

Dear class:

Attached please find our first working paper that Dean Chemerinsky will discuss during the balance of our first class, after I open the class with a discussion of the nuts and bolts of what we will do this semester.

Below is an overview of the project that Dean Chemerinsky has provided to put this book chapter in context. Please read the chapter and come prepared with questions to ask Dean Chemerinsky about the chapter and/or the larger project.

I look forward to seeing you on Monday, August 19, for our first class,

Prof Tyler

From the Dean:

What I have provided is one chapter of a forthcoming book on the religion clauses of the First Amendment. I am co-authoring this book with Howard Gillman, the Chancellor at UC Irvine. It will be published by Oxford University Press. This chapter (Chapter 2) focuses on the Establishment Clause and argues for a robust enforcement of this constitutional provision, though the Supreme Court is going in an opposite direction. A preface describes the overall thesis of the book. Chapter 1 is about the history of religion and the Constitution. Chapter 3 focuses on the free exercise clause and stresses that people should not be able to inflict injuries on others based on religion (thus criticizing decisions like Hobby Lobby and Masterpiece Cakeshop). Chapter 4 looks at the protection of religion under other sources of law besides the Constitution. And chapter 5 is our conclusion.

This is just a draft. We have not yet submitted the manuscript. So there is plenty of time to benefit from the comments of those in class and make revisions. I look forward to the discussion.

Warm regards,

Erwin

Chapter 2

The Establishment Clause: In Defense of Separating Church and State

"Congress shall make no law respecting an establishment of religion . . ."

The meaning of the Establishment Clause, and whether it should be understood as creating a wall separating church and state, is deeply contested along ideological grounds. While liberals generally favor separation of church and state, conservatives vehemently reject that and seek to allow more religious presence in government and more government support for religion. The shift in the ideological composition of the Supreme Court makes it likely that the latter view will triumph and there will be dramatic changes in the law in this area.

There are strong emotions on both sides of this issue, as with so much concerning religion. In 2005, one of us (Erwin Chemerinsky) argued a case at the United States Supreme Court involving the constitutionality of the Ten Commandments monument that sits between the Texas State Capitol and the Texas Supreme Court.¹ The monument is six feet high and three feet wide, and atop it in large letters and words it states, "I AM the LORD, thy God."

In the days before the argument at the Supreme Court, the case received a great deal of media attention.² Some of the reports mentioned that Chemerinsky was the attorney who would be arguing the case against the monument before the Court, and as a result, he received a large amount of hate mail. Some of it, in its viciousness, was shocking.

By itself, what this showed was that there are some people who care very deeply about having religious symbols on government property. But there were also more subtle lessons to be

¹ Van Orden v. Perry, 545 U.S. 677, 681 (2005).

² See, e.g., Linda Greenhouse, The Ten Commandments Reach the Supreme Court, N.Y. Times, Feb. 28, 2005, at A12; Sylvia Moreno, Supreme Court on a Shoestring: Homeless Man Takes on Texas Religious Display, Wash. Post, Feb. 21, 2005, at A1.

learned. The State of Texas was arguing in front of the Supreme Court that it wanted the Ten Commandments monument to remain because of the historical importance of the Ten Commandments as a source of law.³ But it was clear, however, that this was not at all the reason why the people who were sending the hate mail wanted the monument there. They wanted the Ten Commandments there because it was a religious message and a religious symbol. After all, it was not that long before that the Chief Justice of the Alabama Supreme Court, Roy Moore, was removed from office because of a two and a half ton Ten Commandments display in the Alabama State Courthouse.⁴ He defied a court order to keep the Ten Commandments there,⁵ obviously not because he thought it was an important historical symbol. Rather, he wanted it there because it was a religious symbol, and it had come to be taken as a symbol of his religion.

What underlies the debate, whether it is over the Ten Commandments at the Texas State Capitol grounds or other examples, is the profound question of whether to have a secular government or whether to have a government that affiliates with and advances religion. The underlying issue is that stark.

In this chapter we examine the meaning of the Establishment Clause. We begin by describing competing theories of this constitutional provision. We then reject the idea that its meaning can be understood and defined based on history. In light of this we then defend our view that the Establishment Clause is best understood as requiring a wall that separates church and state. We conclude this chapter by applying this vision to some of the most important issues

³ See Brief for Respondent at **32-36, *Van Orden*, 545 U.S. 677 (No. 03-1500), 2005 WL 263793.

⁴ Jeffrey Gettleman, *Monument Is Now Out of Sight, but Not Out of Mind*, N.Y. Times, Aug. 28, 2003, at A14; see also *Moore v. Judicial Inquiry Comm'n*, 891 So. 2d 848, 862 (Ala. 2004).

⁵ *Glassroth v. Moore*, 242 F. Supp. 2d 1068, 1068 (M.D. Ala. 2003); see also Shaila K. Dewan, *The Big Name in Alabama's Primary Isn't on the Ballot*, N.Y. Times, May 30, 2004, at N16

concerning the Establishment Clause, including the presence of religion in government activities and government support for religious institutions.

Competing theories of the Establishment Clause

There are three major competing approaches to the establishment clause. Each has adherents on the Court, and each is supported by a body of scholarly literature. The theory chosen very much determines the outcome in Establishment Clause cases.

Strict Separation

The first theory can be termed “strict separation.” This approach says that to the greatest extent possible government and religion should be separated. The government should be, as much as possible, secular; religion should be entirely in the private realm of society. This theory is perhaps best described by Thomas Jefferson’s metaphor that there should be a wall separating church and state.⁶ As the Supreme Court declared in *Everson v. Board of Education*, “[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable.”⁷

Jefferson’s famous words were uttered, as was Madison’s Remonstrance, as part of a campaign against Virginia’s renewing its tax to support the church. Justice Rutledge, in *Everson*, reviewed this history in describing the philosophy underlying the establishment clause: “The Amendment’s purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of

⁶ Thomas Jefferson, Letter to Messrs. Nehemiah Dodge and others, a Committee of the Danbury Baptist Association, Writings 510 (1984).

⁷ 330 U.S. 1, 18 (1947).

the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.”⁸

A strict separation of church and state also is seen as necessary to protect religious liberty.⁹ When religion becomes a part of government, separationists argue, there is inevitable coercion to participate in that faith. Those of different faiths and those who profess no religious beliefs are made to feel excluded and unwelcome when government and religion become intertwined. Moreover, government involvement with religion is inherently divisive in a country with so many different religions and many people who claim no religion at all.¹⁰

There are problems, though, with the strict separation approach, as there are for all of the theories. A complete prohibition of all government assistance to religion would threaten the free exercise of religion. For example, a refusal by the government to provide police, fire, or sanitation services obviously would seemingly infringe on free exercise. Thus, a total wall separating church and state is impossible, and the issue becomes how to draw the appropriate line. Moreover, religion has traditionally been a part of many government activities, from the

⁸ *Id.* at 31-32.

⁹ See Alan Schwarz, No Imposition of Religion: The Establishment Clause Value, 77 Yale L.J. 692, 708 (1968).

¹⁰ Justice Brennan has articulated these purposes behind the establishment clause:

The first, which is most closely related to the more general conceptions of liberty found in the remainder of the First Amendment, is to guarantee the individual right to conscience. . . . The second purpose of separation and neutrality is to keep the state from interfering in the essential autonomy of religious life, either by taking upon itself the decision of religious issues, or by unduly involving itself in the supervision of religious institutions or officials. The third purpose of separation and neutrality is to prevent the trivialization and degradation of religion by too close an attachment to the organs of government. . . . Finally, the principles of separation and neutrality help assure that essentially religious issues, precisely because of their importance and sensitivity, not become the occasion for battle in the political arena.

Marsh v. Chambers, 463 U.S. 783, 803-805 (1983) (Brennan, J., dissenting) (citations omitted).

phrase “In God We Trust” on coins to the invocation before Supreme Court sessions, “God save this honorable Court.”¹¹

Neutrality Theory

A second major approach to the establishment clause says that the government must be neutral toward religion; that is, the government cannot favor religion over secularism or one religion over others. Professor Philip Kurland, an exponent of this approach to the religion clauses, wrote that “the clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden.”¹² Professor Douglas Laycock said that substantive neutrality means that “the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance.”¹³

Several Supreme Court Justices have advanced a “symbolic endorsement” test in evaluating the neutrality of a government’s action. Under this approach, the government violates the establishment clause if it symbolically endorses a particular religion or if it generally endorses either religion or secularism. For example, Justice O’Connor has written that “[e]very government practice must be judged in its unique circumstances to determine whether it

¹¹ Professor Lupu has argued that strict separation was the dominant theory for the establishment clause from 1947 to 1980, but that since then its role in Supreme Court decisions has greatly waned. Ira C. Lupu, *The Lingering Death of Separationism*, 62 *Geo. Wash. L. Rev.* 230 (1994).

¹² Philip Kurland, *Of Church and State and the Supreme Court*, 29 *U. Chi. L. Rev.* 1, 96 (1961).

¹³ Douglas Laycock, *Formal, Substantive and Disaggregated Neutrality Toward Religion*, 39 *DePaul L. Rev.* 993, 1001 (1990).

constitutes an endorsement or disapproval of religion.”¹⁴

Justice O’Connor explained the importance of such government neutrality: “As a theoretical matter, the endorsement test captures the essential command of the Establishment Clause, namely, that government must not make a person’s religious beliefs relevant to his or her standing in the political community by conveying a message ‘that religion or a particular religious belief is favored or preferred.’ . . . If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.”¹⁵

The difficulty is in determining what government actions constitute a “symbolic endorsement” of religion.¹⁶ Several Justices discussed this in *Capitol Square Review and Advisory Board v. Pinette*.¹⁷ The issue in *Pinette* was whether it was unconstitutional for the government to preclude the Ku Klux Klan from erecting a large Latin cross in the park across from the Ohio Statehouse. Although there was no majority opinion for the Court, seven Justices voted that excluding the cross violated the Klan’s free speech rights and that allowing it to be present would not violate the establishment clause. In the course of the establishment clause

¹⁴ Lynch v. Donnelly, 465 U.S. 668, 694 (1984).

