GOVERNMENT SPEECH AND THE ESTABLISHMENT CLAUSE

*Alexander Tsesis**

This Article argues that the Establishment Clause prohibits public actors or agencies from adopting religious messages and symbols. The limitation is explicitly stated in the First Amendment, which restricts government from encroaching on religious belief and ritual. Separation between private and public spheres protects thought, belief, and practice under the Free Exercise Clause and prevents official orthodoxy under the Establishment Clause. One religion clause requires government to respect deeply held personal beliefs that are parallel to beliefs in God, while the other clause prohibits government from participating in sectarian conduct. Government speech can describe, explain, contextualize, and characterize religious rituals without actually engaging in them. While the Establishment Clause prohibits government intrusion into individual autonomy, the Free Exercise Clause safeguards beliefs of persons but not of government entities.

The Article first defines government speech, distinguishes it from sincerely held beliefs of individuals who work in government, and discusses examples of legitimate public communications about religion. It further critiques cases arising from claims that government speech violated the Establishment Clause by having religious monuments on public property and organizing sectarian prayer before legislative sessions. Next, the Article reviews current Establishment Clause jurisprudence and the resulting tests used to evaluate governmental speech, asserting that the existing tests should be thought of as levels of scrutiny. It also explains whether and how each test engages the overarching question of whether the government speech is religious or about religion, the core distinction between government participation in and government tolerance of religion. Finally, the Article advocates for the (now unwisely overturned) "excessive government entanglement" test of Lemon v. Kurtzman *as the best mode of analysis of these two contextual features of the First Amendment.*

* Visiting Professor of Law, George Washington University Law School; Professor and Raymond & Mary Simon Chair in Constitutional Law, Loyola University School of Law, Chicago; Cambridge University Press Studies on Civil Rights and Civil Liberties, General Series Editor; Oxford University Press Theoretical Perspectives in Law, General Series Editor. I am grateful for feedback on this draft from Helen Norton and Martin Redish.

TABLE OF CONTENTS

I. INTRODUCTION

Despite the First Amendment's prohibition against government engaging in speech that establishes religion and its practices, the Supreme Court has in recent years—with increasing frequency—upheld government display of religious symbols at public fora. Those Establishment Clause cases differ from decisions where private religious displays appeared on public property the Court has reviewed under the Free Speech Clause.[1]

In *American Legion v. American Humanist Association*, a majority found that even a cross maintained by a local government at a busy road intersection did not overstep the constitutional limitation of the Establishment Clause, despite the millennial pedigree of the cross as "a preeminent Christian symbol."[2] In a separate case challenging the practice of a town board that prayed prior to legislative meetings, the Court found that invocations delivered by a chaplain could be both religiously influenced and secularly maintained, even when appealing to the Divinity.[3] The Court also upheld a government display of a crèche.[4] Although an explicitly religious holiday display, a majority found the symbol to have a

1. *See*, *e.g.*, Shurtleff v. City of Boston, 142 S. Ct. 1583, 1593 (2022) (finding unconstitutional viewpoint discrimination in the rejection of a private organization's permit application to fly a "Christian flag" on municipal property).

2. 139 S. Ct. 2067, 2074 (2019).

3. Town of Greece v. Galloway, 572 U.S. 565, 578 (2014).

4. Lynch v. Donnelly, 465 U.S. 668, 687 (1984).

neutral secular purpose when grouped with nonreligious symbolic objects,[5] even though a city government paid for that religious holiday display. The choices of interpretive methodologies reflect more about judicial social and cultural preferences than they do the simple, constitutional prohibition against religious government speech.

This Article argues that the Establishment Clause prohibits a public actor or agency from adopting religious messages, viewpoints, and symbols. Speech that is religious is constitutionally outside the government's limited functions.[6] The Constitution prohibits the State from fusing public messages with religious meanings. The limitation is explicitly stated in the opening clause of the First Amendment, which restricts government from engaging in the private spheres of belief and ritual. This separation between the secular and the religious protects thought, belief, and practice under the Free Exercise Clause.[7] One Religion Clause prohibits government from participating in sectarian conduct, while the other requires government to respect deeply held personal beliefs that are parallel to "the orthodox belief in God."[8] Government speech also grants states authority to describe, explain, contextualize, respect, and characterize religious rituals without actually engaging in them.[9] While the Establishment Clause prohibits government intrusion into individual autonomy, the Free Exercise Clause safeguards beliefs of persons but not government entities.[10] The key question in these cases is the extent to which the government entity, as opposed to a private party, controls the content and meaning of the religious message.[11]

Part II details the nature of government speech, explains how it differs from sincerely held beliefs protected by the Free Exercise Clause, and then discusses examples of legitimate public communications about religion. Part III critiques cases arising from claims that government speech violated the Establishment Clause by having religious monuments on public property and organizing sectarian prayer before legislative sessions. Part IV reviews the principal tests used in Establishment Clause jurisprudence. It explains whether and how each engages the overarching question of whether the government speech is religious or about religion, the core theoretical distinction between government participation in and government tolerance of religion. Further, it argues that the existing tests should be thought of as levels of scrutiny. Part V concludes that the long

5. *See id.* at 699–700 (Brennan, J., dissenting).

