Establishment Clause Jurisprudence Still Groping for Clarity: Articulating a New Constitutional Model

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In previous cases, the endorsement test had often been used to determine whether religious expression or symbols on public property violated the Establishment Clause. However, in American Legion v. American Humanist Ass'n, *the Court turned to an historical traditions test, casting doubt on the future legitimacy of the endorsement test and the broader and older* Lemon *test, which has in recent years fallen into disfavor with the Court, given its foundations in the controversial Wall of Separation metaphor. Even though the* American Legion *Court upheld the religious symbol at issue, it did so on such narrow grounds as to give very little direction to future Establishment Clause cases involving even slightly different factual situations. Consequently, the decision does very little to clarify an already greatly confused Establishment Clause jurisprudence. On the other hand, while it may not have toppled the Wall of Separation, it did remove a brick from that Wall. And perhaps* Lemon *and its progeny can only be undone in small steps.*

This Article conducts the kind of thorough examination of the meaning and purpose of the Establishment Clause that many might have hoped from the American Legion *opinion. In so doing, the Article seeks to bypass all the different tests the Court has used over the past decades and instead focus on the root meaning of the word 'establishment'—an endeavor the courts have never undertaken. Furthermore, America's steady drift to an increasingly secular society makes it even more important to understand the meaning of the Establishment Clause, especially the connection of that Clause to the overall protection of religious liberty.*

I. Introduction

Many European settlers who came to America in the 17th century sought to escape the oppressive mandates of state-established religions in Europe. These settlers came in search of a religious liberty that was not possible in their home countries. In the late 18th century, the framers of the First Amendment sought to codify within the Constitution a clear prohibition of the kind of state-established religion from which the early American settlers had fled. Nearly two and a quarter centuries later, the issue of state-established religion came to the U.S. Supreme Court when a war memorial in the shape of a cross, built and maintained by a private veterans group but now standing on government-owned property, was alleged to constitute an improper state establishment of religion.[1] In a much-anticipated decision, the Court in 2019 found the infamous Blandensburg Peace Cross, built in 1925 to memorialize soldiers killed in World War I,

1 *See generally* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074 (2019).

to be non-offensive to the Constitution.[2]

Although cases involving religious displays on public property had previously come to the Court, *American Legion* gave the Court an opportunity to more clearly define establishment, as the term is used in the First Amendment.[3] The Court did not take this opportunity, however, and instead ruled on narrow constitutional grounds that gave no insights into the underlying meaning of the Establishment Clause, nor provided any guidance for any other type of church-state disputes. Because of the narrowness of the decision, it will do little to clarify the constitutional confusion that has built up over the decades—a confusion that this Article seeks to address through an historical and constitutional examination of the meaning of the term "establishment".

Part II below outlines the state of current Establishment Clause jurisprudence, focusing particularly on the shortcomings of the endorsement test used to determine violations of that Clause. Part III then explores in depth the Court's *American Legion* opinion and how it fails to resolve the jurisprudential confusion. Part IV surveys the various views and models of the Establishment Clause, ranging from the secular-oriented separationist view to the more religious freedom-oriented accommodationist view. Part V distinguishes the two religion clauses in the First Amendment and articulates the institutional focus of the Establishment Clause. Part VI then offers the Article's nonpreferentialist model of the Establishment Clause. And Parts VII and VIII further explore the ways in which the Establishment Clause restrains government power within the overall structure of the U.S. Constitution.

II. THE CONFUSION IN ESTABLISHMENT CLAUSE JURISPRUDENCE

A. *Inconsistencies in Religious Symbol Cases*

Confusion has long characterized the Court's Establishment Clause jurisprudence.[4] Over the years, courts have applied various

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2 *Id.* at 2090.

3 *See e.g.*, Van Orden v. Perry, 545 U.S. 677 (2005) (upholding the constitutionality of a Ten Commandments monument display); McCreary Cty. v. ACLU, 545 U.S. 844 (2005) (striking down a framed display of the Ten Commandments hanging on a courthouse wall). The First Amendment states, in relevant part: "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend I.

4 *See* Patrick M. Garry, *Religious Freedom Deserves More than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 FLA. L. REV.

constitutional tests for determining Establishment Clause violations. In 2005, for instance, the Supreme Court handed down opposite rulings on the same day in two cases involving public displays of the Ten Commandments. First, in *McCreary County v. ACLU,* the Court held that a framed copy of the Ten Commandments in a courthouse hallway was an unconstitutional establishment of religion.[5] Second, in *Van Orden v. Perry,* the Court upheld Texas' right to display a Ten Commandments monument in the grounds of the state capitol.[6]

The Court justified the different rulings with completely different constitutional tests. In *Van Orden,* the plurality opinion did not even recognize the test that had become the one most frequently used to evaluate public displays of religious symbols—the endorsement test.[7] Instead, the Court relied on the less frequently used historical traditions test applied in *Marsh v. Chambers,* which looked to whether there existed a long and unbroken tradition of religious acknowledgments, such as a longstanding public display of the Ten Commandments.[8] Furthermore, the crucial fifth vote supplied by Justice Breyer in *Van Orden* appeared to rely on a new "legal judgment" or judicial common sense test.[9]

In *McCreary,* on the other hand, the Court examined whether the Ten Commandments display served a predominantly secular purpose.[10] However, this "purpose" test departed from the Court's evolving neutrality approach, which focuses on whether a government program is facially neutral toward religion or whether the program explicitly singles out religion for special benefits or burdens.[11]

1, 3 (2005); Patrick M. Garry, *A Congressional Attempt to Alleviate the Uncertainty of the Court's Establishment Clause Jurisprudence: The Public Expression of Religion Act*, 37 CUMBERLAND L. REV. 1, 6–7, 16–18 (2007).

5 McCreary Cty. v. ACLU, 545 U.S. 844 (2005).

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

7 *Van Orden*, 545 U.S. at 685–86, 699 (calling the *Lemon* test inappropriate for "passive" religious expressions). *See infra* Section II.B, "Problems with the Endorsement Test," for further discussion of the endorsement test.

8 *Van Orden*, 545 U.S. at 686–88; Marsh v. Chambers, 463 U.S. 783, 792, 795 (1983) (upholding the Nebraska legislature's practice of opening sessions with a prayer by a state-employed clergy).

9 *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring) (calling on judges to use their own legal judgment to determine what government interactions with religion will prove to be unacceptably divisive or oppressive).

10 *McCreary*, 545 U.S. at 861–63.

11 *See* Zelman v. Simmons-Harris, 536 U.S. 639, 661–22 (2002) (upholding a school voucher law that is facially neutral – e.g., leaving to private individuals

Moreover, confusing the outcomes of *McCreary* and *Van Orden* even more, the monument in the latter case contained the words "I am the Lord thy God"—words that were far more religious than those in the display struck down in *McCreary*.[12] As one prominent commentator noted, "the split decisions in *McCreary* [and] *Van Orden*. . . mean that we will be litigating these cases one at a time for a very long time."[13] This prediction, as borne out in *American Legion*, proved accurate.

The doctrinal inconsistency prevalent in the Establishment Clause area prompted one court to describe the law as suffering "from a sort of jurisprudential schizophrenia."[14] To illustrate the confusion in this area, Christopher Lund notes that in the seven cases involving the "constitutionality of passive displays" of religious symbols brought to the Court between 1984 and 2010, "the Court issued [36] separate opinions," with only one of the 36 attracting more than five votes.[15] All the different tests have not only failed to provide a consistent constitutional guide to the interaction between government and the religious practices of society; they have failed to produce any lasting agreement on the issue of religion in the public arena. As one legal scholar has observed, "we are moving less toward any type of consensus on this matter than toward a state of increased polarization and divisiveness."[16] According to another legal scholar, "[t]here is no underlying theory of religious freedom

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the decision whether to apply public funds toward a religious education – even though the ultimate effect of that law might be to divert funds to a religious school).

12 *Van Orden*, 545 U.S. at 738–39 (emphasis omitted); *see also McCreary*, 545 U.S. at 850–52 (discussing the display of two large copies of the Ten Commandments on the walls in two Kentucky courthouses).

13 Douglas Laycock, *How to be Religiously Neutral*, LEGAL TIMES (July 4, 2005), https://www.law.com/nationallawjournal/almID/900005432092/.

14 Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 717 (9th Cir. 1999).

15 Christopher Lund, Salazar v. Buono *and the Future of the Establishment Clause*, 105 NW U. L. REV. 1387, 1387–88 (2011).

16 Daniel Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. L. REV. 1113, 1160 (1988). Another commentator stated that "[a]s a result of the multitude of tests and opinions stemming from Supreme Court Establishment Clause cases, there have been numerous inconsistencies among the lower courts, as well as a general sense of confusion within society." Roxanne Houtman, ACLU v. McCreary County*: Rebuilding the Wall Between Church and State*, 55 SYRACUSE L. REV. 395, 403–04 (2005). Over "the past [30] years, the Supreme Court's Establishment Clause jurisprudence has become increasingly ambiguous." *Id.* at 397.

that has captured a majority of the Court, and . . . [e]very new case . . . presents the very real possibility that the Court might totally abandon its previous efforts and start over."[17] Yet another scholar notes that the establishment doctrines used by the courts are "in nearly total disarray."[18]

In line with these scholarly opinions, the *American Legion* Court did not attempt to reconcile the various tests; nor did it examine anything outside of the precise facts surrounding the symbol at issue in that case.[19] In particular, the majority did not even specifically mention the endorsement test, which had often been used to evaluate Establishment Clause cases involving the issue of religious expression or displays on public property.[20] Indeed, perhaps the Court's silence on the endorsement test reflects a growing judicial

17 William P. Marshall, *What is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193, 194 (2000).

18 Kent Greenawalt, *Quo Vadis: The Status and Prospects of 'Tests' Under the Religion Clauses*, 1995 S. CT. REV. 323, 323 (1995). "The failure to adopt a single Establishment Clause test has resulted in the use of a multitude of tests by lower courts, which is causing a growing number of disputes among the circuits." Houtman, *supra* note 16, at 419. The inconsistency of the case law is apparent in many ways. For instance, although the Court had previously held that states could lend textbooks to religious schools, Bd. of Educ. v. Allen, 392 U.S. 236, 238 (1968), in *Lemon* the Court ruled that states could not supplement the salaries of religious school teachers who taught the same subjects offered in public schools. Lemon v. Kurtzman, 403 U.S. 602, 617–21 (1971). Though it later allowed book loans from public to parochial schools, the Court prohibited states from providing to religious schools various instructional materials, such as maps and lab equipment. Wolman v. Walter, 433 U.S. 229, 248–51 (1977); Meek v. Pittenger, 421 U.S. 349, 362–66 (1975). In one case, the Court struck down a state's provision of remedial instruction and guidance counseling to parochial school students, *Meek*, 421 U.S. at 367–72, only to later uphold another state's provision of speech and hearing services to such students. *Wolman*, 433 U.S. at 241–48. Whereas some cases have permitted states to furnish religious schools with standardized tests, *see id*. at 255, and pay the costs incurred by religious schools to administer such exams. *See generally Comm. for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646 (1980) (order upholding the constitutionality of a state statute to use public funds to reimburse church-sponsored schools for the performance of testing services as required by state law was affirmed on the grounds that the goal was to provide educational opportunities to state citizens, the nonpublic school did not control the content of the tests, and the reimbursement process was customary to most reimbursement schemes).