¹⁵ County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 627 (1989) (O’Connor, J., concurring in part and concurring in the judgment) (citations omitted).

¹⁶ For a prescient prediction of the development of the symbolic endorsement test and a description of its ambiguity, see William P. Marshall, “We Know It When We See It,” the Supreme Court and Establishment, 59 S. Cal. L. Rev. 495 (1986).

¹⁷ 515 U.S. 753 (1995).

discussion, several of the Justices addressed what constitutes a symbolic endorsement.¹⁸

Justice O'Connor, in an opinion concurring in the judgment joined by Justices Souter and Breyer, concluded that the cross should be allowed because the reasonable observer would not perceive it as an endorsement of religion. O'Connor said that "[w]here the government's operation of a public forum has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result, the Establishment Clause is violated."¹⁹ Justice O'Connor said that a reasonable observer would not likely perceive the cross as being endorsed by the government because there was "a sign disclaiming government sponsorship or endorsement" and this would "remove doubt about the State approval of [the] religious message."²⁰

O'Connor said that the symbolic endorsement test is applied "from the perspective of a hypothetical observer who is presumed to possess a certain level of information that all citizens might not share."²¹ She said that the reasonable observer "must be deemed aware of the history and context of the community and forum in which the religious display appears [and] the general history of the place in which the cross is displayed. [An] informed member of the community will know how the public space in question has been used in the past."²²

Justices Stevens and Ginsburg dissented and argued that symbolic endorsement exists if a

¹⁸ Justice Scalia — writing for a plurality of Rehnquist, Kennedy, and Thomas — rejected the symbolic endorsement test. He said that the symbolic endorsement approach "exiles private religious speech to a realm of less-protected expression. . . . [T]he Establishment Clause . . . was never meant to serve as an impediment to purely private religious speech connected to the State only through its occurrence in a public forum." *Id.* at 766-767.

¹⁹ *Id.* at 777 (O'Connor, J., concurring in the judgment).

²⁰ *Id.* at 776.

²¹ *Id.* at 780.

²² *Id.* at 780-781.

reasonable person passing by would perceive government support for religion. Justice Stevens wrote: “If a reasonable person could perceive a government endorsement of religion from a private display, then the State may not allow its property to be used as a forum for that display. No less stringent rule can adequately protect non-adherents from a well-grounded perception that their sovereign supports a faith to which they do not subscribe.”²³ Justice Stevens argued that Justice O’Connor’s “‘reasonable person’ comes off as a well-schooled jurist, a being finer than the tort-law model. . . . [T]his enhanced tort-law standard is singularly out of place in the Establishment Clause context. It strips of constitutional protection every person whose knowledge happens to fall below some ‘ideal’ standard.”²⁴

Thus, three different approaches to the symbolic endorsement test were expressed in *Pinette*. Justice Scalia, writing for the plurality, rejected using the test at all where the issue is private speech on government property. Justice O’Connor, writing for herself and Justices Souter and Breyer, said that the symbolic endorsement test should be applied from the perspective of the perceptions of a well-educated and well-informed observer. Justice Stevens, dissenting and joined by Justice Ginsburg, said that the symbolic endorsement test should look to the perceptions of the reasonable passerby.

The symbolic endorsement test is defended as a desirable approach to the establishment clause because it is a way of determining whether the government is neutral or whether it is favoring religion. A key purpose of the establishment clause is to prevent the government from making those who are not a part of the favored religion feel unwelcome. The symbolic endorsement test is seen as a way of assessing the likely perceptions of and reactions to

²³ *Id.* at 799-800 (Stevens, J., dissenting).

²⁴ *Id.* at 800 n.5.

government conduct.²⁵

Those who criticize the symbolic endorsement test often focus on its ambiguity and indeterminacy.²⁶ People will perceive symbols in widely varying ways. The Court inevitably is left to make a subjective choice as to how people will perceive a particular symbol. Moreover, judges who are part of the dominant religion may be insensitive to how those of minority religions perceive particular symbols. At the same time, some argue that the endorsement test is too restrictive of government involvement with religion. Justice Kennedy, for example, said: “Either the endorsement test must invalidate scores of traditional practices recognizing the place religion holds in our culture, or it must be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past, while condemning similar practices with no greater endorsement effect simply by reason of their lack of historical antecedent. Neither result is acceptable.”²⁷

Accommodation

A third major theory can be termed an “accommodation” approach. Under this view, the Court should interpret the establishment clause to recognize the importance of religion in society and accommodate its presence in government. Specifically, under the accommodation approach the government violates the establishment clause only if it literally establishes a church, coerces

²⁵ For a defense of the symbolic endorsement test, *see* Jesse Choper, *Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses* 28-29 (1995); Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O’Connor’s Insight*, 64 N.C. L. Rev. 1049 (1986).

²⁶ *See, e.g.*, Marshall, *supra* note ____, at 537; Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 Mich. L. Rev. 266, 283 (1987) (identifying this and other problems with the symbolic endorsement test).

²⁷ *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. at 674.

religious participation, or favors one religion over others in its award of benefits. Justice Kennedy, for example, has said that “the Establishment Clause . . . guarantees at a minimum that a government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a [state] religion or religious faith, or tends to do so.”²⁸ In fact, Justice Kennedy said that “[b]arring all attempts to aid religion through government coercion goes far toward the attainment of [the] object [of the Establishment Clause].”²⁹ Justices taking this approach have described it in terms of the need for the government to treat religious beliefs and groups equally with nonreligious ones.³⁰ Whether termed accommodation or equality the approach is the same: Government should accommodate religion by treating it the same as nonreligious beliefs and groups; the government violates the establishment clause only if it establishes a church, coerces religious participation, or favors some religions over others.

A key question under this approach concerns what constitutes government “coercion.” Several Justices discussed this in *Lee v. Weisman*, where the Court declared unconstitutional clergy-delivered prayers at public school graduations.³¹ Justice Kennedy, writing for the Court, found that such prayers are inherently coercive because there is great pressure on students to attend their graduation ceremonies and to not leave during the prayers.³²

Justice Blackmun, in an opinion joined by Justices Stevens and O’Connor, wrote to emphasize that the establishment clause can be violated even without coercion. He remarked that

²⁸ *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

²⁹ *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. at 660 (Kennedy, J., concurring in the judgment in part and dissenting in part).

³⁰ *See, e.g., Mitchell v. Helms*, 530 U.S. 793 (2000). Justice Thomas refers to this as the government being neutral in its treatment of religion. To avoid confusion with the “neutrality theory” described above, this is described here as requiring equal treatment for religious and nonreligious groups and activities.

³¹ 505 U.S. 577 (1992).

³² *Id.* at 593-595.

it “is not enough that the government refrain from compelling religious practices; it must not engage in them either.”³³ Likewise, Justice Souter, joined by Justices Stevens and O’Connor, wrote separately to stress that coercion is sufficient for a finding of the establishment clause, but it is not necessary; establishment clause violations exist without coercion if there is symbolic government endorsement for religion.³⁴

The dissenting opinion by Justice Scalia, joined by Chief Justice Rehnquist and Justices White and Thomas, advocated the accommodation approach, but defined coercion much more narrowly than Justice Kennedy. Justice Scalia said that “[t]he coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty.”³⁵

In other words, for the dissenters in *Lee*, coercion exists only if the law requires and punishes the failure to engage in religious practices. For Justice Kennedy, coercion can be found by more indirect pressures to engage in religious activity. The other Justices in *Lee* reject the accommodation approach that coercion is a prerequisite for finding an establishment clause violation.

In *Town of Greece v. Galloway*, Justice Thomas further elaborated on his view of “coercion.”³⁶ The Court, in a 5-4 decision, upheld the constitutionality of prayers before meetings of the Town Board, even though almost all of the prayers over a long period of time were delivered by Christian clergy. Justice Thomas concurred in the judgment and in a part of

³³ *Id.* at 604 (Blackmun, J., concurring).

³⁴ *Id.* at 618-619 (Souter, J., concurring).

³⁵ *Id.* at 640 (Scalia, J., dissenting).

³⁶ 572 U.S. 565, 610 (2014) (Thomas, J., concurring in the judgment). This case is discussed below in §12.2.5.3.

the opinion joined by Justice Scalia said that only “legal coercion” — a law demanding religious participation with legal consequences for violations — would violate the establishment clause.

Those who defend the accommodation approach argue that it best reflects the importance and prevalence of religion in American society. Professor Michael McConnell, an advocate of this view, said that it is desirable because it makes “religion . . . a welcome element in the mix of beliefs and associations present in the community. Under this view, the emphasis is placed on freedom of choice and diversity among religious opinion. The nation is understood not as secular but as pluralistic. Religion is under no special disability in public life; indeed, it is at least as protected and encouraged as any other form of belief and association — in some ways more so.”³⁷ Anything less than accommodation, it is argued, is unacceptable hostility to religion.

Opponents of the accommodation approach argue that, especially as defined by Justice Scalia, little ever will violate the establishment clause.³⁸ Nothing except the government creating its own church or by force of law requiring religious practices will offend the provision. Those disagreeing with this theory argue that the establishment clause also should serve to prevent the government from making those of other religions feel unwelcome and to keep the government from using its power and influence to advance religion or a particular religion. Justice O’Connor expressed this view when she wrote: “An Establishment Clause standard that prohibits only ‘coercive’ practices or overt efforts at government proselytization, but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey

³⁷ Michael W. McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 14.