6. *Cf.* THOMAS EMERSON, THE SYSTEM OF FREE EXPRESSION 699 (1970) (discussing the limited sphere of government expression in the sphere of political reelections).

7. U.S. CONST. amend. I.

8. United States v. Seeger, 380 U.S. 163, 165–66 (1965) ("We believe that under this construction, the test of belief 'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is 'in a relation to a Supreme Being' and the other is not."). As a matter of free exercise, government may exempt persons from military service but not if it specifically favors deistic beliefs as opposed to non-theistic or atheistic convictions. Bd. of Educ. v. Grumet, 512 U.S. 687, 716 (1994) (O'Connor, J., concurring).

9. *See* U.S. CONST. amend. I.

10. *Id.*

11. Shurtleff v. City of Boston, 142 S. Ct. 1583, 1592 (2022).

maligned[12] and, as this Article went to press, now unwisely overturned[13] "excessive government entanglement" test of *Lemon v. Kurtzman*[14] was the best mode of analysis of these two contextual features of the First Amendment.

II. ESTABLISHMENT THEORY OF GOVERNMENT SPEECH

The Establishment Clause checks government from adopting religious dogma into its policies. This Part of the Article reviews the government speech doctrine, which Helen Norton parsed in her monograph, *The Government's Speech and the Constitution*.[15] Government is free to assert a viewpoint consistent with lawmakers' beliefs, preferences, and politics.[16] This Article seeks to determine what limits the Constitution sets on official pronouncements, declarations, publications, and monuments. This is a topic that Norton calls "second-stage government speech questions," that is those "when the government is simply speaking and not compelling or regulating others' speech."[17] The Establishment Clause prohibits the adoption of religious government speech.[18] That prohibition extends to official symbolism but not to the personal views of officials.[19] The Free Speech Clause is the other bookend of the Religion Clauses. The personal right to express religious beliefs is preserved as an inalienable right of individuals, whether they be public servants or private citizens.[20] Unlike the Court's recent decision in *Shurtleff v. City of Boston*, a case where religious symbolism expressed ideas of private parties,[21] this Article concerns religious statements that enjoy government support and meaningful involvement.

Where there is "play in the joints" between the Religion Clauses,[22] other principles of constitutional democracy must be brought to bear for identifying the limits of government expression. The two clauses function at an intersection of other provisions. Most important, perhaps, is the Equal Protection Clause, which mandates that the government's chosen message be secular; this protects the right of everyone to be equally treated with the individual dignity of personal

12. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080 (2019) ("If the *Lemon* Court thought that its test would provide a framework for all future Establishment Clause decisions, its expectation has not been met. In many cases, this Court has either expressly declined to apply the test or has simply ignored it.").

13. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022); *Am. Legion*, 139 S. Ct. at 2080.

14. 403 U.S. 602, 612–13 (1971) (establishing three-part test for Establishment Clause review: requiring judges to review whether the challenged government action (1) has a secular purpose; (2) has a "principal or primary effect" that "neither advances nor inhibits religion;" and (3) does not foster "an excessive government entanglement with religion").

15. *See generally* HELEN NORTON, THE GOVERNMENT'S SPEECH AND THE CONSTITUTION (2019).

16. Matal v. Tam, 137 S. Ct. 1744, 1748 (2017) ("[T]he government is not required to maintain viewpoint neutrality on its own speech.").

17. Helen Norton, *A Framework for Thinking about the Government's Speech and the Constitution*, 2022 U. ILL. L. REV. 101, 124–36 (2022).

18. U.S. CONST. amend. I.

19. *Id.*

20. *See id.*

21. Shurtleff v. City of Boston, 142 S. Ct. 1583, 1593 (2022).

22. Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) (explaining that "there is room for play in the joints" between the Religion Clauses of the First Amendment).

values and of sincere worship.[23] The Establishment Clause restricts government from officially adopting religious messages that might signal sectarian preference and favoritism. The First Amendment requirement that government remain neutral is at heart countermajoritarian respect for personal conviction. That is, the balance between the Constitution's guarantee of individual conviction, on the one hand, and mandate of government secularism, on the other, preserves the fundamental right to dissent from state-imposed orthodoxy.[24]

This Part of the Article first explores the government speech doctrine, turns to the Supreme Court's protections of sincerely held religious beliefs, and concludes with the play at the joints of the Establishment Clause's prohibition against government statements that are religious and the Free Exercise Clause's guarantee of self-expression about religion.