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

20 *See id.*

discomfort with that test, along with the *Lemon* test.[21]

B. Problems With the Endorsement Test

The endorsement test finds an unconstitutional establishment of religion when a government action is perceived by a reasonable observer as favoring or endorsing a particular religion or religious belief and hence making nonadherents to that religion or belief feel as if they are second class citizens.[22] The endorsement test was essentially designed for complainants who feel offended and alienated by the religious display or expression, which was just the complaint in *American Legion*.[23] Nonetheless, the majority in its decision did not explicitly mention that test, other than by implicit incorporation into its extensive discussion of *Lemon*, from which the endorsement test came as an outgrowth.[24]

The endorsement test has become the Supreme Court's preeminent means for analyzing the constitutionality of religious symbols and expression on public property.[25] For instance, in one of the early cases involving public displays of religious symbols, the Court in *County of Allegheny v. ACLU* used the endorsement test to strike

21 In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court examined the constitutionality of state statutes from Pennsylvania and Rhode Island, which provided public money to parochial schools. *Id.* at 606. Overturning those statutes, the Court set out the three-part *Lemon* test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 607, 612–13 (citation omitted). For a criticism of the inconsistencies spawned by *Lemon*, see Patrick Garry, *The Institutional Side of Religious Liberty: A New Model of the Establishment Clause*, 2004 UTAH L. REV. 1155, 1182 (2004). The later endorsement test, articulated in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593 (1989), is an offshoot of *Lemon* and states that the government unconstitutionally endorses religion whenever it conveys that a particular religion is favored or preferred over other religions or nonreligions.

22 Lynch v. Donnelly, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 799 (1995) (Stevens, J., dissenting).

23 *See Am. Legion*, 139 S. Ct. at 2074 ("[R]espondents filed this lawsuit, claiming they [were] offended by the sight of the memorial.").

24 *See id.* at 2078–82 (discussing the *Lemon* test).

25 Alberto B. Lopez, *Equal Access and the Public Forum: Pinette's Imbalance of Free Speech and Establishment*, 55 BAYLOR L. REV. 167, 195 (2003). Under this test, the government unconstitutionally endorses religion whenever it conveys the message that a religion or particular religious belief is favored by the state. Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 593 (1989).

down a city's practice of allowing a private religious group to place a crèche on public property during the Christmas season.[26] Demonstrating the uncertainty of the endorsement test, however, the Court in the very same case upheld another holiday display also located on public property—a display that combined a 45-foot Christmas tree and an 18-foot Jewish menorah, which, like the crèche, was a religious symbol.[27]

A problem with the endorsement test is its subjectivity regarding a court's conclusions as to what impressions viewers might have of some religious display or speech. Because the test calls for judges to speculate about the impressions that unknown people may have received from various religious speech or symbols, it is incapable of achieving certainty.[28] One judge has written that the endorsement test requires "scrutiny more commonly associated with interior decorators than with the judiciary."[29]

Justice Kennedy, a critic of the endorsement test, declared it to be "flawed in its fundamentals and unworkable in practice."[30] According to Justice Kennedy, the endorsement test results in a "juris-

26 *Cty. of Allegheny*, 492 U.S. at 579–81 (noting that although the crèche was owned by a Roman Catholic group, the city of Pittsburgh stored, placed and removed it).

27 *Id.* at 579, 581–82, 587, 620–21. Distinguishing the unacceptable crèche in *Allegheny* from the permissible one in *Lynch*, the Court examined the setting and found that, unlike the elephants, clowns and reindeer that surrounded the crèche in *Lynch*, nothing in the *Allegheny* display muted its religious message. *Id.* at 596–98, 620–21. The menorah, on the other hand, represented a holiday with both sectarian and secular aspects. *Id.* at 613–14. Moreover, the placement of the menorah next to the Christmas tree (unlike the display with just the crèche) symbolized two faith traditions—one Jewish and one Christian—conveying the message that the city recognized more than one manner of celebrating the holiday. *Id.* at 616–17 (noting that the Christmas tree was once a sectarian symbol but that it has lost its religious overtones). Thus, while the crèche was considered an endorsement of the Christian faith, the tree and menorah were acceptable, insofar as together they did not give the impression that the state was endorsing any one religion. *Id.* at 620–21. In *Allegheny*, the Court concluded that, as to the crèche, "[n]o viewer could reasonably think that it occupie[d] this location without the support and approval of the government." *Id.* at 599–600. The tree and menorah, on the other hand, did not present a "sufficiently likely" probability that observers would see them as endorsing a particular religion. *Id.* at 620.

28 Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 301 (1987).

29 Am. Jewish Cong. v. City of Chi., 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting).

30 *Cty. of Allegheny*, 492 U.S. at 669.

prudence of minutiae" that requires courts to consider every little detail surrounding the religious speech, so as to determine whether an observer might read into the speech an endorsement by the government.[31] Under the endorsement test, any religious expression by public officials tends to be viewed as an automatic equivalent of establishment, no matter how much that single religious expression may be surrounded by secular messages, and no matter the age or maturity of the audience.[32] Even the most minute or fleeting symbol or expression can rise to the level of an official government endorsement of religion.[33] Accordingly, individual feelings of offense or alienation can become a constitutional trump card against any religious expression or symbol on public property.

This was an issue that arose in *American Legion*, as what gave rise to the initial litigation was the offense the plaintiffs' felt when driving by the cross.[34] And since feelings of offense underlay the

31 In *Allegheny*, this meant that the Court had to examine "whether the city has included Santas, talking wishing wells, reindeer, or other secular symbols" to draw attention away from the religious symbol in the display. *Id*. at 674. The banning of the crèche, in Kennedy's opinion reflected "an unjustified hostility toward religion" and a "callous indifference toward religious faith that our cases and traditions do not require." *Id*. at 655, 664.

32 In one case, endorsement occurred when a professor, Dr. Bishop, at a public university organized an optional after-class meeting on religious topics, which was attended by several of his students. *Bishop v. Aronov*, 926 F.2d 1066, 1068–69 (11th Cir. 1991). This prompted Bishop's supervisor to issue an order to Bishop to cease his interjections of religious beliefs during instructional class periods and his optional classes. In *Bishop*, the professor prefaced his remarks by labeling them his "personal bias," thus denying any implication of institutional endorsement. *Id*. at 1066, 1068. The University's counsel believed, however, that under *Lemon v. Kurtzman*, Dr. Bishop's activities did amount to such violations; thus the University refused the professor's later requests to rescind the order. Ultimately, the 11th Circuit did not reach the Establishment Clause issue, stating that the university was within its right to issue the order on the basis of its power to control classroom content. *Id*. at 1078.

33 Even though a number of Justices "find irresistible the proposition that government should not make anyone feel like an 'outsider' by endorsing religion," these same Justices seem uninclined to overturn free exercise exemptions for religious objectors, or the use of the national motto 'In God We Trust,' or even the opening of Supreme Court sessions with the plea "God save the United States and this Honorable Court." Steven D. Smith, *Nonestablishment Under God – The Nonsectarian Principle*, 50 VILL. L. REV. 1, 13–14 (2005). There is also the example posed by Justice Stevens: what about the observer "who thinks [the exhibition of] an 'exotic cow' in the national zoo conveys the government's [endorsement] of the Hindu religion?" *Id*. at 15–16.

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

endorsement test,[35] the fact that the Court did not use the test may suggest that the test, along with the broader *Lemon* test, has lost favor with the Court.

III. The Court's *American Legion* Decision

A. Facts of the Case

In 1918, a group of private citizens began raising money to erect a giant cross to honor 49 area soldiers killed in World War I.[36] In 1922, the American Legion assumed control of the project and completed it in 1925.[37] The monument, in the shape of a Latin cross, stands 32 feet high in the median of a three-way highway intersection in Bladensburg, Maryland.[38] In 1961, because of safety concerns arising from the placement of the Cross in the middle of a busy traffic median, a state parks agency—the Maryland-National Capital Park and Planning Commission—acquired title to the land on which the Cross sat and assumed care and maintenance of the monument.[39]

Currently, the Cross stands in a "traffic island taking up one-third of an acre at the busy intersection."[40] The American Legion's symbol is affixed near the top of the Cross and a nine-foot wide plaque listing the names of the soldiers memorialized by the Cross is located at the base.[41] The Cross is also part of a memorial park honoring veterans.[42] This park became known as Veterans Memorial Park.[43] Monuments in the park include a War of 1812 memorial, a World War II memorial, a Korean War veterans memorial, a Vietnam War veterans memorial, and a September 11th memorial garden.[44]

In 2012, the American Humanist Association lodged an Establishment Clause complaint with the Commission.[45] Litigation was

35 *See* Am. Jewish Cong. v. City of Chi., 827 F.2d 120, 129–30, 134 (7th Cir. 1987) (Easterbrook, J., dissenting).
36 *Am. Legion*, 139 S. Ct. at 2076–77.
37 *Id.* at 2077.
38 *Id.* at 2077–78; Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n, 874 F.3d 195, 201 (4th Cir. 2017).
39 *Am. Legion*, 139 S. Ct. at 2078.
40 *Am. Humanist Ass'n*, 874 F.3d at 201.
41 *Am. Legion*, 139 S. Ct. at 2077.
42 *Id.*
43 *Id.*
44 *Id.*
45 *Id.* at 2078.

commenced in 2014 by the American Humanist Association and a group of individuals who encountered the Cross while driving in the area and were offended by it.[46] Claiming that the Cross violated the Establishment Clause, the plaintiffs asked a federal court to demolish the Cross or at least remove its arms.[47] The District Court upheld the Cross against this challenge, but the Fourth Circuit Court of Appeals ruled that the cross breached the wall of separation between church and state, violating the Establishment Clause.[48]

B. *The Supreme Court's Decision*

In a seven to two decision, with five concurrences and an opinion written by Justice Alito, the U.S. Supreme Court in *American Legion* upheld the state's ownership of the Cross, relying on the historical traditions test of *Marsh v. Chambers*,[49] *Van Orden v. Perry*,[50] and *Town of Greece v. Galloway*.[51] Under the historical traditions test, state-sponsored religious exercises or symbols may be upheld if those exercises or symbols are "simply a tolerable acknowledgment of beliefs widely held among the people of this country."[52] As a prelude to its decision, the Court in *American Legion* made several findings. It found that, although the general symbol of a Latin cross is unquestionably a secular symbol, it had "also taken on a secular meaning."[53] The Court also found that, given the historical circumstances surrounding World War I, the figure of a cross was a logical symbol to memorialize the veterans killed in that war.[54]

There was no conclusive evidence to suggest that religious motivations were the only or even the primary reasons for initial-

46 *Id.* at 2074.
47 *Id.*
48 Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n, 874 F. 3d 195, 203, 210 (4th Cir. 2017).
49 Marsh v. Chambers, 463 U.S. 783 (1983).
50 Van Orden v. Perry, 545 U.S. 677 (2005).
51 Town of Greece v. Galloway, 572 U.S. 565 (2014).
52 *Marsh*, 463 U.S. at 792. According to *Marsh*, "historical evidence sheds light not only on what the drafts-men intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress." *Id.* at 790.
53 Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074 (2019). As the Court recognized, "there are instances in which [the cross'] message is now almost entirely secular." *Id.* at 2074 (citing the cross symbol used by the Red Cross and in the Swiss flag, as well as by corporations such as Blue Cross Blue Shield).
54 *Id.* at 2075–76.

ly deciding on the symbol of a cross to be used in the memorial.[55] As the Court stated, while "we do not know precisely why the [designers of the memorial] chose the cross, it is unsurprising that the committee—and many others commemorating World War I—adopted a symbol so widely associated with that wrenching event."[56] Not only was the Court unable to ascertain the original purposes of the Cross—religious or secular—the Court also pointed out that over time the purposes of monuments often multiply and change.[57] Furthermore, according to the Court, just as the purposes behind monuments change and evolve over time, so too did the messages conveyed by that monument.[58]

A primary focus of the Court's opinion was its disposal of the *Lemon* test as the appropriate test for the dispute at hand.[59] The *Lemon* test gives courts broad latitude to find Establishment Clause violations, since this test requires that any government program pass three different hurdles.[60] Acknowledging the hostility to religion and doctrinal chaos fostered by *Lemon*,[61] as well as the failure of *Lemon* to fulfill its ambitious attempt to "find a grand unified theory of the Establishment Clause," the Court in *American Legion* decided on a much more narrow and modest approach to the historical traditions test.[62]

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55 *Id.* at 2076.
56 *Id.*
57 *Id.* at 2082.
58 *Id.* at 2084.
59 This is noteworthy because the three-part *Lemon* test was used by the Fourth Circuit to rule that the Cross violated the Establishment Clause. Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n, 874 F. 3d 195, 206–10 (4th Cir. 2017), *rev'd sub nom.* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019). *See* footnote 21, *supra*, for a discussion of the *Lemon* test.
60 *See* note 21, *supra*.
61 *See, e.g.*, *Am. Legion*, 139 S. Ct. at 2081–82; Michael McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 118–20 (1992) (outlining the doctrinal chaos fostered by *Lemon*).
62 *Am. Legion*, 139 S. Ct. at 2071, 2087. As Justice Gorsuch stated,

> *Lemon* was a misadventure . . . Scores of judges have pleaded with us to retire *Lemon*, scholars of all stripes have criticized the doctrine, and a majority of this Court has long done the same. . . . Today, not a single Member of the Court even tries to defend *Lemon* against these criticisms – and they don't because they can't.