³⁸ Professor Sherry argues that the coercion test “makes the Establishment Clause redundant. Any government action that coerces religious belief violates the Free Exercise Clause.” Suzanna Sherry, *Lee v. Weisman: Paradox Redux*, 1992 Sup. Ct. Rev. 123, 134.

a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community. Thus, this Court has never relied on coercion alone as the touchstone of Establishment Clause analysis.”³⁹ Justices O’Connor and Souter have strongly objected that equality alone never has been regarded as the sole test of the establishment clause.⁴⁰

The Theories Applied: Examples

The importance of these three theories in determining the inquiry and the results in establishment clause cases is reflected in *Allegheny County v. Greater Pittsburgh ACLU*.⁴¹ The case concerned two different religious displays. One was a crèche — a representation of the nativity of Jesus — that was placed in a display case in a stairway in a county courthouse. The other display was in front of a government building and included a large Christmas tree, a large menorah (a candleholder used as part of the Chanukah celebration), and a sign saying that the city salutes liberty during the holiday season.

Three Justices — Stevens, Brennan, and Marshall — took a strict separation approach and argued that both symbols should be deemed unconstitutional as violating the establishment clause. Justice Stevens said that the “Establishment Clause should be construed to create a strong

³⁹ *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. at 627-628 (O’Connor, J., concurring in part and concurring in the judgment).

⁴⁰ *Mitchell v. Helms*, 530 U.S. at 836 (O’Connor, J., concurring); *id.* at 867 (Souter, J., dissenting). For a discussion of the desirability of the Court’s “equality” approach to the establishment clause, see Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values — A Critical Analysis of “Neutrality” Theory and Charitable Choice*, 13 *Notre Dame J.L. Ethics & Pub. Poly.* 243 (1999) (criticizing equality theory); Michael W. McConnell, *State Action and the Supreme Court’s Emerging Consensus on the Line Between Establishment and Private Religious Expression*, 28 *Pepp. L. Rev.* 681 (2001) (defending equality approach).

⁴¹ 492 U.S. 573 (1989).

presumption against the display of religious symbols on public property.”⁴²

Four Justices — Kennedy, Rehnquist, Scalia, and White — took an accommodationist approach and would have allowed both symbols. Justice Kennedy wrote that “the principles of the Establishment Clause and our Nation’s historic traditions of diversity and pluralism allow communities to make reasonable judgments respecting the accommodation or acknowledgement of holidays with both cultural and religious aspects.”⁴³

Justices Blackmun and O’Connor used a neutrality approach, specifically applying the symbolic endorsement test, and found that the menorah was constitutional, but the nativity scene was unconstitutional. From their perspective, the menorah was permissible because it was accompanied by a Christian symbol (a Christmas tree) and a secular expression concerning liberty. But the nativity scene was alone on government property and thus was likely to be perceived as symbolic endorsement for Christianity. Justice O’Connor concluded that “the city of Pittsburgh’s combined holiday display had neither the purpose nor the effect of endorsing religion, but that Allegheny County’s crèche display had such an effect.”⁴⁴

Thus, the result was 5 to 4 that the nativity scene was unconstitutional but 6 to 3 that the menorah was permissible. The case clearly reflects the importance of the theories of the establishment clause.

The importance of the competing theories was very much in mind in briefing and arguing *Van Orden v. Perry*. As mentioned above, the Court considered the constitutionality of a six-

⁴² *Id.* at 650.

⁴³ *Id.* at 679 (Kennedy, J., concurring in the judgment in part and dissenting in part).

⁴⁴ *Id.* at 637 (O’Connor, J., concurring and concurring in the judgment).

foot high, three-foot wide Ten Commandments monument between the Texas State Capitol and Texas Supreme Court.⁴⁵ I (Erwin Chemerinsky) knew that there were four justices – Rehnquist, Scalia, Kennedy, and Thomas – who were going to find the Ten Commandments monument to be constitutional. By their view, religious symbols on government property never violate the Establishment Clause because there is no coercion of religious participation. But I also was confident that there would be three justices who would find the Ten Commandments monument to be unconstitutional: Stevens, Souter, and Ginsburg. They believe that religious symbols do not belong on government property. Thus it was predictable that the case would turn on the two justices – O’Connor and Breyer – who would focus on whether it is an endorsement of religion.

Indeed, this is exactly what happened. Chief Justice Rehnquist wrote a plurality opinion, joined by Justices Scalia, Kennedy, and Thomas, that rejected an Establishment Clause challenge to the Ten Commandments monument. Justice Breyer, though, concurred in the judgment and voted to uphold the monument’s constitutionality. He expressly said that he agreed with the symbolic endorsement test, but concluded that there was not symbolic endorsement in this case because of the presence of many other secular monuments on the Texas State Capitol grounds and because the monument had been there for over 40 years without challenge. Justices Stevens, O’Connor, Souter, and Ginsburg dissented and would have found the monument unconstitutional as an impermissible symbolic endorsement.

In *Allegheny County* in 1989 and in *Van Orden v. Perry* in 2005, no theory commanded support from a majority of the Justices. However, with changes in the composition of the Court, it is possible — indeed likely — that a majority of the Justices now take this accommodationist

⁴⁵ 545 U.S. 677 (2005).

approach. In its most recent Establishment Clause case, *American Legion v. American Humanist Association*, the Court considered the constitutionality of a 40 foot cross that sits on public property in Prince George’s County, Maryland.⁴⁶ The cross was erected in 1920 as a memorial to those who died in military service in World War I.

The Court in a 7-2 decision rejected the constitutional challenge. Justice Alito wrote, in part for the majority and in part for a plurality, and stressed that although a cross is a religious symbol, it also has other non-religious significance, including as a memorial for war dead. He explained: “The cross came into widespread use as a symbol of Christianity by the fourth century, and it retains that meaning today. But there are many contexts in which the symbol has also taken on a secular meaning. Indeed, there are instances in which its message is now almost entirely secular.”⁴⁷ Echoing Justice Breyer’s opinion in *Van Orden*, Justice Alito stressed that the monument long had been present and to remove it would be hostility to religion. Justice Alito declared: “The passage of time gives rise to a strong presumption of constitutionality.”⁴⁸

Justice Thomas concurred in the judgment and repeated his view that the Establishment Clause does not apply to state and local governments at all. He stated, as he has expressed in the past, “The text and history of this Clause suggest that it should not be incorporated against the States.”⁴⁹ He believes that the Establishment Clause was meant to keep the federal government from establishing a national church to rival state churches, not to create individual rights. Under this approach, a state or local government *never* would violate the Establishment Clause; even if it declared an official state religion it would not offend the First Amendment.

⁴⁶ 139 S.Ct. 2067 (2019).

⁴⁷ Id. at 2074.

⁴⁸ Id. at 2075.

⁴⁹ Id. at 2095 (Thomas, J., concurring in the judgment).

Justice Gorsuch concurred in the judgment and argued that no one has standing to challenge a religious symbol on government property.⁵⁰ He said that no one is sufficiently injured to permit a suit in federal court. He concluded that “suits like this one should be dismissed for lack of standing.”⁵¹

Justice Kavanaugh concurred and wrote separately to say that he believed that the Court had overruled the test from *Lemon v. Kurtzman*, a position long taken by those who advocate the accommodationist approach to the Establishment Clause.⁵² He made clear that religious symbols on government property do not offend the Constitution: “The practice of displaying religious memorials, particularly religious war memorials, on public land is not coercive and is rooted in history and tradition.”⁵³

Only Justices Ginsburg and Sotomayor dissented. Justice Ginsburg expressed the view that a cross is the quintessential Christian religious symbol and the display of a 40 foot cross on public property violates the Establishment Clause. She wrote: “By maintaining the Peace Cross on a public highway, the Commission elevates Christianity over other faiths, and religion over nonreligion. Memorializing the service of American soldiers is an ‘admirable and unquestionably secular’ objective. But the Commission does not serve that objective by displaying a symbol that bears ‘a starkly sectarian message.’”⁵⁴

From this case, and other recent decisions such as *Town of Greece v. Galloway*, it seems that there are now five justices – Roberts, Thomas (who does not believe that the Establishment Clause applies to the states at all), Alito, Gorsuch, and Kavanaugh -- to take the

⁵⁰ Id. at 2098 (Gorsuch, J., concurring in the judgment).

⁵¹ Id.

⁵² Id. at 2092 (Kavanaugh, J., concurring).

⁵³ Id. at 2093.

⁵⁴ Id. at 2105 (Ginsburg, J., dissenting).

accommodationist approach. For them, the government will be found to violate the Establishment Clause only when it coerces religious participation or discriminates among religions in the distribution of benefits. Rarely will the government be deemed to infringe this part of the First Amendment. There are likely two justices – Breyer and Kagan – who take the neutrality, or endorsement, approach. And there are now justice two justices – Ginsburg and Sotomayor – who take the strict separationist view of the Establishment Clause.

History provides no answer

It is tempting to try and decide among these approaches and determine the meaning of the Establishment Clause from history. But the many problems with originalism as a theory of constitutional interpretation are familiar.⁵⁵ We think that Justice Robert Jackson got it right, albeit in another context, when he said, “Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.”⁵⁶ Research will reveal little more than competing quotations about religion that each side cites to support its position.

Justice Brennan expressed this well when he stated: “A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected for several reasons. . . . [T]he historical record is at best ambiguous, and statements can readily be found to support either side of the proposition.”⁵⁷ Yet Justices on all sides of the issue continue to invoke history and the framers’ intent to support their position. Chief Justice Rehnquist has

⁵⁵ See, e.g., Eric J. Segall, *Originalism as Faith* (2018).