A. Government Speech Doctrine

Government is generally under no Free Speech Clause obligations in its official statements.[25] It can take positions on any public policy matters; indeed, its perspective changes from one administration to another, especially when power shifts from one political party to the other. But as discussed later,[26] the same cannot be said of the constitutional principle against government expressions of religious ideology.

Government's participation in the realm of expression was undertheorized until the 1990s and barely defined before the 1970s.[27] The legal scholar Professor Thomas Emerson has explained that government controls its own messages not subject to the Free Speech Clause's protection of private expression.[28] More recently, Professor Toni Massaro explained that the Court does not apply First Amendment review to government speech "even when the message is explicitly ideological, and not merely a message designed to improve the integrity of

23. Bd. of Educ. v. Grumet, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring) (stating that "equal treatment" in religious worship is mandated by "the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause"). Of course, insincere worship is also protected but probably implicates the Free Speech Clause rather than the Free Exercise Clause, similar to the area of protected parody, as in Hustler v. Falwell, 485 U.S. 46, 57 (1988).

24. *See* Joy Milligan, *Religion and Race: On Duality and Entrenchment*, 87 N.Y.U. L. REV. 393, 403 (2012) ("As the Court developed these two new fields, it read the religion clauses and the Equal Protection Clause in a similar dualistic way: One aspect was closer to a guarantee of individual rights, though it rested as much on disparities in outcomes as on findings of invidious intent, and the other aspect was a structural regulation of the state and its relationship to particular types of majorities.").

25. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207 (2015) ("When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says."); Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny."); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) (noting that a government actor "is entitled to say what it wishes").

26. *See* discussion *infra* Subsection II.C.1.

27. *See* Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 140 n.7 (1973) (Stewart, J., concurring) ("[G]overnment is not restrained by the First Amendment from controlling its own expression."); ZECHARIAH CHAFEE JR., GOVERNMENT AND MASS COMMUNICATIONS 723 (1947) (stating that government's role in communication had been "a subject hitherto neglected").

28. EMERSON, *supra* note 6, at 700.

discourse, promote knowledge, advance respect for prevailing expert or scientific knowledge, or expand the marketplace of ideas."[29] Judicial review is unwarranted because its content is a political matter not subject to review.[30]

Other scholars disagreed, believing that government speech could be placed in the context of the First Amendment, identifying ways to prevent public actors from drowning out dissident voices, and expanding participation in representative government.[31] Professor Steven Shiffrin helps to unravel the many ways government conduct is intertwined with expression:

> [S]tate support of communications ranging from official government messages, to statements by public officials at publicly subsidized press conferences or in letters mailed at taxpayers' expense, to the speech of political candidates and artists supported by government political or artistic subsidies, to the publicly financed editorializing of broadcasters and public school newspapers, to the communications of public school teachers, and even to the speech supported by second class mail privileges that once operated as a generous subsidy to periodicals.[32]

Shiffrin argues that government speech should not go unrestricted but aim to preserve the "intellectual marketplace."[33] Professor Norton proposes "that the government's speech can violate the Free Speech Clause of the First Amendment when it is sufficiently coercive of its targets' beliefs or expression to constitute the functional equivalent of the government's direct regulation of that expressive activity."[34]

The Supreme Court explicitly holds that the "Free Speech Clause . . . does not regulate government speech."[35] The basic premise behind modern government speech doctrine is that the First Amendment places no restrictions on government's political messages.[36] Put another way, government actors can establish political orthodoxy without running aground of any constitutional provisions. The ability of government to advance its preferred programs hinges on the ability to encourage certain conduct, such as energy conservation, free trade and competition, disarmament, and the like.[37] Traditional political processes, not litigation, are the typical means of accountability for persons to alter

29. Toni M. Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365, 433–34 (2014).

30. *See* John Harrison, *The Political Question Doctrines*, 67 AM. U. L. REV. 457, 461 (2018).

31. MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 200 (1983) ("Risky guardians they may be, but the courts nevertheless have a constitutional role to play in preventing the falsification of majorities and the demise of the self-controlled citizen in consequence of unregulated government expression.").

32. Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 565 n.* (1980).

33. *Id.* at 606–07.

34. Helen Norton, *Government Speech and the War on Terror*, 86 FORDHAM L. REV. 543, 558 (2017).

35. Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009); *see also* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny.").

36. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207 (2015) ("[G]overnment statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas.").