Id. at 2101. (Gorsuch, J., concurring in judgment). For further discussion on *Lemon*'s hostility toward religion, see Patrick Garry, *The Myth of Separation: America's Historical Experience with Church and State*, 33 Hofstra L. Rev. 475, 495–497 (2004).

It was as if the failure of *Lemon*'s grand test discouraged the Court from any broader or more comprehensive view of the Establishment Clause. However, as much as the Court may have dismissed *Lemon,* it only narrowly did so, refusing to apply it only to longstanding passive displays such as the Cross.[63]

In place of the *Lemon* test, which was used by the Fourth Circuit to find the Cross unconstitutional,[64] the Court resorted to a narrow application of the historical traditions test, holding that sufficiently longstanding passive religious symbols that have over time taken on one or more secular meanings do not violate the Establishment Clause.[65] Articulated in *Marsh v. Chambers,* which upheld the practice of a chaplain leading a prayer at the beginning of a state legislative session, the historical traditions test looks to whether the particular government-religion interaction has a sufficiently long historical record.[66]

The problem with the historical traditions test, regarding its ability to resolve other Establishment Clause issues, is that it looks only to the distant past.[67] Consequently, a host of unanswered questions persist in the aftermath of *American Legion*. As the Court stated, "[t]he passage of time gives rise to a strong presumption of constitutionality."[68] In the case of the Cross, it had stood for 89 years.[69] But how long must a government-religion interaction per-

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63 "Today, the Court declines to apply *Lemon* in a case in the religious symbols and religious speech category . . . . The Court's decision in this case again makes clear that the *Lemon* test does not apply to Establishment Clause cases in that category." *Am. Legion,* 139 S. Ct. at 2093. (Kavanaugh, J., concurring). The narrowness of the decision was reflected in Justice Kagan's concurrence: "Although I agree that rigid application of the *Lemon* test does not solve every Establishment Clause problem, . . . I prefer at least for now to [proceed on a] case-by-case [basis], rather than to sign on to any broader statements about history's role in Establishment Clause analysis." *Id.* at 2094 (Kagan, J., concurring in part).

64 Am. Humanist Assoc. v. Md.-Nat'l Capital Park & Planning Comm'n, 874 F. d 195, 212 (4th Cir. 2017), *rev'd sub nom.* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019).

65 *Am. Legion,* 139 S. Ct. at 2089.

66 Marsh v. Chambers, 463 U.S. 783, 787–88 (1983). The test was later applied in *Town of Greece v. Galloway,* 572 U.S. 565 (2014) (upholding the constitutionality of a town's practice of opening monthly town board meetings with an invocation given by a volunteer chaplain of the month).

67 *See supra* note 52 and accompanying text for a discussion of the historical traditions test.

68 *Am. Legion,* 139 S. Ct. at 2085.

69 *Id.* at 2074.

sist before it acquires a presumption of constitutionality? What if other longstanding symbols or expressions do not acquire the various secular meanings or perceptions that the Cross acquired over its 89 years? What if evidence exists that the longstanding symbol had more religious reasons attached to its construction than did the Cross? Because the historical traditions test encompasses such a long period of time, it becomes impossible to know when exactly a religious symbol becomes sufficiently surrounded by secular meanings as to render it constitutional.

IV. Competing Views of the Establishment Clause

The *Lemon* test was a definite casualty of *American Legion*. But the Court made no attempt to replace *Lemon* with a revised or altered view of the Establishment Clause; instead, the Court seemingly issued as narrow a decision as it could, thereby avoiding the opportunity to give any view of the role of the Establishment Clause in the scheme of religious liberty or any broader direction to the relationship of religion and the public square.[70] Nor did the Court address any underlying constitutional theory or vision of the Establishment Clause that gave rise to *Lemon*.[71] Perhaps it was unrealistic to expect another grand *Lemon*-type test. The consequence of this, however, is that the *American Legion* decision does little to reconcile the various competing and opposing views of the Establishment Clause.[72]

Other than telling us that the *Lemon* or endorsement test is inappropriate for longstanding religious symbols that have taken on various secular meanings, the Court in *American Legion* gives no broader guidance to Establishment Clause disputes.[73] It is clear that five different concurrences would make any kind of broad or far-reaching decision impossible. On the other hand, the decision does help turn the Court further away from a *Lemon* test that proved both unpredictable and inhospitable to the historic presence of re-

70 *See generally Am. Legion*, 139 S. Ct. 2067.

71 The underlying vision of *Lemon* rested in the wall of separation metaphor that saw a complete separation between government and religion, thus confining religion to the private realm. *See* Patrick M. Garry, *The Democratic Aspect of the Establishment Clause: A Refutation of the Argument that the Clause Serves to Protect Religious or Nonreligious Minorities*, 59 Mercer L. Rev. 595, 618–19 (2008).

72 Justice Thomas acknowledged this deficiency, stating that “I cannot join the Court’s opinion because it does not adequately clarify the appropriate standard for Establishment Clause cases.” *Id.* at 2098 (Thomas, J., concurring in judgment).

73 *See generally Am. Legion*, 139 S. Ct. 2067.

ligion in American society. *American Legion* will undoubtedly mark a small step in the Court's Establishment Clause jurisprudence, but perhaps it will be a necessary step that leads to an eventual understanding of the Establishment Clause that is free from the restraints of *Lemon*.

The history and current state of confusion and inconsistencies in the Court's Establishment Clause jurisprudence reflect an array of different viewpoints concerning the meaning and purpose of the Clause itself. For simplicity's sake, these various viewpoints will be narrowed to two basic, opposing positions. On one hand, separationists see the Establishment Clause as protecting a secular society, with religion as a strictly private enterprise that should not enter the public square.[74] On the other hand, accommodationists believe the Establishment Clause serves to protect religious liberty and support a thriving religious pluralism in the public square, permitting the government to accommodate religion's historic public presence.[75]

A. The Separationist View

1. The Wall of Separation's Inaccurate Reading of History

The separationist view holds that a strict separation should exist between government and religion and that under no circumstances should any government aid or benefits go to religion.[76] This view seeks to achieve a secularist public square, with religion confined to a purely private role or presence.[77] It sees religion as having little positive effect on public life, and most often having a negative effect.[78] However, the separationist position contradicts the American historical experience. According to Justice Story, the Establishment Clause merely helped to effectuate the inalienable right of free exercise by preventing any particular sect from being established at the national level.[79] Indeed, the secularist view was wholly rejected

74 *See* Garry, *Religious Freedom Deserves More than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, *supra* note 4, at 4–6, 24, 40; Garry, *supra* note 21, at 1177.

75 *See* Garry, *Religious Freedom Deserves More than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, *supra* note 4, at 41.

76 *See id.* at 45 (outlining the purpose and effects of the separationist view).

77 *Id.* at 24–33.

78 *See id.*

79 2 Joseph Story, Commentaries on the Constitution of the United States 593–97 (2d ed. 1851).

by every justice on the Marshall court.[80] And throughout the 19th century and up until the mid-twentieth century, courts consistently endorsed the importance of religion in the nation's public life.[81] However, in 1947, the Court's Establishment Clause jurisprudence took a turn.

The infamous "wall of separation" metaphor was introduced to Establishment Clause jurisprudence in the 1947 case of *Everson v. Board of Education*[82] and has since formed the constitutional basis for the modern separationist view.[83] In upholding the constitutionality of a program allowing parents to be reimbursed for the costs of transporting their children to and from parochial schools, the Court gave its view of the Establishment Clause: "[T]he clause against establishment of religion by law was intended to erect a 'wall of separation between church and state.'"[84] As Justice Rehnquist later argued, the "greatest injury" done by the use of this metaphor has been in its "mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights."[85] Although early Americans may have believed in separating church and state, their purpose was not to protect the state from religion, but to protect religious institutions from being regulated and corrupted by the state. [86]

The "wall of separation" metaphor lead in 1971 to *Lemon v. Kurtzman*,[87] and subsequently courts during the 1970s and 1980s began taking a separationist view of religion that sharply contradicted the nation's historical experience, interpreting the Establishment

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80 Joseph McClellan, Joseph Story and the American Constitution 134 (1971).

81 Douglas W. Kmiec & Stephen B. Presser, The American Constitutional Order: History, Cases, and Philosophy 185–86 (1998).

82 Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

83 For a discussion of the history of this metaphor, see Garry, *supra* note 62, at 494–500.

84 *Id.* at 15–16.

85 Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting).

86 Stephen Carter, *Reflections on the Separation of Church and State*, 44 Ariz. L. Rev. 293, 294 (2002).

87 Lemon v. Kurtzman, 403 U.S. 602, 611–12 (1971). In striking down two state statutes that provided public money to parochial schools, the Court articulated what would be known as the three-part *Lemon* test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion." *Id.* at 606, 613 (internal citation omitted).

Clause as protecting a secular state and confining religion to the private realm.[88] This separationist approach has often conveyed a "categorical opposition to the intermixing" of religion and politics.[89] However, the framers never intended "to use the idea of separation to authorize discrimination against religion within the public sphere."[90]

The "wall of separation" metaphor is appropriate only if one believes that there should be a limit on the public presence of religion, that religion should be a private matter, existing outside of the public square. However, the constitutional history of the First Amendment, as well as the American experience with religion and the public square, contradicts the notion that the Establishment Clause reflects a suspicion of religion and an opposition to its public presence.[91] As Justice Goldberg observed:

> Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion.[92]

The "wall of separation" metaphor does not even accurately reflect the beliefs of its original author, Thomas Jefferson.[93] In

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88 Joseph Viteritti, *Reading* Zelman*: The Triumph of Pluralism, and Its Effects on Liberty, Equality and Choice*, 76 S. CAL. L. REV. 1105, 1115–16 (2003). For a discussion of how *Everson* misstated Jefferson's views, how Jefferson was not a strict separationist, and how Jefferson was really concerned about limiting the federal government's power to regulate religion, see David Steinberg, *Thomas Jefferson's Establishment Clause Federalism*, 40 HASTINGS CONST. L.Q. 277, 289–303 (2013).

89 Mark D. Rosen, *Establishment, Expressivism, and Federalism*, 78 CHI.-KENT L. REV. 669, 688 (2003).

90 Michael Stokes Paulsen, Lemon *is Dead*, 43 CASE W. RES. L. REV. 795, 810 (1993) (emphasis omitted).

91 *See generally* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 481, 483–84 (2002) (arguing that the strict separationist view has little historical and constitutional support and that this view owes more to political forces).