⁵⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) (discussing the intended scope of the executive power).

⁵⁷ *Abington School Dist. v. Schempp*, 374 U.S. at 237.

remarked that “[t]he true meaning of Establishment Clause can only be seen in its history.”⁵⁸ In the Supreme Court’s decision in *Rosenberger v. Rector and Visitors of the University of Virginia*, which concerned whether a public university could deny student activity funds to a religious group, both Justice Thomas in a concurring opinion and Justice Souter dissenting focused at length on James Madison’s views of religious freedom.⁵⁹

As Professor Laurence Tribe has cogently summarized, there were at least three main views of religion among key framers.⁶⁰

[A]t least three distinct schools of thought . . . influenced the drafters of the Bill of Rights: first, the evangelical view (associated primarily with Roger Williams) that “worldly corruptions . . . might consume the churches if sturdy fences against the wilderness were not maintained”; second, the Jeffersonian view that the church should be walled off from the state in order to safeguard secular interests (public and private) “against ecclesiastical depredations and incursions”; and, third, the Madisonian view that religious and secular interests alike would be advanced best by diffusing and decentralizing power so as to assure competition among sects rather than dominance by any one.⁶¹

These are quite distinct views of the proper relationship between religion and the government. Roger Williams was primarily concerned that government involvement with

⁵⁸ *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting).

⁵⁹ 515 U.S. 819, 854-858 (1995) (Thomas, J., concurring); *id.* at 868-873 (Souter, J., dissenting). James Madison issued his famous Remonstrance in arguing against a Virginia decision to renew a tax to support the church. This is reviewed in detail in *Everson v. Board of Education*, 330 U.S. 1, 12 (1947); *id.* at 31-34 (Rutledge, J., dissenting).

⁶⁰ Laurence H. Tribe, *American Constitutional Law* 1158-1160 (2d ed. 1988).

⁶¹ *Id.* at 1158-1559 (citations omitted).

religion would corrupt and undermine religion, whereas Thomas Jefferson had the opposite fear that religion would corrupt and undermine the government. James Madison saw religion as one among many types of factions that existed and that needed to be preserved. He wrote that “[i]n a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects.”⁶²

The problem of using history in interpreting the religion clauses is compounded by the enormous changes in the country since the First Amendment was adopted. The country is much more religiously diverse today than it was in 1791. Justice Brennan observed that “our religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all.”⁶³

Also, as discussed below, a significant number of cases involving the establishment clause have arisen in the context of religious activities in connection with schools. But public education, as it exists now, did not exist when the Bill of Rights was ratified, and it is inherently difficult to apply the framers’ views to situations that they could not have imagined. Justice Brennan also remarked that “the structure of American education has greatly changed since the First Amendment was adopted. In the context of our modern emphasis upon public education

⁶² James Madison, Federalist No. 51, *The Federalist Papers* 322 (C. Rossiter ed. 1961).

⁶³ *Abington School Dist. v. Schempp*, 374 U.S. at 240 (Brennan, J., concurring).

available to all citizens, any views of the eighteenth century as to whether the exercises at bar are an ‘establishment’ offer little aid to decision.”⁶⁴ Nonetheless, debates about history and the framers’ intent are likely to remain a key aspect of decisions concerning the religion clauses. Members of the Supreme Court who follow an originalist philosophy of constitutional interpretation believe that the Constitution’s meaning is to be ascertained solely from its text and from its framers’ intent. Also, the divergence of views among the framers, and the abstractness with which they were stated, makes it possible for those on all sides of the debate to invoke history in support of their positions. Those who favor strict separation can point to the words of Jefferson and Madison; those who favor accommodation can point to the religious content of George Washington’s Thanksgiving Proclamation and the presence of religion in government activities early in American history. But in the end, each side is left with examples and quotations, but there is no definitive answer based on history, even assuming that history should be determinative in resolving contemporary constitutional questions.

In Defense of Strict Separation

We think that Thomas Jefferson got it right when he coined the phrase that there should be “a wall of separation between church and state”⁶⁵ -a wall that the Supreme Court later declared both “high and impregnable.”⁶⁶ It is interesting that when the Supreme Court in 1947

⁶⁴ *Id.* at 238.

⁶⁵ *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (quoting Jefferson's letter to the Danbury Baptist Association). This was the first reference in the Supreme Court to “Jefferson's now ubiquitous ... statement.” Mark J. Chadsey, *Thomas Jefferson and the Establishment Clause*, 40 *Akron L. Rev.* 623, 638 n.67 (2007). For the original text of the letter, see *Letter from Thomas Jefferson to Messers. Nehemiah Dodge et al., a Comm. of the Danbury Baptist Ass'n* (Jan. 1, 1802), available at [http:// www.loc.gov/loc/lcib/9806/danpost.html](http://www.loc.gov/loc/lcib/9806/danpost.html).

⁶⁶ *Everson*, 330 U.S. at 18.

held that the Establishment Clause applied to state and local governments, all nine Justices then on the Court endorsed this notion that there should be a wall separating church and state.⁶⁷

There are many reasons why this is the best approach to the Establishment Clause. First, it is a way of ensuring that we can all feel that it is “our” government, whatever our religion or lack of religion. If government becomes aligned with a particular religion or religions, those of other beliefs are made to feel like outsiders. Justice O'Connor captured this better than anyone in her writings for the Court. She said that the Establishment Clause is there to make sure that none of us is led to feel that we are insiders or outsiders when it comes to our government. She wrote: that “[e]ndorsement [of religion by the government] sends a message to nonadherents that they are outsiders, and not full members of the political community, and an accompanying message to adherents that they are insiders”⁶⁸

If our government becomes aligned with religion or a particular religion, some of us are made to feel that we just do not belong in that place. If there were a large Latin cross atop a city hall, those who were not part of religions that accept the cross as a religious symbol would feel that it was not “their” city government. When I argued in front of the Supreme Court in the Ten Commandments case, I said, “Imagine that [a] judge put the Ten Commandments right above his or her bench. That would make some individuals feel like outsiders.”⁶⁹ In the same way, how would one who does not accept God, or one who does not believe that there is one God, feel about walking into the Texas Supreme Court or the Texas State Capitol and seeing “I am the Lord, thy God,” and seeing underneath it, “Thou shalt have no other gods before me”? If we

⁶⁷ Id. at 15; id. at 31-32 (Rutledge, J., dissenting); see also *Lee v. Weisman*, 505 U.S. 577, 600-01 (1992) (Blackmun, J., concurring) (discussing the agreement between the majority and dissent in *Everson* with Jefferson's conception of strict separation).

⁶⁸ *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)

⁶⁹ See Transcript of Oral Argument at 17-18, *Van Orden*, 545 U.S. 677 (No. 03-1500), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-1500.pdf.

want all citizens to feel that the government is open for everyone -- that it is their government -- we need our government to be strictly secular.

A second important reason to favor strict separationism is that it is wrong to tax people to support the religion of others. James Madison captured this best in Virginia, where he talked about why he believed that it was, in his words, “immoral” to tax people to support religions in which they did not believe.⁷⁰ Each of us has our own religion, or maybe we decided that we do not have any religion, but should our tax dollars go to advance a religion in which we do not believe? What if it is a religion that teaches things that we find abhorrent? Should we have our tax dollars go to that? Certainly we have the right to give our money to support any religion or any cause we want, but it is wrong to be coerced to give our tax dollars to religions we do not believe in. That is why strict separation is best: it allows people to choose how to spend their money, rather than permitting the government to use it against their own wishes.

A third reason that strict separation is best is that it prevents the coercion that is inherent when the government becomes aligned with religion. World history, to say nothing of the history of this country, shows us that inherently, when the government becomes aligned with religion, people feel coerced to participate.⁷¹ As the Court explained in *Engel v. Vitale*, “the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.”⁷²

⁷⁰ See James Madison, Memorial and Remonstrance Against Religious Assessment (June 20, 1785), in 8 The Papers of James Madison 295, 298-306 (Robert A. Rutland et al. eds., 1973) (urging the Commonwealth of Virginia not to enact a bill providing support to religious groups through the levy of a tax).

⁷¹ See, e.g., Henry Kamen, *The Spanish Inquisition: An Historical Revision* 10-11 (1997) (discussing the status of conversos-Jews or Muslims who had been forced to convert to Christianity-and the continuing pressure to conform in fourteenth century Spain).

⁷² 370 U.S. at 431.

This is especially the case in the context of public schools. A few years ago, a controversy arose regarding the words “under God” in the Pledge of Allegiance.⁷³ My (Erwin Chemerinsky) daughter was then attending a Los Angeles public school. When she came home at the beginning of her second week of kindergarten, she wanted to demonstrate to her mom and me that she could say the Pledge of Allegiance. She put her hand over her heart, and she recited it, including the words “under God.” My wife turned to me and said, “I thought that the Ninth Circuit said that students weren't supposed to say ‘under God.’” My daughter, having no idea what the Ninth Circuit was, said, “Oh, you have to say that or else you get sent to the principal's office.” That is certainly not what the teacher told the kids, but what my daughter internalized during her first week of kindergarten is that you do what the teacher says or the punishment is that you go to the principal's office. What the teacher told her was that you say the words “under God.” She was five years old at the time, but notice the coercion. It was very subtle coercion, but it was there. Certainly, this is why the Supreme Court has repeated for forty-five years that prayer, even voluntary prayer, does not belong in public schools.⁷⁴

Once the government becomes aligned with religion, coercion becomes so easy. We have seen this at public universities. Cadets at the Air Force Academy talk movingly about being forced to participate in Christian religious ceremonies, even if they are not Christians.⁷⁵ This is the danger if church and state are not separate.

