishment Clause involves only neutrality between and among religions, not between religion and nonreligion. Accordingly, courts need not consider the spatial relationship between the religious and secular components of a display or symbol. The *Lemon* and endorsement tests have been retired (at least until a different majority holds sway), and the history and tradition approach from *Marsh* and *Town of Greece* likely has emerged as the dominant Establishment Clause test. And if Justice Gorsuch is correct, courts need not consult a temporal tape measure either. Instead, courts must ensure only that the government acts neutrally between and among religions, and they should do this by looking at the history and traditions of religion in the public sphere.[360]

359. Tandon v. Newsom, No. 20A151, 2021 WL 1328507, at *1 (Apr. 9, 2021) (per curiam) (citing Roman Catholic Diocese v. Cuomo, 141 S. Ct. 63, 67 (2020) (per curiam)).

360. *See Am. Legion*, 139 S. Ct. at 2102 (Gorsuch, J., concurring) ("[W]hat matters when it comes to assessing a monument, symbol, or practice isn't its age but its compliance with ageless principles. The Constitution's meaning is fixed, not some good-for-this-day-only coupon, and a practice consistent with our nation's traditions is just as permissible whether undertaken today or 94 years ago.").