92 Sch. Dist. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

93 *See* DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 125–26 (2002).

his book, *Thomas Jefferson and the Wall of Separation between Church and State,* Daniel Dreisbach reveals the historical flaws behind the view that the First Amendment intended to create a "wall of separation" between religion and government.[94] Dreisbach argues that Jefferson's "wall of separation" differs both in "function and location" from the "high and impregnable barrier erected in 1947 by Justice Hugo Black . . . in *Everson v. Board of Education*."[95] As Dreisbach explains: "Whereas Jefferson's wall explicitly separated the institutions of church and state, Black's wall, more expansively, separates religion and all civil government."[96] Consequently, the metaphor as used in the Court's Establishment Clause jurisprudence is not grounded in Jeffersonian principles. This modern judicial misreading of Jefferson's "wall of separation" metaphor was well documented by Justice Rehnquist in his dissent in *Wallace v. Jaffree*:[97]

> It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years. Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the states. His letter to the Danbury Baptist Association was a short note of

94 *See id.* Dreisbach argues that Jefferson's actions throughout his public career show that he believed state governments could accommodate religious exercises. *Id.* at 59–60. Dreisbach is not alone; many other works examine the historical origins of the wall of separation. *See generally* Philip Hamburger, *supra* note 91; John Witte, Jr., Religion and the American Constitutional Experiment: Essential Rights and Liberties (2000); Steven D. Smith, Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom (1995); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279 (2001); J. Clifford Wallace, *The Framers' Establishment Clause: How High the Wall?*, 2001 BYU L. Rev. 755. The historical record demonstrates that, in the years leading up to adoption of the First Amendment, the colonies, states, and Continental Congress frequently enacted legislative accommodations to religions and religious practices; there is "no substantial evidence that anyone at the time of the Framing viewed such accommodations as illegitimate, in principle." Michael McConnell, *Accommodation of Religion,* 60 Geo Wash. L. Rev. 685, 693 (1992).

95 Dreisbach, *supra* note 93, at 125.

96 *Id.*

97 Wallace v. Jaffree, 472 U.S. 38, 91–114 (1985) (Rehnquist, J., dissenting).

> courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment. … Whether due to its lack of historical support or its practical unworkability, the *Everson* "wall" has proved all but useless as a guide to sound constitutional adjudication."[98]

Jefferson's metaphor has been distorted in the attempt to push religion to the margins of civil society. In the words of Justice Goldberg, the strict separationist approach carries an attitude of "a brooding, and pervasive devotion to the secular and a passive, or even active, hostility, to the religious."[99] Under the influence of the "wall of separation" metaphor, establishment doctrines have sought to reduce the public role of religion and the civil government's interaction with religion.[100] But the fact that the religion clauses are even included in the First Amendment proves that, to the framers, religion was not like everything else. Religion was something special, deserving of extra protection.

2. *Separationism and the Endorsement Test*

The endorsement test has "become the preeminent analytical tool employed in Establishment Clause cases involving religious symbols" and expression on public property.[101] This test has taken the "wall of separation" metaphor one step further. Not only does it contain a presumption that religion should remain private, but it affirmatively sides with those who may object to or be offended by religion's public presence.[102] Thus, an examination of the endorsement test reveals the nature and effects of a separationist view of the Establishment Clause.

Steven Smith describes how this test and the legacy of the Court's "wall of separation" approach has resulted in the "constitutionalization of political secularism."[103] Instead of being used to fos-

98 *Id.* at 92, 107.
99 Sch. Dist. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).
100 Carter, *supra* note 86, at 309.
101 Lopez, *supra* note 25, at 195.
102 *See* Garry, *supra* note 21, at 678–81.
103 Steven Smith, *Nonestablishment, Standing, and the Soft Constitution*, 85 ST. JOHN'S L. REV. 407, 427 (2011).

ter a diversity of religions, while not establishing any one religion, the Establishment Clause under the "wall of separation" approach has "effectively establish[ed] political secularism as an official and enforceable national orthodoxy."[104]

According to the proponents of a broadly-enforced Establishment Clause, the Clause serves to remedy any sense of exclusion or alienation felt by those who disagree with the public expression of religion.[105] Under this view, the only way to combat the isolation or alienation that dissenters to religion might feel is to ban all religious messages from public property.[106] But the First Amendment focuses on freedom, not social engineering. The whole purpose of religious faith and exercise is to confront people and make them uncomfortable with the status quo of their lives. Moreover, if government actions ever rise to the point of truly excluding minority beliefs from the public square, then the Free Exercise Clause should come into play, since government is then targeting certain beliefs for discriminatory treatment.

The application of the endorsement test often favors dissenting minorities.[107] The court took this approach in *Buono v. Norton*, where it ordered that a cross be removed from a federal preserve.[108] The cross was a memorial to veterans who died in World War I; it had been erected by the Veterans of Foreign Wars in 1934, 60 years before the land on which the cross stood was made part of the federal preserve.[109] Approximately 130,000 acres comprised the preserve, and the cross, which was less than eight feet tall, stood

104 *Id.* at 431.

105 *See* Patrick M. Garry, *Distorting the Establishment Clause Into an Individual Dissenter's Right*, 7 Charleston L. Rev. 661, 678–81 (2013).

106 Lopez, *supra* note 25, at 224. "[T]he Establishment Clause should . . . create a strong presumption against the display of religious symbols . . . [because] [t]here is always a risk that such symbols will offend nonmembers of the faith being advertised." Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 650–51 (1989), *abrogated by* Town of Greece, N.Y. v, Galloway, 572 U.S. 565 (2014). "A paramount purpose of the Establishment Clause is to protect such a person from being made to feel . . . a stranger in the political community." Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S 753, 799–800 (applying the endorsement test).

107 *See, e.g.*, Buono v. Norton, 212 F. Supp. 2d 1202 (C.D. Cal. 2002), *aff'd*, 371 F.3d 543 (9th Cir. 2004).

108 *Id.* at 1215–17. For the Supreme Court decision in this case, although that decision did not rule on Establishment Clause grounds, see Salazar v. Buono, 559 U.S. 700 (2010).

109 *Buono*, 212 F. Supp. 2d at 1205.

on undeveloped land that was well off of one of the narrow secondary roads winding through the preserve.[110] Thus, it follows logically that almost all the viewers of this cross were automobile travelers who had made a conscious decision to drive through that particular secondary road. But, contrary to free speech cases, the court did not require offended viewers to take any steps to avoid the harm, such as taking another road or not looking up at the cross as their car passed by.[111] The court also seemed indifferent to the context of the cross, concluding that the size of the cross and the number of people who view it are not relevant to whether a reasonable observer would perceive the cross as a governmental endorsement of religion.[112]

Under the endorsement test, the rights of a religious dissenter have practically no specific boundaries. Since perception is the key to endorsement test cases,[113] seemingly nothing is too minute to

110 *Id.*

111 Regarding listeners who do not want to hear unwanted or offensive speech, the courts require that they bear the full burden of averting their eyes or ears. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 209–12 (1975) (striking down an ordinance prohibiting drive-in movie theaters from exhibiting nudity and holding that the burden falls upon the unwilling viewer to "avert his eyes") (quoting Cohen v. California, 403 U.S. 15, 21 (1971)). *See also* Patrick M. Garry, *The Right to Reject: The First Amendment in a Media-Drenched Society*, 42 SAN DIEGO L. REV. 129, 143–44 (2005).

112 *Buono*, 212 F. Supp. 2d at 1216. Although there was no plaque in *Buono,* the existence of such a plaque, explaining how and why the cross had been erected, may not have mattered. In *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, which the court refers to in *Buono*, the *Buono* court stated:

> With regard to whether the presence of the cross has a primary effect that advances or inhibits religion, or conveys a message of governmental endorsement or disapproval of religion, the court is bound by SCSC, which, in applying the effect prong, concluded that the presence of a particular cross on government land violated the Establishment Clause. The SCSC court, faced with facts materially indistinguishable from those in the action at bar, assessed the constitutionality of a latin cross that was erected by private individuals. 93 F.3d at 618. These individuals deeded the cross to the City of Eugene, which placed a plaque "at the foot of the cross dedicating it as a memorial to war veterans."

Buono at 1215.

113 Under the endorsement test, impermissible government involvement with religion exists when the public perceives that government is endorsing a religion. *See* Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) (discussing the endorsement test and the importance of determining what message the government communicates in its activities).

rise to an official government endorsement of religion.[114] Private religious speech conducted on public property can rise to the level of an establishment, even when the government is not officially sponsoring or sanctioning that speech, lest the perception mistakenly occur that the government is so sponsoring.[115]

114 One such endorsement was found with an Ohio school district, whose policy permitted non-profit community groups such as Little League, the Red Cross and the YMCA to distribute leaflets advertising their activities. *See* Rusk v. Crestview Local Sch., 220 F. Supp. 2d. 854, 855 (N.D. Ohio 2002). Religious groups could also distribute their materials, but only after the principal scrutinized those leaflets, ensuring that they only advertised specific activities and did not engage in any proselytizing. *See id.* Moreover, the leaflets were not even handed out personally to the children; they were placed in mailboxes from which students could retrieve them at the end of the school day. *Id.* Yet despite all these precautions, the court held that the practice of distributing religious material to students could be construed as an endorsement of religion by the school. *See id.* at 858. In another case, the singing of "The Lord's Prayer" by a high school choir was found to violate the Establishment Clause. *See* Skarin v. Woodbine Cmty. Sch. Dist., 204 F. Supp. 2d 1195, 1198 (S.D. Iowa 2002). According to the court, just the rehearsal of that song during choir practice was enough to constitute a violation. *See id.* Even a city's leasing of land to the Boy Scouts on favorable lease terms was held to be an unconstitutional establishment of religion. *See* Barnes-Wallace v. Boy Scouts of Am., 275 F. Supp. 2d 1259, 1287 (S.D. Cal. 2003), *aff'd in part, rev'd in part sub nom.* Barnes-Wallace v. City of San Diego, 704 F.3d 1067 (9th Cir. 2012).

115 In *Capital Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995), involving a private group's placement of a cross in a public plaza next to the state capitol, the court ruled that the display did not violate the Establishment Clause. However, the plurality left open the possibility that the Establishment clause might be violated if the government "fostered or encouraged" the mistaken attribution of private religious speech to the government. *Id.* at 766. Justice O'Connor noted that "an impermissible message of endorsement can be sent in a variety of contexts, not all of which involve direct government speech or outright favoritism." *Id.* at 774 (O'Connor, J., concurring in part and concurring in the judgment). This may occur "even if the governmental actor neither intends nor actively encourages [the endorsement]." *Id.* at 777. Thus, the Establishment Clause imposes on the government "affirmative obligations that may require a State, in some situations, to take steps to avoid being perceived as supporting or endorsing a private religious message." *Id.* Consequently, even though Justice O'Connor joined in the majority opinion which stated that "private religious speech . . . is as fully protected under the Free Speech Clause as secular private expression." *Id.* at 760. She also announced that the Establishment Clause limits the Free Speech Clause's protection of private religious speech when that speech occurs on government property or in other contexts in which the speech becomes associated with the government. *Id.* at 772 (O'Connor, J., concurring in part and concurring in the judgment). The problem is, of course, how to determine when private speech "becomes associated" with the government.

The endorsement test examines government conduct from both an objective and subjective viewpoint, recognizing that the message sent by the conduct may be different from the message received.[116] This subjectivity regarding the possible impressions that unknown viewers might have of a religious display renders the endorsement test incapable of certainty.[117] Justice Kennedy argues that the endorsement test reflects "an unjustified hostility toward religion" and a "callous indifference toward religious faith that our cases and traditions do not require."[118]

Justice Gorsuch echoed this criticism toward the endorsement test and its underlying basis in his *American Legion* concurrence.[119] He articulated a blistering objection to the notion of the "offended observer" theory of standing in Establishment Clause jurisprudence.[120] And if offense cannot give rise to standing, it cannot form the basis of an Establishment Clause violation. As Justice Gorsuch recognized: "In a large and diverse country, offense can be easily found[;] . . . most every governmental action probably offends somebody."[121]

3. The Endorsement Test as a Dissenter's Right

The endorsement test often diverts the courts from the essential focus of the Establishment Clause—i.e., state interference in the institutional autonomy of religious organizations—and turns it instead to all the possible ways in which a religious dissenter might object to or feel uncomfortable with religious expressions or symbolism on public property. The endorsement test rests in part on Justice O'Connor's premise that the Establishment Clause prohibits the government from sending messages which divide the community into outsiders and insiders.[122] In *Lynch v. Donnelly*, Justice O'Connor wrote that "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community,

116 *See* Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).
117 *See* Smith, *supra* note 28, at 300–01.
118 Cty. of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 655, 644 (1989).
119 Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2101 (2019) (Gorsuch, J., concurring).
120 *Id.* at 2100–02.
121 *Id.* at 2103 (emphasis omitted).
122 *See* Lynch v. Donnelly, 465 U.S. 668, 688, 692 (1984) (O'Connor, J., concurring) (stating that government actions endorsing religion "make religion relevant, in reality or public perception, to status in the political community").

and an accompanying message to adherents that they are insiders, favored members of the political community."[123]

Strict separationists argue that religious speech can be socially and politically divisive, and hence should be discouraged from entering the public sphere.[124] They argue that the Establishment Clause should protect anyone who might suffer a sense of alienation because of their nonbelief.[125] As strict separationists argue, the First Amendment should promote a sense of inclusion and combat the isolation that minority groups feel; and the only way to do this may be to "ban all permanent religious messages from public grounds."[126] But such a reading gives a heckler's veto to anyone who objects to religious speech in the public square, thereby endangering the right to free speech.[127]

4. The Establishment Clause as Social Policy

The dissenter's right created by the separationist view in general and the endorsement test in particular rests perhaps less

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123 *Id.* at 687–88 (O'Connor, J., concurring) ("The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community.").