A fourth reason why strict separation is the best theory is to protect religion. Roger Williams, a co-founder of Rhode Island, talked about this prior to the drafting of the

⁷³ Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1 (2004).

⁷⁴ See, e.g., Lee v. Weisman, 505 U.S. 577 (1992) (holding that the Establishment Clause forbids prayer at public school graduations); Wallace v. Jaffree, 472 U.S. 38 (1985) (striking down a statute authorizing “moments of silence” at public schools as violating the Establishment Clause); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (finding that the Establishment Clause barred reading Bible passages in public schools); Engle v. Vitale, 370 U.S. 421 (1962) (holding that states may not compose official prayer to be read in public schools).

⁷⁵ Josh White, Intolerance Found at Air Force Academy, Wash. Post, June 23, 2005, at A2.

Establishment Clause.⁷⁶ He wanted to separate church and state not to safeguard the state from religion, but to protect religion from the state. The reality is that the more the government becomes involved in religion, the more the government will regulate religion and, consequently, the greater the danger is to religion. There is also the danger of trivializing religion. To say that a cross is just there for secular purposes – as in *American Legion v. American Humanist Association* -- ignores how important the cross is as a religious symbol.

We do not believe that strict separation is hostile to religion. Of course, any enforcement of the Establishment Clause will be seen by those who want a religious presence as hostility to religion. But that view begs the question and assumes that a religious presence in government is permissible. If the Constitution is seen as requiring separation of church and state, excluding religion is enforcing the view that the place for religion should be in the private realm; our government should be strictly secular.

Applications

What would it mean for the Court to follow the strict separation approach? Consider several examples: prayers at government activities, religious symbols on government property, and government aid to religious institutions.

Prayer

We believe the Supreme Court has gotten it right in holding that prayer in public schools – even voluntary school prayer – violates the Constitution. Few Supreme Court decisions have been as controversial as those that declared unconstitutional prayers and Bible readings in public

⁷⁶ See James P. Byrd, Jr., *The Challenges of Roger Williams* 121-27 (2002) (“In the process of corrupting the church, Williams believed that Christendom had corrupted biblical exegesis by devising an interpretative method that supported the state's claim to authority over religious matters.”).

schools. The Supreme Court has invalidated prayer in public schools, including voluntary prayers led by instructors and a government-mandated moment of “silence” for “meditation or silent prayer.” The Court also has followed this reasoning to invalidate clergy-delivered prayers at public school graduations.

Engel v. Vitale was the initial Supreme Court case holding prayers in public schools to be unconstitutional.⁷⁷ *Engel* invalidated a school policy of having a “non-denominational prayer,” composed by the state’s Board of Regents, recited at the beginning of each school day. The prayer was: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.”⁷⁸

The Court, in an opinion by Justice Black, said that “[t]here can be no doubt that New York’s state prayer program officially establishes the religious beliefs embodied in the Regents’ prayer. . . . Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause.”⁷⁹ The Court said that the establishment clause rests on the “belief that a union of government and religion tends to destroy government and to degrade religion. . . . The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its ‘unhallowed perversion’ by a civil magistrate.”⁸⁰

The Court emphasized the unconstitutionality of the government writing prayers and

⁷⁷ 370 U.S. 421 (1962).

⁷⁸ *Id.* at 422.

⁷⁹ *Id.* at 430.

⁸⁰ *Id.* at 431-432.

directing that they be read within the public schools. Justice Black expressly rejected the argument that forbidding prayers constituted hostility to religion: “It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.”⁸¹

A year later, in *Abington School District v. Schempp*, the Court declared unconstitutional a state’s law and a city’s rule that required the reading, without comment, at the beginning of each school day of verses from the Bible and the recitation of the Lord’s Prayer by students in unison.⁸² Although *Schempp*, unlike *Engel*, did not involve a state-composed prayer, the laws requiring Bible reading and reciting of the Lord’s Prayer were deemed to violate the establishment clause. The Court emphasized that these religious exercises were prescribed as part of the curricular activities of students, conducted in school buildings, and supervised by teachers.

The Court distinguished studying the Bible in a literature or comparative religion course, which would be permissible. The Court said that “the exercises here do not fall into those categories. They are religious exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion.”⁸³

In *Wallace v. Jaffree*, the Court followed *Engel* and *Schempp* and declared unconstitutional an Alabama law that authorized a moment of silence in public schools for

⁸¹ *Id.* at 435.

⁸² 374 U.S. 203 (1963).

⁸³ *Id.* at 225.

“meditation or voluntary prayer.”⁸⁴ The legislative history of the law was clear that its purpose was to reintroduce prayer into the public schools.⁸⁵ The Court said that the record was “unambiguous” that the law “was not motivated by any clearly secular purpose — indeed, the statute had *no* secular purpose.”⁸⁶

The Court reaffirmed and extended the ban on prayers in the public school in *Lee v. Weisman*.⁸⁷ In *Lee*, the Court declared unconstitutional clergy-delivered prayers at public school graduations. Justice Kennedy, writing for the Court, said that cases such as *Engel*, *Schempp*, and *Wallace* were controlling and indistinguishable. He said: “[T]he controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel the holding here. . . . The State’s involvement in the school prayers challenged today violates these central principles [of the establishment clause.]”⁸⁸ The school decided that there should be a religious invocation and benediction, chose a clergy member to perform the prayers, and gave instructions concerning them.

Justice Kennedy stressed the inherent coercion in allowing prayer at graduations. Although no student was required to attend graduation, it is an important event in a person’s life and students likely feel psychological pressure not to absent themselves during the prayer. He wrote that there “are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. [What] to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious

⁸⁴ 472 U.S. 38 (1985).

⁸⁵ Justice Powell noted in his concurring opinion that “[t]he record before us . . . makes clear that Alabama’s purpose was solely religious in character.” *Id.* at 65 (Powell, J., concurring).

⁸⁶ *Id.* at 56.

⁸⁷ 505 U.S. 577 (1992).

⁸⁸ *Id.* at 586-587.

practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.”⁸⁹

Justice Blackmun, in a concurring opinion joined by Justices Stevens and O’Connor, emphasized that prayers in public schools are unconstitutional even in the absence of coercion. He said that “it is not enough that the government restrain from compelling religious practices: it must not engage in them either. . . . Our decisions have gone beyond prohibiting coercion.”⁹⁰ Likewise, Justice Souter, in a concurring opinion joined by Justices Stevens and O’Connor, argued that the establishment clause is violated by prayers at public school events regardless of whether there is a finding of coercion.⁹¹

But Justice Scalia, joined by Chief Justice Rehnquist and Justices White and Thomas, vehemently dissented and disagreed with the view that there was anything coercive about a clergy-delivered prayer at a public school graduation.⁹² Scalia said that even if a student did feel subtly coerced to stand during the prayer, this was acceptable because maintaining “respect for the religious observance of others is a fundamental civic virtue that government can and should cultivate.”⁹³ For Scalia, the prohibition of prayer constitutes impermissible hostility to religion. He wrote: “The reader has been told much in this case about the personal interest of [the plaintiffs], and very little about the personal interests on the other side. They are not inconsequential. Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in

⁸⁹ *Id.* at 592.

⁹⁰ *Id.* at 604, 606 (Blackmun, J., concurring).

⁹¹ *Id.* at 618-619 (Souter, J., concurring).

⁹² *Id.* at 632 (Scalia, J., dissenting).

⁹³ *Id.* at 638.

secret, like pornography, in the privacy of one's room. For most believers it is not that, and has never been. . . . But the longstanding American tradition of prayer at official ceremonies displays with unmistakable clarity that the Establishment Clause does not forbid the government to accommodate it.”⁹⁴

Subsequent Supreme Court decisions concerning prayers in the public schools continue to find that such activity is impermissible at official school activities, particularly where the school encourages and facilitates prayer. In *Santa Fe Independent School District v. Doe*, the Supreme Court, in a 6-to-3 decision, held that student-delivered prayers at high school football games violate the establishment clause.⁹⁵ A public high school in Texas had a tradition of having a student deliver a prayer before varsity football games. After this was challenged in litigation, the school adopted a policy where students would hold two elections; one was to decide whether to have invocations before football games and, if so, the second was to select the student to give the invocation.

Justice Stevens, writing for the Court, emphasized that the school had encouraged and facilitated the prayer at an official school event. The school claimed that the student prayers were private speech, but the Court emphatically disagreed. Justice Stevens explained: “[W]e are not persuaded that the pregame invocations should be regarded as ‘private speech.’ These invocations are authorized by a government policy and take place on government property at government-sponsored school-related events.”⁹⁶ The Court noted how the school encouraged the delivery of prayers, both in its official policies and in its traditional support for prayer at football

⁹⁴ *Id.* at 645.

⁹⁵ 530 U.S. 290 (2000).

⁹⁶ *Id.* at 302.

games. The result is both actual and likely perceived government endorsement for religion. Justice Stevens stated: “The actual or perceived endorsement of the message, moreover, is established by factors beyond just the text of the policy. Once the student speaker is selected and the message composed, the invocation is then delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property. The message is broadcast over the school’s public address system, which remains subject to the control of school officials.”⁹⁷

Justice Stevens also noted the coercive aspects of the school’s policy in that many students — football players, band members, cheerleaders — were required to be present in order to receive academic credit, as well as the benefits from participating in an extracurricular activity. The Court said that forcing students to choose between attending the game and avoiding religion itself violated the establishment clause: “The Constitution, moreover, demands that the school may not force this difficult choice upon these students for it is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.”⁹⁸

It is notable that Justice Stevens’s majority opinion avoided choosing among the theories of the establishment clause; he explained why the prayers failed scrutiny under any of the leading tests. The dissent, written by Chief Justice Rehnquist, saw the exclusion of prayer as undue hostility to religion. He wrote: “But even more disturbing than its holding is the tone of the Court’s opinion; it bristles with hostility to all things religious in public life. Neither the

⁹⁷ *Id.* at 307.