124 *See* Douglas Laycock, *Freedom of Speech That is Both Religious and Political*, 29 U.C. Davis L. Rev. 793, 801 (1996). But all these arguments ignore the political and socially unifying effects that religion has had. For instance, the abolition movement relied heavily on religious argument. *See* Sydney E. Ahlstrom, A Religious History of the American People 648–69 (1972). Likewise, religious activists and arguments led the way in the civil rights movement. Edward M. Gaffney, Jr. *Politics Without Brackets on Religious Convictions*, 64 Tul. L. Rev. 1143, 1168–71 (1990). And rather than undermining civic values, the evidence indicates that religious institutions have historically served as a foundation for civic life in America. *See* Robert D. Putnam, Bowling Alone: The Collapse and Revival of American Community 65-69 (2000); William A. Galston & Peter Levine, America's Civic Condition: A Glance at the Evidence, *in* Community Works: The Revival of Civil Society in America 30, 33–34 (E.J. Dionne, Jr. ed., 1998).

125 *See* Lopez, *supra* note 25, at 218 (citing examples of threats and harassment made against religious dissenters and those who take court action to oppose public displays of religion).

126 *Id.* at 224.

127 *See* Richard Duncan, *Just Another Brick in the Wall: The Establishment Clause as a Heckler's Veto*, 18 Tex. Rev. L. & Pol. 255, 264–65 (2014) (stating that "the evil in heckler's veto situations is that it empowers hecklers to 'silence any speaker of whom they do not approve.'"). As Richard Duncan observes, the "endorsement test has been used by the Court as a vehicle for allowing offended observers . . . to impose heckler's vetoes on harmless religious expression in the public culture." *Id.* at 277.

on constitutional history than on a certain social view of religion in which religion can be a destructive force within society. Of all the issues and conflicts in society, according to this view, religion is the most divisive—and divisive in a way that uniquely threatens society.[128]

But if divisiveness becomes a controlling factor, then the Establishment Clause may no longer focus on constitutional intent or history, but rather on achieving certain social and cultural conditions; indeed, if social divisiveness becomes a controlling constitutional principle, the "wall of separation" metaphor and the endorsement test can be used to shield a secular society and its public square, as well as opponents of religion, from certain controversies and conflicts that naturally arise in a democracy containing religious constituencies and viewpoints. This view reflects a fear that the failure to keep the religious and political spheres separate will lead to social strife along religious lines and a fragmentation of the political community.[129] Of course, the most effective way to keep religion private and out of the public arena is to silence religion with laws stopping religious believers from speaking out on controversial issues.

In their *Zelman v. Simmons-Harris* dissents, reflecting the religion-as-divisive view, Justices Stevens and Breyer, for instance, argue that the extension of any public aid to religion would foster political discord and tear the social fabric underlying American democracy.[130] Drawing on experiences from the Balkans, Northern Ireland and the Middle East, Justice Stevens wrote: "Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy."[131] Justice Breyer likewise noted that "the Establishment Clause concern for protecting the Nation's social fab-

128 For a discussion of this political divisiveness argument, see Garry, *supra* note 71, 608–10.

129 *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 718–729 (2002) (Breyer, J., dissenting). Another concern includes not making a person's standing in the political community turn on her religion. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring). As one commentator has noted, "it is plausible to conclude that today's Establishment Clause doctrine communicates at least one thing very clearly: that the intermingling of political and religious authority is categorically bad." Rosen, *supra* note 89, at 685.

130 *See Zelman*, 536 U.S. at 684–86 (Stevens, J., dissenting); *id.* at 717 (Breyer, J., dissenting).

131 *Id.* at 686 (Stevens, J., dissenting).

ric from religious conflict poses an overriding obstacle to the implementation of this well-intentioned school voucher program."[132] In *McCreary County v. ACLU*, Justice Souter's opinion, striking down a Ten Commandments display in a county courthouse, stated that "nothing does a better job of roiling society" than any perceived interaction between government and religion.[133]

Justice Breyer further asserted his religion-as-politically-divisive theme in *Van Orden v. Perry*, where he supported a Ten Commandments monument on the Texas State Capitol grounds, arguing that in this case the monument was "unlikely to prove divisive."[134] According to Justice Breyer, the purpose of the Establishment Clause is to avoid "divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike."[135] This is not a new argument. Chief Justice Warren Burger used it in his *Lemon* opinion, in which he wrote that "[o]rdinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[136] Echoing these sentiments, Justice Marshall in *Wolman v. Walter* found that an Ohio program that provided public assistance to schools, including religious ones, violated the Establishment Clause because the aid risked "political 'divisiveness on religious lines.'"[137]

But this avoidance of strife argument runs exactly counter to the whole purpose behind the Free Speech and Free Exercise clauses of the First Amendment. Moreover, the acceptance of this argument serves to effectively censor particular viewpoints from public discourse. Essentially, this argument rationalizes the "freedom from religion" notion that sees religion as a threat to society and seeks

132 *Id.* at 717 (Breyer, J., dissenting).
133 McCreary Cty. v. ACLU, 545 U.S. 844, 876 (2005). According to Justice Souter, America is "centuries away from the St. Bartholomew's Day massacre and the treatment of heretics in early Massachusetts, but the divisiveness of religion in current public life is inescapable." *Id.* at 881.
134 Van Orden v. Perry, 545 U.S. 677, 704 (2005) (Breyer, J., concurring).
135 *Id.* at 698.
136 Lemon v. Kurtzman, 403 U.S. 602, 622 (1971). According to the Chief Justice, the "potential divisiveness of such conflict is a threat to the normal political process," since it "would tend to confuse and obscure other issues of great urgency." *Id.* at 622–23.
137 Wolman v. Walter, 433 U.S. 229, 259 (1977) (Marshall, J., concurring in part and dissenting in part) (internal citation omitted).

to drive religion out of the public square and confine it to the private realm. The argument also contradicts the whole thrust of recent equal protection norms, insofar as it seeks to single out particular voices or viewpoints for discriminatory treatment.[138] Indeed, if the fear of social divisiveness is so well-founded and powerful, then why are certain controversial views related to race or sexual preference not subject to regulation?[139]

This approach also contradicts Madison's view that the only way to counter social division was to encourage an even greater pluralism.[140] As Madison outlined in *Federalist Paper No. 10,* the threat of majority tyranny can be remedied by a diverse political landscape composed of many competing groups and interests.[141] And the same holds true for religion. Madison argued in *Federalist Paper No. 12* that the way to guard against the oppression of minority religions was to promote a robust religious pluralism.[142] The religion-as-socially-divisive view is thus a conclusory opinion that ignores all the evidence of religion's positive social contributions over the centuries, assigning to the Court the role of squashing any conflicts that might arise from the religious practices of a diverse people.[143]

To the extent that the separationist view rests on a view of religion as unacceptably divisive, it grounds the Establishment Clause on considerations of what kind of a modern culture and society is de-

138 For a discussion of how the Court's treatment of religious freedom differs from its treatment of speech freedoms, see Patrick M. Garry, *An Inequality Among Equals: Disparities in the Judicial Treatment of Free Speech and Religious Exercise Claims*, 39 WAKE FOREST L. REV. 361 (2004).

139 For an excellent discussion of the religion-as-politically-divisive view and how this view underlies the separationist position, see Richard W. Garnett, *Religion, Division, and the First Amendment,* 94 GEO. L.J. 1667, 1674 n.40, 1676 n.62, 1705 (2006).

140 *See* JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 35–36, 42–58 (1996).

141 *See* THE FEDERALIST NO. 10 (James Madison).

142 *See* THE FEDERALIST NO. 10 (James Madison).

143 The U.S. is one of the most religious countries in the world. *See* Stephen J. Stein, *Religion/Religions in the United States: Changing Perspectives and Prospects*, 75 IND. L.J. 37, 41 (2000). Yet, there is little of the sectarian strife that plagues much of the rest of the world. Rather than serving to undermine civic values, the weight of evidence indicates that religious institutions have historically served as a foundation for civic life in America. PUTNAM, *supra* note 124, at 65–69. In the opinion of the author of this article, even if one does accept the premise that religion is divisive, that reason alone is not sufficient to single it out for more restrictive treatment, just as this reason cannot justify the censorship of highly controversial and inflammatory political speech.

sired. In effect then, the view seeks to use the Establishment Clause as a broad regulatory power to achieve that desired society. But if the separationist view envisions religion as an oppressive force used by a Christian majority to coerce the rest of society, this assumption may now be factually erroneous, given the state of religious observance in general and membership in Christian denominations in particular.

B. The Accommodationist View

Contrary to the separationist view, the accommodationist view sees religion as an historic and valuable element of civil society, and believes that the government should accommodate this element on a nondiscriminatory basis.[144] This view recognizes that the constitutional framers believed that a strong religious presence in society served a vital role in the maintenance of American democracy.[145] Believing that the Establishment Clause grew out of this constitutional sentiment, accommodationists assert that the Clause protects a free and vibrant religious presence in America.[146] Under this view, the Establishment Clause provides a protection for religious liberty over and above the Free Exercise Clause.[147] While a secular government may be a result, the Establishment Clause does not serve as a specific promoter of secularism within society. And the protection *for* religion provided by the Establishment Clause, recognizing that the pursuit of religious truth represents a valuable human endeavor, occupies the opposite end of the spectrum from the notion of protection *from* religion, which sees religion as dangerous.[148]

In 18th century America, "[a]ccommodations of religion . . . were frequent and well known, and no one took the position that they constituted an establishment of religion."[149] The framers of

144 For a discussion of the accommodationist view, see Garry, *Religious Freedom Deserves More than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, *supra* note 4, at 37–42.

145 *See id.* at 37–38.

146 *See id.* at 39–42.

147 *See id.* at 42.

148 *See id.*

149 McConnell, *supra* note 94, at 714. Generally, whenever conflicts occurred between civil law and religious belief, the latter was accommodated; and these accommodations were never seen as amounting to impermissible establishments. *Id.* at 714–15. In fact, such establishment claims were never even raised during the colonial and constitutional periods. *See* Mark Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 Geo. Wash.

the First Amendment "did not think that the government should adopt a position of being . . . religious or certainly anti-religious."[150] To them, the Pilgrims had not journeyed to America just to live in a society void of religion.[151] The framers believed, as for instance did George Washington, that "religion and morality [were the] indispensable supports" for democratic government.[152] According to Washington, "religion . . . [was] inseparable from good government, and . . . no true patriot . . . would attempt to weaken the . . . political . . . influence of religion and morality."[153] De Tocqueville likewise observed that the early Americans considered religion "necessary to the maintenance of republican institutions."[154]

During the constitutional period, "churches were the primary institutions for the formation of democratic character and the transmission . . . of community values."[155] But the framers did not want to duplicate the English experience with the established Angli-

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L. REV 645, 645–46 (1992). In those periods, it was religious organizations that performed social services, including education. *See* WILLIAM C. BOWER, CHURCH AND STATE IN EDUCATION 23–24 (1944). It was government that "depended on the support of the churches for stability, a sense of shared morality among the citizenry, and a common commitment to the protection of the greater good of the community." Chopko, *supra*, at 647.