⁹⁸ *Id.* at 312 (citations omitted).

holding nor the tone of the opinion is faithful to the meaning of the Establishment Clause, when it is recalled that George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of ‘public thanksgiving and prayer,’ to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God.”⁹⁹ Chief Justice Rehnquist’s dissent thus is similar to Justice Scalia’s lament in dissent in *Lee v. Weisman* that the Court was wrongly ignoring the interests of those who want prayer.

Engel, Schempp, Wallace, Lee, and Doe establish that prayer — even if voluntary, nondenominational, or silent — is impermissible in public schools.¹⁰⁰ The cases embody the view that government-directed prayer is inherently religious activity and therefore does not belong in public schools. Students are required by compulsory attendance laws to be present, and even voluntary prayers are coercive.¹⁰¹ Students who do not believe in religion or are part of religions that do not believe in prayers are inherently made to feel unwelcome and to be outsiders when prayer occurs in the classroom. Yet critics of the Court’s decision argue that prayer should be allowed in schools because of its importance in students’ lives and because it is not coercive so long as it is voluntary. Former Solicitor General Erwin Griswold said: “No compulsion is put upon him. He need not participate. But he, too, has the opportunity to be tolerant. He allows the majority of the group to follow their own tradition, perhaps coming to understand and to respect

⁹⁹ *Id.* at 318 (Rehnquist, C.J., dissenting).

¹⁰⁰ The one situation where prayer would be permissible would be if it were conducted by students as part of a noncurricular use of school facilities. The Supreme Court has held that government may not exclude student religious groups from using school facilities on the same terms as nonreligious groups (*Widmar v. Vincent*, 454 U.S. 263 (1981)) and has upheld the federal Equal Access Act that prohibits schools receiving federal funds from discriminating against student groups in access to facilities based on their religious or philosophical activities or beliefs. *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990)..

¹⁰¹ See Paul G. Kauper, *Prayer, Public Schools and the Supreme Court*, 61 Mich. L. Rev. 1031, 1046 (1963) (“immature and impressionable children are susceptible to a pressure to conform and to participate in the expression of religious beliefs that carry the sanction and compulsion of the state’s authority”).

what they feel is significant to them.”¹⁰²

Indeed, we believe that under any of the theories of the Establishment Clause, prayer in public schools should be deemed to violate the Establishment Clause: there is coercion, even without sanctions, to participate; it is a government endorsement of religion; and it is a religious presence in government that does not belong.

By contrast, we strongly disagree with the Court’s decisions that have allowed prayer at government meetings. In *Marsh v. Chambers*, the Supreme Court upheld the constitutionality of a state legislature employing a Presbyterian minister for 18 years to begin each session with a prayer.¹⁰³ The Nebraska legislature had employed Robert E. Palmer, a Presbyterian minister, since 1965 to open each legislative day with a prayer. The Court upheld this as constitutional because of the long history and tradition of religious invocations before legislative sessions.

Chief Justice Burger, writing for the Court, said that “[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.”¹⁰⁴ After reviewing this history in detail, Burger concluded that “[t]his unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged.”¹⁰⁵ The Court said: “In light of the unambiguous and unbroken history of more than

¹⁰² Erwin Griswold, *Absolute Is in the Dark: A Discussion of the Approach of the Supreme Court to Constitutional Questions*, 8 *Utah L. Rev.* 167, 177 (1963).

¹⁰³ 463 U.S. 783 (1983).

¹⁰⁴ *Id.* at 786.

¹⁰⁵ *Id.* at 791.

200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. . . . Nor is the compensation of the chaplain from public funds a reason to invalidate the Nebraska Legislature’s chaplaincy: Remuneration is grounded in historic practice initiated . . . by the same Congress that drafted the Establishment Clause of the First Amendment.”¹⁰⁶

The dissent, though, stressed that the purpose of legislative prayers and paying a minister seems obviously to advance religion.¹⁰⁷ Paying a minister, from one faith, for 18 years from public funds clearly seems to have the effect of advancing that religion and of entangling government with religion.¹⁰⁸ Historical practice should not justify a constitutional violation. Segregation of schools or the prohibition of same-sex marriage were not made permissible by long historical practice.

The Court returned to the issue of prayers before legislative sessions in *Town of Greece v. Galloway*, which held that it does not violate the establishment clause for a town board to begin virtually every meeting over a ten-year period with a prayer by a Christian minister.¹⁰⁹ The Town of Greece is a suburb of Rochester, New York of about 100,000 people. Its town board opened meetings with a moment of silence until 1999 when the town supervisors initiated a policy change. The town began inviting ministers to begin meetings each month with a prayer. From 1999-2007, the town invited exclusively Christian ministers, most of whom gave explicitly

¹⁰⁶ *Id.* at 792-793.

¹⁰⁷ *See id.* at 797 (Brennan, J., dissenting) (“That the ‘purpose’ of legislative prayer is preeminently religious rather than secular seems to me to be self-evident.”).

¹⁰⁸ *Id.* at 798-799.

¹⁰⁹ 134 S. Ct. 1811 (2014).

Christian prayers.

In 2007, complaints were made to the Town Board about this and for four months clergy from other religions were invited. But then for the next 18 months, the Town Board reverted to inviting only Christian clergy and their prayers were almost always Christian in their content.

The Court, in a 5-4 decision, held that the Town of Greece did not violate the establishment clause. The Court stressed the long history of prayers before legislative sessions, including explicitly Christian prayers, and said that *Marsh* “teaches . . . that the Establishment Clause must be interpreted ‘by reference to historical practices and understandings.’”¹¹⁰ The Court said that for it to require nonsectarian prayers would put the government and the courts unduly in the position of monitoring the content of the prayers delivered by others: “To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town’s current practice of neither editing or approving prayers in advance nor criticizing their content after the fact.”¹¹¹

The Court expressed great deference to the government in having prayers before legislative sessions and held: “Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation.”¹¹²

¹¹⁰ *Id.* at 1819.

¹¹¹ *Id.* at 1822.

¹¹² *Id.* at 1825.

Justice Thomas wrote an opinion concurring in part and concurring in the judgment, which was joined in part by Justice Scalia. Writing for just himself, Justice Thomas reiterated his view that the establishment clause does not apply to state and local governments; it was, in his view, meant only to keep Congress from creating a national church that could rival state churches.¹¹³ In a part of the opinion joined by Justice Scalia, Justice Thomas argued that the establishment clause is violated only if there is “actual legal coercion” to participate in religious activities.¹¹⁴

Justice Kagan wrote a dissent, which was joined by Justices Ginsburg, Breyer, and Sotomayor.¹¹⁵ The dissent found that the Town Board violated the establishment clause by inviting virtually only Christian clergy over a long period of time and their usually delivering explicitly Christian prayers. Justice Kagan wrote: “[T]he Town of Greece’s prayer practices violate that norm of religious equality — the breathtakingly generous constitutional idea that our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian.”¹¹⁶ Justice Kagan explicitly distinguished *Marsh v. Chambers*: “The practice at issue here differs from the one sustained in *Marsh* because Greece’s town meetings involve participation by ordinary citizens, and the invocations given — directly to those citizens — were predominantly sectarian in content. Still more, Greece’s Board did nothing to recognize religious diversity: In arranging for clergy members to open each meeting, the Town never sought (except

¹¹³ *Id.* at 1835 (Thomas, J., concurring in part and concurring in the judgment). Justice Alito also wrote a concurring opinion.

¹¹⁴ *Id.* at 1838.

¹¹⁵ Justice Breyer also wrote a dissenting opinion and stated: “[T]he town of Greece failed to make reasonable efforts to include prayer givers of minority faiths, with the result that, although it is a community of several faiths, its prayer givers were almost exclusively persons of a single faith. Under these circumstances, I would affirm the judgment of the Court of Appeals that Greece’s prayer practice violated the Establishment Clause.” *Id.* at 1841 (Breyer, J., dissenting).

¹¹⁶ *Id.* at 1841 (Kagan, J., dissenting).

briefly when this suit was filed) to involve, accommodate, or in any way reach out to adherents of non-Christian religions. So month in and month out for over a decade, prayers steeped in only one faith, addressed toward members of the public, commenced meetings to discuss local affairs and distribute government benefits. In my view, that practice does not square with the First Amendment's promise that every citizen, irrespective of her religion, owns an equal share in her government."¹¹⁷

The notion of a wall separating church and state is that our government should be secular. The Town of Greece's practice is the antithesis of such separation of church and state. It was the government beginning meetings over a long period of time with prayers of one religion.

Even under the more relaxed approach to the Establishment Clause which finds a violation only when there is government endorsement of religion, the Town of Greece acted unconstitutionally. As the Second Circuit concluded, the town's prayer practice had unconstitutionally affiliated the town with Christianity. The Establishment Clause of the First Amendment is violated when a Town so clearly links itself to Christianity, by inviting only Christian clergy to deliver prayers for a long period of time and those prayers being explicitly Christian.

In fact, even under the coercion test – unless it is limited to legal coercion as Justice Thomas advocated – the town acted unconstitutionally. The prayers were delivered to an audience of local citizens, including both children and adults, who attended meetings at the town board's invitation or direction. Children's athletic teams were invited to be publicly honored for their successes, police officers and their families attended to participate in oath-of-office

¹¹⁷ *Id.* at 1841-1842 (Kagan, J., dissenting).

ceremonies, people came to speak to the board about local issues of great personal importance, and would-be business owners came to request zoning permits from the board. All of these people --- Christians and non-Christians --- were asked to stand and bow their heads for many of these prayers. But Muslims, Jews, and nonbelievers cannot in good conscience participate in a prayer to Jesus Christ --- and doing so shouldn't be the price of civic participation.

Religious symbols on government property

As expressed above, our view is that religious symbols do not belong on government property. We thus are critical of the many Supreme Court cases that have permitted this. Because of the division among the justices among the three theories of the Establishment Clause, the result has been that the Supreme Court has ruled that nativity scenes, menorahs, and other religious symbols are allowed on government property as long as they do not convey symbolic government endorsement for religion or for a particular religion. In *Lynch v. Donnelly*, the Supreme Court upheld the constitutionality of a nativity scene in a park.¹¹⁸ The Christmas display included, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, a Christmas tree, hundreds of colored lights, and a crèche. All of the display was owned by the city and placed in a park maintained by a nonprofit organization.

The Court, in an opinion by Chief Justice Burger, found that the nativity scene did not violate the establishment clause. Burger began by reviewing the many ways in which religion has traditionally been a part of government, from President George Washington's Thanksgiving Day proclamation to the slogan "In God We Trust" on currency.¹¹⁹ Burger concluded that the nativity scene was permissible because it was motivated by a secular purpose: celebrating Christmas. He

¹¹⁸ 465 U.S. 668 (1984).

¹¹⁹ *Id.* at 675-676.

wrote: “The narrow question is whether there is a secular purpose for Pawtucket’s display of the crèche. The display is sponsored by the city to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes.”¹²⁰

Yet from the perspective of both Christians and non-Christians this view of the nativity scene seems wrong. The crèche is a “re-creation of an event that lies at the heart of the Christian faith.”¹²¹ For Christians, it is a basic religious symbol and therefore is likely perceived that way by non-Christians as well. Our position is that a profoundly religious symbol, like a Nativity Scene or a cross does not belong on government property.

In *Allegheny County v. Greater Pittsburgh ACLU*, which we describe above, the Court recognized the inherent religious nature of the nativity scene.¹²² As described above, this case involved two December holiday displays: One was a crèche placed in a staircase display by the Roman Catholic Church; the other was a December holiday display that included a menorah, a Christmas tree, and a sign saluting liberty. The Court, without majority opinion, invalidated the nativity scene, but allowed the menorah. The key difference, at least for Justices Blackmun and O’Connor who cast the decisive votes, was that the nativity scene was by itself and thus conveyed symbolic endorsement for Christianity; the menorah, in contrast, was accompanied by symbols of other religions and secular symbols.¹²³

We are in agreement with the three Justices — Stevens, Brennan, and Marshall — who would have found that both the nativity scene and the menorah on government property violated

¹²⁰ *Id.* at 681.

¹²¹ *Id.* at 711 (Brennan, J., dissenting).

¹²² 492 U.S. 573 (1989). This case is discussed in §12.2.1.

¹²³ *Id.* at 632 (O’Connor, concurring in part and concurring in the judgment).

the establishment clause.¹²⁴

Similarly, we believe that a cross – a quintessential Christian religious symbol – does not belong on government property. In *Capitol Square Review and Advisory Board v. Pinette*,¹²⁵ the Court considered the Ku Klux Klan placing a large Latin cross in a public park across from the Ohio state capitol. The Supreme Court, without a majority opinion, found that the government’s attempt to exclude the cross was unconstitutional discrimination against religious speech.

Justice Scalia wrote the plurality opinion, joined by Rehnquist, Kennedy, and Thomas. He emphasized that the First Amendment’s protection of speech includes religious expression and concluded that excluding the cross was impermissible content-based discrimination.¹²⁶ He concluded that “[r]eligious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated forum, publicly announced and open to all on equal terms.”¹²⁷

Justice O’Connor concurred in part and concurred in the judgment and was joined by Justices Souter and Breyer. O’Connor said that the key question was whether allowing the cross would be perceived, by the reasonable observer, as government symbolic endorsement for religion.¹²⁸ O’Connor said that a reasonable observer would see the sign indicating the private origin of the cross and also would know the history surrounding its placement.

Justices Stevens and Ginsburg dissented. Justice Stevens argued for a strong presumption

¹²⁴ *Id.* at 646 (Stevens, J., concurring in part and dissenting in part).

¹²⁵ 515 U.S. 753 (1995).

¹²⁶ 515 U.S. at 760.

¹²⁷ *Id.* at 770.

¹²⁸ *Id.* at 773 (O’Connor, J., concurring in part and concurring in the judgment).

against allowing such religious symbols on government property. He also criticized Justice O'Connor's focus on the educated observer and said that the establishment clause was violated because "[t]he 'reasonable observer' of any symbol placed unattended in front of any capitol in the world will normally assume that the sovereign — which is not only the owner of that parcel of real estate but also the lawgiver for the surrounding territory — has sponsored and facilitated its message."¹²⁹ Justice Ginsburg dissented and stressed the inadequacy of the disclaimer of government involvement accompanying the cross.¹³⁰

This, of course, is the strict separationist position that we advocate. Likewise, in the most recent case, *American Legion v. American Humanist Association*,¹³¹ discussed above, we strongly agree with Justice Ginsburg's dissent that saw the cross as a profoundly religious symbol that does not belong on government property. She observed: "An exclusively Christian symbol, the Latin cross is not emblematic of any other faith. The principal symbol of Christianity around the world should not loom over public thoroughfares, suggesting official recognition of that religion's paramountcy."¹³²

Aid to religious institutions

Many establishment clause cases have involved the issue of government assistance to religion. Decisions in this area are numerous, but often difficult to reconcile. The Court inevitably is involved in line-drawing. Total government subsidy of churches or parochial schools undoubtedly would violate the establishment clause. Indeed, the famous statement of Thomas Jefferson concerning the need for a wall separating church and state and James

¹²⁹ *Id.* at 801-802.

¹³⁰ *Id.* at 812 (Ginsburg, J., dissenting).

¹³¹ 139 S.Ct. 2067 (2019).

¹³² *Id.* at 2107 (Ginsburg, J., dissenting).

Madison's Memorial and Remonstrance Against Religious Assessments were made in the context of opposing a state tax to aid the church.¹³³ But it also would be clearly unconstitutional if the government provided no public services — no police or fire protection, no sanitation services — to religious institutions. Such discrimination surely would violate equal protection and infringe on free exercise of religion.¹³⁴

Therefore, the Court must draw a line between aid that is permissible and that which is forbidden. No bright-line test exists or likely ever will exist. Any aid provided to a religious institution or a parochial school frees resources that can be used to further its religious mission.¹³⁵ The dominant approach for the past half century has been to apply the test from *Lemon v. Kurtzman* and ask whether there is a secular purpose for the assistance, whether the aid has the effect of advancing religion, and whether the particular form of assistance causes excessive government entanglement with religion.¹³⁶ But not every case has used the *Lemon* test.

The decisions often seem difficult to reconcile. For example, the Court has upheld the government providing buses to take children to and from parochial schools,¹³⁷ but not buses to take parochial school students on field trips.¹³⁸ The Court has permitted the government to pay for administering standardized tests in parochial schools,¹³⁹ but not for essay examinations

¹³³ Madison's Remonstrance is reprinted in *Everson v. Board of Educ.*, 330 U.S. 1, 63 (1947).

¹³⁴ *See, e.g.*, *Lemon v. Kurtzman*, 403 U.S. at 614 ("Fire inspections, building and zoning regulations, and state requirements under compulsory school attendance laws are examples of necessary and permissible contacts.").

¹³⁵ In the initial case concerning government aid to parochial schools, *Everson v. Board of Education*, 330 U.S. 1 (1947), the Court upheld the constitutionality of the government's reimbursing parents for the costs of bus transportation to and from parochial school. The Court recognized that "[t]here is even a possibility that some of the children might not be sent to the church schools if the parents were compelled . . . to pay their children's bus fares out of their own pockets . . . when transportation to a public school would have been paid for by the State." *Id.* at 17.

¹³⁶ 403 U.S. 602 (1971).

¹³⁷ *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

¹³⁸ *Wolman v. Walter*, 433 U.S. 229 (1977).

¹³⁹ *Committee for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646 (1980).

assessing writing achievement.¹⁴⁰

Although these distinctions often seem arbitrary, it is possible to identify several criteria that explain them. While not every case fits the pattern, in general, the Court historically has been likely to uphold aid if three criteria are met. First, the aid must be available to all students enrolled in public and parochial schools; aid that is available only to parochial school students is sure to be invalidated. Second, the aid is more likely to be allowed if it is provided directly to the students than if it is provided to the schools. Third, the aid will be permitted if it is not actually used for religious instruction.

These criteria help explain the seemingly arbitrary distinctions described above. For example, buses to take children to and from school are provided to students at all schools and are not involved in education itself, but buses for field trips might be to see cathedrals or religious icons. The content of state-prescribed standardized tests is secular, but teacher-written essay examinations might be on religious subjects. Each of the three criteria is examined in turn.

But the law in this area is likely to change dramatically with a Court dominated by those taking an accommodationist approach. The importance of the three theories of the Establishment Clause in the area of government aid to religious schools is reflected in *Mitchell v. Helms*.¹⁴¹ *Mitchell* involved Louisiana providing instructional equipment to parochial schools. Justice Thomas, writing for a plurality of four, said that the aid should be allowed because it is provided

¹⁴⁰ *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472 (1973).