150 *See* CHESTER JAMES ANTIEAU ET AL., FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES 187–88 (1964) (describing the Framers' understanding of the presence of religious ideals in governmental institutions).

151 *See* 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 153–55, 227 (1950) (arguing that the Puritans had journeyed to America for the freedom to publicly practice their religion). And many other religious dissenters, including Catholics, had come for the same reason. *Id.* at 227–28.

152 President George Washington, *Washington's Farewell Address, (Sept. 17, 1796)*, *in* 1 DOCUMENTS OF AMERICAN HISTORY 169, 173 (Henry S. Commager ed., 1973).

153 David Barton, *The Image and the Reality: Thomas Jefferson and the First Amendment*, 17 NOTRE DAME J. L. ETHICS & PUB. POL'Y 399, 428 (2003). And yet, those who advocate reading the Establishment Clause broadly ignore these proclamations from such a constitutional expert as Washington, and instead focus on their own interpretations of the Jeffersonian statement regarding a wall of separation between church and state.

154 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293 (J.P. Mayer ed., 1969). He came to agree with this position, arguing that religion was desperately needed in a democratic republic. *Id.* at 294.

155 *See* Michael W. McConnell, *Why is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1253 (2000).

can church.[156] They did not want a federally-sponsored religion that would interfere with the beliefs or existence of other religious denominations; nor did they want the federal government to corrupt or weaken religions by funding and regulating them.[157] Thus, it was for the purpose of strengthening religion that the Establishment Clause was drafted.[158]

Not only did late 18th century Americans fail to see religion as a politically divisive threat to democracy, and hence the Establishment Clause as protecting secular society from religion, they also saw religion as a vital element in the functioning of a democracy.[159] To Americans of the constitutional period, religion was an indispensable ingredient to self-government.[160] The constitutional fram-

156 *See, e.g.*, Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 668 (1970) ("[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.").

157 *See id.*; *see also* McConnell, *supra* note 155, at 1253–57.

158 *See* McConnell, *supra* note 155, at 1255 ("Americans of the founding era widely recognized that establishing religion–granting it exclusive privileges and emoluments and protecting it from the need to compete in the marketplace of ideas–would weaker religion, not strengthen it.).

159 *See id.* at 1253–57 ("[I]n the early years of the American republic, few would have perceived any conflict between a religious citizenry and liberal republicanism.").

160 Tocqueville likewise observed that the early Americans considered religion "necessary to the maintenance of republican institutions." TOCQUEVILLE, *supra* note 154, at 293. He came to agree with this position, arguing that religion was desperately needed in a democratic republic. *Id.* at 294. Jefferson, in his *Notes on Virginia*, expressed the sentiment that belief in divine justice was essential to the liberties of the nation: "And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?" THOMAS JEFFERSON, THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 278-79 (Adrienne Koch & William Peden eds., 1944). Political writers and theorists emphasized the need for a virtuous citizenry to sustain the democratic process. For a discussion on the influence of republican thought on the writing of the Constitution, see generally THOMAS L. PANGLE, THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE (1988). John Adams believed there was "no government armed with power capable of contending with human passions unbridled by morality and religion." 9 THE WORKS OF JOHN ADAMS 229 (Charles Frances Adams ed., 1850). He wrote that "[r]eligion and virtue are the only foundations, not of republicanism and of all free government but of social felicity under all governments and in all the combinations of human society." THE SPUR OF FAME: DIALOGUES OF JOHN ADAMS AND BENJAMIN RUSH 192 (John A. Schutz & Douglass Adair

ers "saw clearly that religion would be a great aid in maintaining civil government on a high plane," and hence would be "a great moral asset to the nation."[161]

Late 18th century Americans generally agreed that the only solid ground for the kind of morality needed to build a virtuous citizenry lay with religious observance.[162] Religion, the Founders believed, fostered republicanism.[163] Consequently, the notion that the First Amendment was intended to foster a strict policy of state neutrality or indifference toward religion would have been met with, to use Justice Story's words, "universal disapprobation, if not universal indignation."[164] It was the separation of a specific church from state, not the separation of all religion from the state, that was the aim of the framers.[165]

The framers rejected the idea of an established church, but they had no problem with government accommodations of private religion.[166] The Bill of Rights was ratified in an age of close and on-

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eds., 1966). According to Benjamin Rush: "The only foundation for a useful education in a republic is to be laid in religion. Without it there can be no virtue, and without virtue there can be no liberty, and liberty is the object and life of all republican governments." Brian C. Anderson, *Secular Europe, Religious America*, 155 PUB. INT. 143, 152 (2004).

161 STOKES, *supra* note 151, at 515. A 1788 New Hampshire pamphleteer expressed the prevailing view: "[C]ivil governments can't well be supported without the assistance of religion." 4 THE COMPLETE ANTI-FEDERALIST 242 (Herbert J. Storing, ed., 1981).

162 J. William Frost, *Pennsylvania Institutes Religious Liberty*, *in* ALL IMAGINABLE LIBERTY: THE RELIGIOUS LIBERTY CLAUSES OF THE FIRST AMENDMENT 45 (Francis Graham Lee ed., 1995).

163 Richard Vetterli & Gary C. Bryner, *Religion, Public Virtue, and the Founding of the American Republic*, *in* TOWARD A MORE PERFECT UNION: SIX ESSAYS ON THE CONSTITUTION 91–92 (Neil L. York ed., 1988).

164 DANIEL L. DREISBACH, REAL THREAT AND MERE SHADOW: RELIGIOUS LIBERTY AND THE FIRST AMENDMENT 72 (1987) (citation omitted).

165 Since law was an expression of morality, and since morality derived from religion, it was seen as both impossible and undesirable to completely separate state from religion. *Id.* According to the constitutional framing generation, a "belief in religion would preserve the peace and good order of society by improving men's morals and restraining their vices." Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2197 (2003).

166 JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 16 (2d ed. 2001). And those who advocated government support of religion saw it as "compatible with religious freedom"; they did not equate it with establishment. THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF

going interaction between government and religion.[167] For example, in the Northwest Ordinance, Congress even set aside land to endow schools that would teach religion and morality.[168] Therefore, a strict separationist view of the Establishment Clause does not represent the views of the founding generation.

V. The Relationship Between The Religion Clauses

A. The Clauses Are Not in Conflict

Separationists often see the two religion clauses of the First Amendment—the Free Exercise Clause and the Establishment Clause—as opposing forces.[169] While the Free Exercise Clause protects religious liberty, the Establishment Clause places boundaries around that liberty, insofar as it is expressed in the public square.[170] But to see these two clauses in tension, with one somewhat negating the other, is to ignore the overall focus on liberty that is present in the First Amendment.[171]

The two religion clauses work in different directions, but both serve the cause of religious liberty. Whereas the Free Exercise Clause operates on the level of individual liberty, the Establishment Clause should work on an institutional level to prevent government from interfering with religious organizations by becoming a religious actor itself, through either aligning itself with one denomination or creating its own denomination. Indeed, as the constitutional generation foresaw, the kind of strict separation of church and state that twentieth-century separationists would later espouse would hinder

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the First Amendment 217 (1987).

167 Ellis Sandoz, A Government of Laws: Political Theory, Religion, and the Founding 18–19 (1990).

168 The Northwest Ordinance is reprinted in a footnote to Act of Aug. 7, 1789, ch.8, 1 Stat. 50. Edwin Gaustad, *Religion and Ratification*, *in* The First Freedom: Religion and the Bill of Rights 54–56 (James E. Wood ed., 1990).

169 *See* Garry, *supra* note 21, at 1158–59.

170 *Id.*

171 The Court recently ruled that the government cannot justify discriminatory treatment against religion because of fears of an Establishment Clause violation arising from granting aid to religion on a neutral basis. Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012 (2017) (ruling that Missouri's refusal to allow a church to participate in a program offering grants to qualifying nonprofit organizations purchasing playground surfaces made from recycled tires violated the Free Exercise Clause).

the free exercise of religion.[172] The framers never intended "to use the idea of separation to authorize discrimination against religion within the public sphere."[173]

During the constitutional period, the impetus for the Establishment Clause grew out of the same concern that led to the Free Exercise Clause.[174] As Professor Feldman has argued, both clauses were intended to protect freedom of religious worship and the right to exercise one's religious beliefs.[175] To the Founders, the Establishment Clause sought to protect religious liberty by dictating institutional boundaries between the state and religion.[176] Indeed, the debates over the First Amendment religion clauses at the state ratifying conventions focused on protecting religious liberty and guaranteeing equality among religious sects.[177] This focus shows that the Establishment Clause is not a protection *from* religion, as many sep-

172 STORY, *supra* note 79, at 593–97. According to Story, the Establishment Clause merely helped to effectuate the inalienable right of free exercise by preventing any particular sect from being established, at the national level. *Id.* Moreover, the constitutional intent behind separation of church and state was as a means of protecting religion, not the secular state. Carter, *supra* note 86, at 296.

173 Paulsen, *supra* note 90, at 810 (emphasis omitted).

174 For a discussion of how James Madison's views on religious establishments stemmed not from his opposition to religion but from his fears about how establishments would threaten religious liberty, see Andy Olree, *Pride Ignorance and Knavery: James Madison's Formative Experiences with Religious Establishments*, 36 HARV. J.L. & PUB. POL'Y 211 (2013).

175 *See* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 381–84, 398–402 (2002).

176 NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 52 (2005). According to Feldman, the impetus behind the religion clauses "was to protect the liberty of conscience." *Id.* at 20. But religious liberty, and certainly the liberty to join and function within a religious organization, would be restricted if government intruded into that organization or if government gave preferential treatment to some other religious organization. The Establishment Clause was not focused on forbidding "public religious symbolism" so as to prevent offending secular society. *Id.* at 50. As Feldman argues, the First Amendment served to separate the institutions of government and religion, not to separate religion from public life. *Id.* at 52.

177 Steven K. Green, *A Spacious Conception: Separationism as an Idea*, 85 OR. L. REV. 443, 469–70 (2006). Moreover, Professor Derek Davis, in his study of the Continental and Confederation Congresses, recognizes that the focus or nature of Congress' religious activity "operated almost exclusively within an accommodationist paradigm." DEREK H. DAVIS, RELIGION AND THE CONTINENTAL CONGRESS 1774-1789: CONTRIBUTIONS TO ORIGINAL INTENT 227 (2002).

arationists claim.[178]

B. The Institutional Focus of the Establishment Clause

The most obvious way in which the Establishment Clause protects the institutional autonomy of religious organizations is through a kind of equal protection application.[179] Significant historical research supports the notion that the Establishment Clause requires not that the government refrain from any aid to or recognition of religion, but that when it does so it treats all religious sects the same and does not give preferential treatment to any select sect.[180] This equal protection aspect was "designed to buttress free

178 *See* Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 Wm. & Mary Bill Rts. J. 73, 89–90 (2005) (arguing that, consequently, since the Establishment Clause exists to serve the Free Exercise Clause, "then in the event of conflict, the former must yield"). For a discussion on the unitary or harmonious relationship between the two religion clauses, see Patrick M. Garry, Wrestling with God: The Courts' Tortious Treatment of Religion 129–31 (2007); Garry, *supra* note 21, at 1158–60, 1163–71.

179 This individual-institutional distinction can also be seen in some of the Court's decisions regarding the constitutionality of government aid, in which the Court is more likely to uphold public aid to an individual who uses the money for religious purposes than it is to uphold aid given to religious institutions engaged in religious activities, and in the way the notion of entanglement is applied only to institutions under the Establishment Clause. *See* Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 Vill. L. Rev. 37, 81–82 (2002).

In his survey of establishments in England and the colonies during the pre-constitutional period, Michael McConnell lists six basic characteristics or elements of an established religion: state control over the doctrines and structure of the state religion; mandatory public membership in the state religion; governmental financial support of the state religion; a restriction on any other religions; the involvement of the state religion in state civil affairs; and limiting political participation to members of the state religion. *See* McConnell, *supra* note 165, at 2131, 2146, 2159, 2169, 2176. But each of these elements of establishment relate to institutional aspects of religions.

Anti-discrimination and equal protection concerns are at the heart of the Establishment Clause. *See* Steven Calabresi & Abe Salander, *Religion and the Equal Protection Clause*, 65 Fla. L. Rev. 909, 1010, 1030 (2013). Professor Michael Paulsen likewise argues that the Establishment Clause should be applied under an equal protection approach. Michael Paulsen, *Religion, Equality and the Constitution*, 61 Notre Dame L. Rev. 311, 326 (1986).

180 *See* Natelson, *supra* note 178, at 124–25 (stating that during the constitutional period establishment was thought to mean some "mechanism whereby one denomination or group of denominations was favored over others"). Although the clause allowed the government to favor religion over nonreligion, it prohibited any discrimination among religious sects. *Id.* at 135 (stating

exercise by requiring the federal government, to the extent its legislation touched religion, to treat all faiths in a non-discriminatory manner."[181]

The Establishment Clause thus has an institutional focus, protecting the autonomy of religious institutions from state intrusion into the functions, powers, or identity of a religious organization.[182] Rather than reflect a mistrust of religion, it should protect religious institutions from intrusive or discriminatory treatment by the state. This interpretation differs sharply from the separationist theory, which uses the Clause to separate religion from civil society and to dramatically redefine society along strictly secular lines.[183]

However, having earlier diverted from the historical meaning of the Establishment Clause with its *Lemon*-era use of the "wall of separation" metaphor, the Court has been inching perhaps toward a more accurate use of the Clause as a pro-religious liberty provision. In 2012, for instance, the Court for the first time applied the Clause to shield religious institutions from intrusive government regulation that sought to determine who would serve as religious ministers.[184] Thus, the Court used the Clause not as a protection of

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that this can explain "why the same houses of Congress that adopted the Establishment Clause saw no inconsistency in hiring chaplains to offer prayers or in resolving to reserve 'a day of public thanksgiving and prayer'").

181 *Id.* at 138 (noting that the Establishment Clause extended no protection to the irreligious, since those "who did not believe in God did not have a 'religion' within the meaning of the First Amendment and had no standing under that Amendment"). As Justice Rehnquist stated in his dissent in *Wallace v. Jaffree,* the Founders intended for the Establishment Clause only "to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. [They] did not see it as requiring neutrality on the part of government between religion and irreligion." Wallace v. Jaffree, 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting).

182 The First Amendment protects church autonomy. *See* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy,* 81 COLUM. L. REV. 1373, 1373 (1981); *see also* Kathleen Brady, *Religious Group Autonomy: Further Reflections About What is at Stake,* 22 J.L. & RELIGION 153, 168, 178 (2007) (arguing that "a broad right of autonomy is necessary to protect the ability of religious groups to develop and communicate new visions for social life," and that "religious group autonomy is essential to support robust freedom of belief").

183 *See* GARRY, WRESTLING WITH GOD, *supra* note 178, at 44–54.

184 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188–89 (2012) (stating that giving government "the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions"). In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the

secular society from a government-religion interaction, but rather referenced the Clause as a protection for the institutional autonomy of religious institutions.

C. Prohibition of Government Interference in Religious Institutions

As historian Thomas Curry argues, the classical concept of an exclusive state-supported and mandated church constituted the American understanding of an establishment of religion throughout the colonial and constitutional periods.[185] A state preference of one denomination over others was what was primarily thought to be an establishment of religion, as the framers did not want to duplicate the English experience with the established Anglican church.[186] In the American view, the most repressive aspect of establishment was government intrusion into religious doctrines and liturgies.[187]

Although modern jurisprudence focuses on "'advancement of religion' as [a] key element of establishment," in 18th-century

Court recognized an institutional liberty aspect of the Establishment Clause. *Id.* at 172–73. Although the ministerial exception at issue in *Hosanna-Tabor* has traditionally been justified under the Free Exercise Clause, the lawyers representing *Hosanna-Tabor* understood that the Establishment Clause provided a way in which the Court could rule in favor of the church without contradicting the holding of *Employment Division v. Smith*, 494 U.S. 872 (1990), which the Court decided as a Free Exercise case, but this would go against the traditional ways in which the Establishment Clause had been applied—namely, as a means of striking down public religious expressions or certain government aid to religion. *Id.* at 188–90. The Establishment Clause has often been used as a kind of negative check on religion, rather than as a positive protection of institutional liberty; it has never been used to strike down a law merely because it intruded too deeply into the autonomy of religious organizations.

185 Curry, *supra* note 166, at 146, 192.

186 Walz v. Tax Comm'n of N.Y.C., 397 U.S. 664, 668 (1970) (stating that "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity"). Separation of church and state was a concept focused on ensuring the institutional independence and integrity of religious groups, preventing government from dictating articles of faith or interfering in the internal operations of religious bodies. *See* Elisha Williams, The Essential Rights and Liberties of Protestants 46 (1744) (emphasis omitted) (stating that "every church has the right to judge in what manner God is to be worshiped by them, and what form of discipline ought to be observed by them, and the right also of electing their own officers" free of interference from government officials).

187 Witte, *supra* note 94, at 51.

America the lesson taken from the Anglican experience in England involved "control."[188] In 18th-century England, it was the state that controlled the church, not the church that controlled the state.[189] Thus, the effects of the establishment of the Anglican Church in England were twofold: to prohibit public religious worship outside of the Anglican Church; and to maintain government control over the ecclesiastical doctrines of the Anglican Church.[190]

In connection with this view of establishment as a long-standing associational involvement between the state and a religion, any particular state-religious interaction should not be viewed in isolation, as if that one single interaction, particularly if temporary, would rise to a permanent institutional establishment of religion. For instance, a single religious symbol on public property should not be viewed as itself single-handedly defining the state's overall policy and intent with regard to that religion.[191] This is one of the faults of the endorsement test. It allows an objecting observer to successfully convince a court that a religious symbol on public property alone is sufficient for a conclusion that the government has established a particular religion. The objector can succeed even if there are no other indications whatsoever in that observer's interactions with government that the government has in fact established the particular religion, and even though there may exist a myriad of other factors that contradict any establishment of religion. The Establishment Clause requires courts to focus on what government is doing

188 McConnell, *supra* note 165, at 2131.

189 Government officials dictated the appointment of ministers, and civil law controlled religious doctrine and articles of faith; and the doctrines and liturgy for public worship were governed by Parliament, which enacted legislation restricting public worship by Catholics, Puritans and Quakers. URSULA HENRIQUES, RELIGIOUS TOLERATION IN ENGLAND, 1787-1833 6 (1961).

190 McConnell, *supra* note 165, at 2132–33. From the time of Elizabeth I, people not attending Anglican services were subject to monetary fines, the amount of which depended on the length of absence. 4 WILLIAM BLACKSTONE, COMMENTARIES, *151–52. Marriages could be lawfully performed only by ministers of the Church of England, and the law expressly declared illegitimate the offspring of marriages performed outside the Anglican Church. SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY 92 (1902).

191 An establishment of religion cannot be determined simply by looking at one instance of government-religion interaction in isolation. Because one Hindu group is providing social welfare services at one prison in a state, unless the state has improperly preferred that group to any other group, should not by itself be sufficient to show an establishment. However, there still might be Exercise Clause issues.

to become a religious actor or influencing other religious actors.[192] It does not focus on what perceptions individuals might have.

As Douglas Laycock argues, an establishment is not something fleeting or minute, but amounts to a substantial undertaking by government—e.g., forming a national monopoly on religion.[193] "Mere whiffs of religion" do not create an establishment of the kind that existed in England in the 17th and 18th centuries.[194] Consequently, "[t]he idea that a religious display constitutes an establishment of religion because some peoples' consciences are offended by it is frankly laughable."[195] The text of the Establishment Clause clearly permits "placing religious symbols anywhere on government buildings or in parks."[196]

VI. Nonpreferentialism as the Test

The Establishment Clause, when functioning properly, guards against the government playing favorites among religious denominations and granting preferential treatment to one sect over another, even if that preferential treatment does not, on its face, appear to immediately affect free exercise rights. This view comports with Justice Rehnquist's argument in *Wallace v. Jaffree* for a more simple and narrow establishment test that would look to whether the government was preferring one particular sect over others.[197] Nonpreferentialism captures the essential traits and aims of the Establishment Clause; it allows government accommodation and interaction with religion as long as that interaction does not discriminate between religions.[198] Under a nonpreferential approach to the Establishment

192 *See* Patrick M. Garry, *Coordinating the Exercise and Establishment Clauses*, 6 Ave Maria L. Rev. 387, 395 (2008).

193 Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DePaul L. Rev. 373, 376–78 (1992) (providing examples of an establishment in violation of the Establishment Clause).

194 Calabresi & Salander, *supra* note 179, at 1031.

195 *Id.*

196 *Id.* at 1028.

197 Wallace v. Jaffree, 472 U.S. 38, 105–06 (1985) (Rehnquist, J., dissenting). Or, as Justice Blackmun's concurrence in *Lee v. Weisman* stated: "Government may neither promote nor affiliate itself with any religious doctrine or organization, nor may it obtrude itself in the internal affairs of any religious institution." Lee v. Weisman, 505 U.S. 577, 599 (Blackmun, J., concurring).

198 For a discussion of the nonpreferential tradition and approach during the constitutional period, and the belief that religion was indispensable to democracy and that government should then accommodate religion in a nonpreferential manner, see Garry, *supra* note 62, at 482–96. *See also* Patrick

Clause, government can accommodate religion's role and presence in society so long as it does so without discriminating between religions.

The nonpreferentialist tradition was firmly embraced by the constitutional generation.[199] During the constitutional period, there was overwhelming agreement that government could provide special assistance to religion, as long as such assistance was given without any preference among sects.[200] The Establishment Clause prohibited only "discrimination in favor of or against any one religious denomination or sect."[201] James Madison repeatedly stressed

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M. Garry, *An Equal Protection View of the First Amendment*, 28 Quinnipiac L. Rev. 787, 813–18 (2010).

199 James McClellan, Joseph Story and the American Constitution 134 (1971). This tradition reflected "the belief that the religion clauses were designed to foster a spirit of accommodation and cooperation between religion and the state insofar as no single church is officially established and governmental encouragement does not deny any citizen freedom of religion expression." Dreisbach, *supra* note 164, at 54.

200 Patrick W. Carey, *American Catholics and the First Amendment: 1776-1840*, 113 Pa. Mag. Hist. & Biography 323, 338 (1989). Even in Virginia, with the established Anglican Church, the growing sentiment in the late 18th century was that, while government could indeed give aid to religion, there should be equal treatment in such aid. *See* Rodney Smith, Public Prayer and the Constitution 45 (1987). Catholics in Maryland, for instance, opposed any state established religion, yet supported state aid to religion if conferred without discrimination. Mary Virginia Geiger, Daniel Carroll: A Framer of the Constitution 83–84 (1943). This nonpreferentialist tradition approves of government aid to religion generally, so long as that aid is not discriminatory among particular sects. Leonard W. Levy, The Establishment Clause: Religion and the First Amendment 91 (1986). The very text of the First Amendment supports the nonpreferential view. The use of the indefinite rather than definite article "the" before "establishment of religion" indicates the drafters were "concerned" with government "favoritism toward one sect," rather than with "favoritism" of religion over nonreligion. Michael S. Ariens & Robert A. Destro, Religious Liberty In a Pluralistic Society 89 (1996). This notion is further supported in the debates over the Establishment Clause. On August 15, 1789, Madison stated that he "apprehended the meaning of the words to be, that Congress should not establish *a* religion, and enforce the legal observation of it by law." 1 *Annals of Cong.*, 758 (Joseph Gales ed., 1790) (emphasis added).