¹⁴¹ 530 U.S. 793 (2000). For competing views of the equality theory the Court follows in *Mitchell*, see Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values — A Critical Analysis of “Neutrality Theory” and Charitable Choice*, 13 *Notre Dame J.L. Ethics & Pub. Poly.* 243 (1999) (criticizing equality theory); Michael W. McConnell, *State Action and the Supreme Court’s Emerging Consensus on the Line Between Establishment and Private Religious Expression*, 28 *Pepp. L. Rev.* 681 (2001) (defending equality approach).

equally to all schools, religious and nonreligious.¹⁴² He said that the key question is whether the government was participating in religious indoctrination. He wrote: “In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.”¹⁴³ He rejected the argument that aid is impermissible because it might be diverted to religious use because any assistance could free funds that end up being used for religious purposes.

Justice Thomas emphatically rejected the view that the government cannot give aid that is actually used for religious education. He also sharply criticized the traditional law preventing the government from giving aid to “pervasively sectarian” institutions. He said that this phrase was born of anti-Catholic bigotry and wrote that “hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow.”¹⁴⁴ He declared: “[T]he inquiry into the recipient’s religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person’s or institution’s religious beliefs.”¹⁴⁵ Taken literally, this would seem to require the government to give aid to parochial schools any time it is assisting secular private schools.

Justice O’Connor wrote an opinion concurring in the judgment, joined by Justice Breyer,

¹⁴² 530 U.S. at 809.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 828.

¹⁴⁵ *Id.*

in which she sharply disagreed with Justice Thomas's approach. Justice O'Connor said that equality never had been the sole measure of whether a government action violated the establishment clause. She wrote: "[W]e have never held that a government-aid program passes constitutional muster solely because of the neutral criteria it employs as a basis for distributing aid. I also disagree with the plurality's conclusion that actual diversion of government aid to religious indoctrination is consistent with the Establishment Clause."¹⁴⁶ Justice O'Connor said that the test should be whether aid actually is used for religious instruction, in which case the establishment clause is violated.¹⁴⁷ Because she found no indication here that the aid was used for religious education in more than a negligible way, she found that the Louisiana program did not violate the First Amendment.

Justice Souter's dissenting opinion, joined by Justices Stevens and Ginsburg, urged the Court to adhere to its precedents and find that aid is impermissible when it is of a type, like instructional materials, that can be used for religious education.¹⁴⁸ Justice Souter began by observing: "The establishment prohibition of government religious funding serves more than one end. It is meant to guarantee the right of individual conscience against compulsion, to protect the integrity of religion against the corrosion of secular support, and to preserve the unity of political society against the implied exclusion of the less favored and the antagonism of controversy over public support for religious causes."¹⁴⁹ He strongly disagreed with the plurality's view that equality is the sole test for the establishment clause and identified a number of factors that prior

¹⁴⁶ *Id.* at 839-840 (O'Connor, J., concurring in the judgment).

¹⁴⁷ *Id.* at 840-841.

¹⁴⁸ *Id.* at 867 (Souter, J., dissenting).

¹⁴⁹ *Id.* at 868.

cases require to be considered in determining whether aid is impermissible.¹⁵⁰ Justice Souter powerfully concluded his dissent by stating: “[I]n rejecting the principle of no aid to a school’s religious mission the plurality is attacking the most fundamental assumption underlying the Establishment Clause, that government can in fact operate with neutrality in its relation to religion. I believe that it can, and so respectfully dissent.”¹⁵¹

The rule that emerges from *Mitchell* is that the government cannot give aid if it is actually used for religious instruction. But the position taken by Justice Thomas, which was supported by four justices, likely can command a majority today: the government not only can give money that is used for religious instruction, but it must do so when it provides the assistance for private secular schools.

An indication of this is found in the Court’s recent decision in *Trinity Lutheran Church of Columbia v. Comer*.¹⁵² The Supreme Court, in a 7-2 decision, held that Missouri violated the rights of Trinity Lutheran under the free exercise clause of the First Amendment by denying the church an otherwise available public benefit on account of its religious status. Chief Justice Roberts wrote for the Court and said that Missouri was clearly discriminating against religious institutions in the receipt of this benefit and that therefore the state had to meet strict scrutiny under the free exercise clause to justify the denial of the benefit. The Court declared: “Trinity Lutheran is a member of the community too, and the State’s decision to exclude it for purposes of this public program must withstand the strictest scrutiny.”¹⁵³

¹⁵⁰ *Id.* at 868-869.

¹⁵¹ *Id.* at 913.

¹⁵² 137 S. Ct. 2012 (2017).

¹⁵³ *Id.* at 2022.

The Court concluded that Missouri’s denial of aid failed strict scrutiny. Providing this aid would not violate the establishment clause, and Missouri did not have a compelling interest in refusing to provide such aid.

The Court found that Missouri failed to meet strict scrutiny and Chief Justice Roberts concluded his opinion with the powerful statement: “But the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand.”¹⁵⁴

Justice Sotomayor wrote a vehement dissent, joined by Justice Ginsburg, lamenting that this was the first time in history the Supreme Court ever found that the government was required to provide aid to a religious institution. She wrote: “This case is about nothing less than the relationship between religious institutions and the civil government—that is, between church and state. The Court today profoundly changes that relationship by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church. Its decision slights both our precedents and our history, and its reasoning weakens this country’s longstanding commitment to a separation of church and state beneficial to both.”¹⁵⁵ She described the framers’ desire to keep people from being taxed to support the religions of others.

Chief Justice Roberts addressed the limit to the reach of the Court’s holding in footnote 3, where he writes: “This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.”¹⁵⁶ Only three other Justices (Kennedy, Alito, and Kagan) joined this footnote.

¹⁵⁴ *Id.* at 2025.

¹⁵⁵ *Id.* at 2027 (Sotomayor, J., dissenting).

¹⁵⁶ *Id.* at 2024 n.3.

It seems highly unlikely *Trinity Lutheran* will be limited; much more likely, it will be a basis for a broad requirement that the government *must* provide the same aid to religious institutions that it gives to secular ones. The majority in *Trinity Lutheran* sees discrimination against religious institutions as an infringement of free exercise of religion that must meet strict scrutiny. It appears that there now is a majority of the Court who will hold that the government *must* give aid to religious institutions when it provides it to secular private institutions.

The Court's central argument is that it is unfair (and even "odious") to deny a church or other devotional institution an equal opportunity to compete for public funding merely because of its religious character (and particularly when such funding is purportedly for a secular purpose and the Court has ruled that government may voluntarily provide such benefits consistent with the federal Establishment Clause). However, as benign as this concern may seem on its surface, it is subject to a number of objections.

Most obviously, the Constitution itself mandates the disparate treatment of religious communities in regards to receiving public funding. As discussed earlier, the history of the Establishment Clause is in significant part about protecting against compelled funding of religious groups, which in turn makes it dubious to assert that government may provide even non-preferential financial assistance to churches.

Moreover, as also discussed earlier, when public funds are directed to churches or other worship institutions purportedly for secular purposes, they inevitably underwrite the devotional and proselytizing practices of those organizations. Or it becomes tempting to divert those funds to religious purposes, a concern which led the Court for many years to bar such aid if there was a risk of "excessive entanglement" between government and religion in policing the uses of such

monies.¹⁵⁷

As discussed earlier, the solution of the conservative wing of the Court—as illustrated by the plurality opinion in the *Helms* case—is simply to let such funding be used for religious purposes. And it seems to be where those justices intend the *Trinity Lutheran* decision to push the law, given the repeated assertions in the majority opinion about the unfairness of denying churches public funding while barely noting in a footnote (joined only by a plurality of justices) the significance of the fact that it was to be used in that case for purportedly secular purposes.¹⁵⁸ But a principle that would allow (or even worse, force) the government to directly fund the devotional practices and proselytization efforts of various religion sects, would surely alarm the generations of early Americans who came to understand free exercise and anti-establishment protections as being designed in significant part to protect against those very government actions.

Further, even if the Court were right to read the religion clauses as permitting the government to voluntarily provide funding to religious groups as part of a generally available funding program, it is quite another thing from a rights of conscience perspective to have judges *force* the government to do so. At least in the former situation, rights of conscience have had a chance to prevail in the resulting democratic decision to include religious institutions in government funding decisions. In such instances, any violations would presumably be confined to objecting minorities. But where judges compel funding through their own ideologically-driven interpretations of the Religion Clauses, the infringement of conscience rights for objectors is potentially much more sweeping.

As we have argued, there are compelling reasons for treating religious groups differently than secular organizations in regards to public funding—and particularly the use of compulsory

^{157.} See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

^{158.} See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 n.3 (2017).

taxation for such purposes. Many of the reasons that persuaded the founding generation that compelled taxpayer funding of churches and similar devotional or proselytizing institutions was “of a different ilk”¹⁵⁹ still apply today in a way that does not apply to such funding for secular institutions.

Most obviously, secular institutions do not use public money to underwrite devotional or proselytization activities, by which we mean the observance, celebration, or indoctrination of religious beliefs. But why, one may legitimately ask, is it a problem to compel funding to support such activities if a secular organization—and in particular an ideologically controversial one such as the National Rifle Association—might use a public grant to celebrate and convince others of its views?

The short answer is that religious belief systems differ from secular belief systems in ways that make it incumbent on the government not to force members of the public to underwrite the former even if used to foster the latter. Freedom of religious belief occupies a special place in our historical and constitutional traditions. It is the only type of belief that Americans have singled out in their basic charter for explicit protection since the founding of this country.

Conclusion

Soon before retiring from the Court, Justice Sandra Day O'Connor said: “By enforcing the [Religion] Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat. At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish.... Those who would renegotiate the boundaries

¹⁵⁹ Locke v. Davey, 540 U.S. 712, 723 (2004).

between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?"¹⁶⁰

Why indeed? It is why we believe that a strict separationist approach is the best way of interpreting the Establishment Clause and it is why we lament the direction of the current Court.

¹⁶⁰ *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 882 (2005) (O'Connor, J., dissenting).