201 Thomas M. Cooley, A Treatise on the Constitutional Limitations 583 (5th Ed. 1883). The Reverend Jaspar Adams, cousin of John Quincy Adams, "wrote in 1833 that the term 'establishment of religion' . . . meant 'the preference and establishment given by law to one sect of Christians over every other.'" Dreisbach, *supra* note 164, at 70. (citation omitted). The

that government could accommodate or facilitate religious exercise, so long as it did so in a nonpreferential manner.[202] Thus, the strict separationist view was almost nonexistent during the constitutional period.[203]

Accordingly, the doctrine of nonpreferentialism does not effect a broad and rigid policing of the interaction between religion and the public square. It does not require the courts to constantly scrutinize all such interactions. As long as the government is not becoming a religious actor itself and favoring one sect over another, society is free to interact as it pleases. Under the nonpreferential model, the Establishment Clause is, as it should be, of narrow and limited application.

If it was applied in *American Legion*, the nonpreferential test would have examined whether the government was maintaining the Cross on public land so as to give any religious sect or denomination preference over other sects or denominations. Of course, there was no evidence that the government obtained and maintained the property so as to give preference to a particular religion or to disadvantage other unfavored religions.[204] Thus, with the nonpreferential test, which allows the nondiscriminatory presence of religion in the public square, all the litigation which preceded the Supreme Court pronouncement in *American Legion* could have been avoided, since that test does not automatically prohibit government-religion interaction unless there is evidence of discrimination or favoritism, which there was not.

VII. Government Banned from Dictating Religious Truth

As previously mentioned, the Establishment Clause prohibits the government from becoming a religious actor by creating or aligning itself with a religious sect or institution. And the government becomes a religious actor when it acts in a way that attempts to promulgate religious truth.[205]

The Establishment Clause, in the view of this author, should

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clause was not a prohibition on favoritism toward religion in general. *Id.*

202 Smith, *supra* note 200, at 56.

203 *Id.*

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

205 *See* Andrew Koppelman, *And I Don't Care What It Is: Religious Neutrality in American Law*, 39 Pepp. L. Rev. 1115, 1120–21, 1134 (2013) (discussing the reasons for government's "incompeten[ce]" to declare religious truth but also why government can accommodate religion as long as it does not attempt to "declare" religious truth).

forbid the government from forcing citizens to choose between their duties to the state and to God, which might occur when the government becomes involved in declaring religious truth, instead of protecting the freedom of individuals to discover and practice their notions of religious truth. Government can accommodate religious practice, as long as it does not pick sides in the debate regarding religious truth or take actions amounting to a declaration of religious truth. But in the case of *American Legion*, the government's assumption of the maintenance of a war monument for reasons of public safety does not in any reasonable interpretation amount to a statement of religious truth. There is no declaration of doctrinal beliefs by the government in the monument's maintenance that would constitute the basis for the kind of principles and practices that would arguably constitute a workable religion.[206] In *American Legion*, the government was not acting in any way as a religious actor, but was simply mowing the grass and making cement repairs on property acquired because of traffic control issues.[207]

Although a Latin cross is a religious symbol, reflecting the core beliefs of Christianity, it can also be a symbol often used to denote solemnity, as in remembrances of the dead who gave their lives in a sacrifice for freedom.[208] As such, the cross can be a default symbol used to reflect long-lasting gratitude and remembrance. The intentions of those who constructed the monument, the intentions of those who maintained it over the years, and the exact understandings of all those who witnessed the monument will never be known. But under the endorsement test, the question must be asked as to what the government may have done in *American Legion* to establish a state-sponsored religion. Was it acquiring the land on which the monument sat, so as to maintain a busy intersection of roadways? Was it failing, once it acquired the land, to tear down a privately-built monument honoring soldiers killed in World War I? Was it continuing to mow the grass surrounding the monument and patch the cracks in the cement?

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206 *Id.*

207 *See Am. Legion*, 139 S. Ct. at 2078 ("[T]he Maryland-National Capital Park and Planning Commission (Commission) acquired the Cross and the land on which it sits in order to preserve the monument and address traffic-safety concerns.").

208 The Court in *American Legion* discussed in detail all the various secular meanings and purposes that the cross symbol has taken on over time. *See id.* at 2082–83.

The point is that the government in *American Legion* did nothing to create an establishment within the 18th-century understanding of that term. There was no religious action by the government; no attempt to spread any religion; no coercive acts aimed at those who disagreed with what the Cross symbolized. The government did not control doctrine or personnel of a church; it did not mandate religious participation; it gave no financial support to a sect; it did not ban worship in non-established religions; it did not govern the use of religious institutions for public functions; nor did it restrict political participation to members of the established religion.[209] Other than cutting the grass and patching cement cracks, the government did nothing to proclaim any kind of religious truth.

VIII. The Establishment Clause and Limited Government

As broadly applied, the Establishment Clause often restricts the public presence of religion. However, such an application may weaken religion's role as a social mediating institution serving to check the power of government.[210]

To the constitutional framers, "[l]imited government and a vigorous private religious sphere went hand in hand."[211] Therefore, the Establishment Clause should not be used to weaken religion or dampen its public influence. Government regulatory control over religion was detrimental not only to religion but to the general cause of liberty as well.[212] Under the constitutional scheme, government would be checked and controlled by private institutions of opinion formation, the most prominent of which was religion.[213] The prohibition on establishments reflected the desire that government "not control the instruments for the formation of character and opinion."[214] Thus, the constitutional "separation of church and state is not a limitation on churches or religion; it is a limitation on the role of government with respect to these private social institutions and

209 *See* McConnell, *supra* note 165, at 2131 (citing these six government actions that fell within the 18th century meaning of establishment).

210 *See generally* Garry, *supra* note 71, at 600; Patrick M. Garry, *Liberty Through Limits: The Bill of Rights as Limited Government Provisions*, 62 SMU L. Rev. 1745, 1754–57, 1760–61, 1774 (2009).

211 Michael McConnell, *Religion and Its Relation to Limited Government*, 33 Harv. J.L. & Pub. Pol'y 943, 952 (2010).

212 *Id.*

213 *Id.* at 948.

214 *Id.* at 947. To the framers, public opinion should control government, not vice versa, and religion was a primary conveyor of public opinion. *Id.* at 944.

religious life in general."[215]

During the constitutional period, religion was perhaps the most prominent mediating institution capable of controlling government.[216] The autonomy and influence of such non-governmental mediating institutions was vital within the constitutional scheme for limiting the newly empowered federal government.[217] Consequently, the Establishment Clause prevented the federal government from creating a religious monopoly or gaining control over the religious sphere of society.[218]

Religious institutions and organizations are an important component of democratic government and society. As John Witte notes, religious institutions constitute vital "structures" that "stand between the State and the individual," not only to help "create the conditions for the realization . . . of . . . civil and political rights," but also to provide many important social goods such as "education, health care, [and] child care."[219] Furthermore, such institutions generally make possible the exercise of religion, a liberty protected by the Free Exercise Clause. As Richard Garnett argues, there is reason "to worry that the individual conscience, standing alone, is not up to the task of creating and sustaining the conditions necessary to insure religious freedom."[220] According to Garnett, individual freedom, like free exercise, depends on the existence of religious insti-

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215 *Id. See generally* PATRICK GARRY, LIMITED GOVERNMENT AND THE BILL OF RIGHTS (2012). *See also* Carl Esbeck, *When Accommodations for Religion Violate the Establishment Clause,* 110 W. VA. L. REV. 359, 361 (2007) (describing the Establishment clause as a power-limiting clause). According to Professor Esbeck, "the Establishment Clause is a structural clause that is about limiting in all cases the government's net power to legislate on matters more properly within the purview of organized religion." *Id.* at 365.

216 *See generally* GARRY, *supra* note 215, at 105–07 (discussing the prominence of religion as a mediating institution).

217 *See id.*

218 Michael McConnell, *Government, Families, and Power: A Defense of Educational Choice*, 31 CONN. L. REV. 847, 848 (1999).

219 *See* RELIGION AND HUMAN RIGHTS: AN INTRODUCTION 16 (John Witte, Jr. & M. Christian Green eds., 2012).

220 *See* Richard Garnett, *Do Churches Matter?*, 53 VILL. L. REV. 273, 295 (2008). A related argument is that there can be no real individual religious liberty or free exercise without a strong institutional foundation or tradition to support and facilitate that free exercise. Such a foundation or tradition not only serves to constrain government power on behalf of individual believers, but also to provide a pathway through which individuals can pursue their vision and beliefs.

tutions that nourish and facilitate that exercise.[221]

The Establishment Clause is arguably the most important power-limiting provision in the Constitution because it limits the government from intruding into the province of the divine. The religion clauses recognize and delineate the jurisdictional boundaries between the temporal and divine sovereignties. For the religious believer, the spiritual duties to the creator cannot be superseded by the state. Hence, the First Amendment limits the state from attempting to supersede those duties. However, because the government has grown so exponentially since the New Deal, its activities continually intersect the traditional domain of religion.[222] For this reason, it becomes all the more important that government accommodate the presence of religion in an increasingly government-dominated world.

Given the pervasiveness of government in modern society, sometimes accommodation is needed so as to keep religion free and vibrant. The historic involvement of religions in social welfare work, for instance, indicates that the overwhelming resources of the government should not be allowed to drown out religious organizations from this role.[223] Such a result could easily happen, however, if the government funds only nonreligious viewpoints on or approaches to social problems.

When "the First Amendment was ratified, the government had little or no involvement in education . . . or social welfare."[224] "These functions were predominantly left to the private sphere . . . where religious institutions played a leading role."[225] But "with the rise of the welfare-regulatory state, the spheres of religion and government" began to overlap.[226] The state had now "extended its regulatory jurisdiction over broad aspects of life that formerly had been private and frequently religious, creating conflicts with both religious institutions and the religiously motivated activity of individuals."[227] This takeover of religion's traditional functions, without a corresponding approach of accommodation, constricts the freedom

221 *See id.*
222 *See generally* PATRICK M. GARRY, THE FALSE PROMISE OF BIG GOVERNMENT 89–93 (2017).
223 *See* Garry, *Religious Freedom Deserves More than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, *supra* note 4, at 18–19.
224 *See id.*
225 *See id.*
226 McConnell, *supra* note 165, at 1261.
227 *Id.*

and ability of religious groups to perform the social duties that their religious beliefs command them to perform.[228]

IX. CONCLUSION

As the Court in *American Legion* may have implicitly recognized, many reasons explain why a broad test for constitutionality under the Establishment Clause could be problematic. Indeed, the *Lemon* test demonstrates those problems. For decades after its adoption, the *Lemon* test perpetuated an unjustified hostility toward religion and its presence in the public square; and it has taken nearly a half century to turn Establishment Clause jurisprudence back toward its historical meaning and intent. The fundamental problem with *Lemon* was that it contradicted the very aim and purpose of the First Amendment; it is thus unsurprising that any test built upon *Lemon*'s presumptions would be problematic.

Many hoped that *American Legion* would begin to address these larger, more fundamental questions underlying the Establishment Clause, such as: what does the Establishment Clause strive to do? Who or what is meant to be served by the Clause? Is the Clause intended to act primarily as a guarantor of secular society or as a protection of religious liberty? But those questions will have to wait. The Court's narrow decision in *American Legion* answered nothing beyond the specific facts of that case. And the problem with the historical traditions test used in *American Legion* is that it is not dynamic. It cannot begin to address any of the relationships or interactions between government and religion that currently take place or have recently taken place. All that *American Legion* settled was the matter of very long-standing religious symbols that have taken on a sufficient secular image. Every other issue involving the Establishment Clause will have to be dealt with on a case-by-case basis.

Perhaps *Lemon* and/or the endorsement test might still prevail for other fact settings. Perhaps a later Court will slip back into

228 *See id.* at 1261. Gedicks claims that "[i]n the modern welfare state that the contemporary United States has become, government aid to both individuals and organizations is widespread and pervasive. Since in the United States most persons and entities are entitled to some kind of government aid, religious neutrality would generally seem to require that this aid not be denied to otherwise qualified recipients simply because they are religious." FREDERICK M. GEDICKS, THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE 57 (1995). Thus, contrary to the separationist claim, the no-aid baseline is implausible in the late twentieth century.

a separationist mentality. However, for now, the Court has at least drawn a barrier to *Lemon* and the negative effects of the endorsement test. Perhaps, for now, that small step is all that can be taken.