37. *See* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 221 (2013) (Scalia, J., dissenting).

government messages.[38] But where some speech is prohibited, including government speech that fuses public messages with religious orthodoxy, the judicial system must be available for redress.[39]

The Court's earliest explicit exposition of the government speech doctrine was in *Rust v. Sullivan* in 1991, a case that upheld a Department of Health and Human Services prohibition on those physicians who received federal funding from communicating to patients about abortion-related services.[40] In turning away arguments of the plaintiff physicians, who challenged federal public health regulations arising from Title X of the Public Health Service Act, the 5-4 majority rationale explained that government could advocate views without having to render assistance to "competing lines of political philosophy."[41] That explanation was formalistic, without acknowledging that the funding program interfered with a physician's ability to inform pregnant patients of medical options.[42] Justice O'Connor argued in dissent that the regulation sought to manipulate the patient-physician dialogue.[43] After *Rust*, government agencies were at liberty to promote public information programs, even when they regulated third-party professional conduct.

Government speech can overtly silence private speakers with divergent political or professional views, as was the case with the regulation that stifled physicians' voices in *Rust*.[44] While government is prohibited from conditioning public funding on the basis of private-party viewpoint, it can choose private spokespersons who will "neither garble[] nor distort[]" its message.[45] Such opinions preserve public control of official pronouncements.

38. *See* Johanns, 544 U.S. at 563.

39. The details of this premise are discussed in Part III of the Article. The general point is that the Establishment Clause allows for adjudicative proceedings as the proper vehicles for addressing alleged violations.

40. 500 U.S. 173, 196 (1991); 42 C.F.R. § 59.8(a)(1) (1989) ("[T]itle X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.").

41. Rust, 500 U.S. at 194.

42. Furthermore, those medical options included the Fifth Amendment privacy right to procure an abortion consistent with Supreme Court holdings. *Id.* at 216 (Blackmun, J., dissenting).

43. *See id.* at 223 (O'Connor, J., dissenting). The reasoning has been criticized for "treating government funding of private speech as identical to government speech." Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2055 n.212 (1994).

44. *See Rust*, 500 U.S. at 210 (Blackmun, J., dissenting).

45. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995). A more complicated question that to date the Court has not satisfactorily answered is what remedies the citizenry has when government violates the rights of individuals through its speech. NORTON, *supra* note 15, at 98–119 (analyzing government speech that harms equal protection norms, discriminates based on race or class, is asserted with animus intent). Entirely unclear, for instance, is that any remedy exists when government falsifies political information to undermine democracy. Such official action seems to be inimical to the constitutional principle that government is "accountable to the electorate and the political process for its advocacy." Bd. of Regents v. Southworth, 529 U.S. 217, 235 (2000). Under those circumstances, the democratic system "accountable to the electorate and the political process for its advocacy" is regarded as ultimate recourse against political malfeasance. *Id.* There appears for now to be no recourse for government propaganda, even when it harms the political process through such things as gerrymandering schemes that aim to disenfranchise part of the electorate. Rucho v. Common Cause, 139 S. Ct. 2484, 2494 (2019) (holding constitutional claims challenging partisan gerrymandering are nonjusticiable). Such a conclusion dramatically impacts litigation seeking judicial redress capable of

The variety of cases that followed brought with them an ill-defined doctrine that extended to government engagement in the "reasonable, viewpoint-neutral exercise of its journalistic discretion," to exclude political candidates from a non-public forum.[46] So too, government can control speech in a viewpoint-neutral manner anywhere at military bases[47] and directly in front of penitentiaries.[48] There is a correlation between government as property owner and sovereign entity with policies whose disclosure to the public is not governed by the First Amendment.

That doctrine does not give government the authority to discriminate based on patrons' viewpoints. Public libraries have pedagogical discretion but cannot remove items from stacks on the basis of ideological orthodoxy.[49] Professors Randall Bezanson and William Buss identified variations of government speech to include statements needed to implement policies, control forums, create pedagogical programing, allocate fees, regulate mass communications, assign National Endowment for the Arts subsidies, control public information, and even discourage third-party communications that reasonable observers could attribute to government actors.[50] Other cases speak to government as employer, whose employees are free to privately discuss civil concerns but are required to abide by certain guidelines consistent with their public employment status, when it comes to matters of policy and its implementations.[51] Many cases also deal with constitutional restraints on government's use of viewpoint discrimination against the recipients of public funding.[52] This array of cases demonstrates the rather tangled, tangential, and broad typology of what constitutes government speech.

Matters are different when religious content is fused with government messages. As Section II.C demonstrates,[53] the Establishment Clause prohibits government from adopting orthodox religious messages; this is quite the opposite of government's authority to express political views. The constitutional prohibition against government adopting religious views as official policy preserves equality in the free exercise of private religious ideas.[54] Keeping the state out of religion

safeguarding representative governance. *See* Alexander Tsesis, *Multifactoral Free Speech*, 110 NW. U. L. REV. 1017, 1025 (2016) ("The national commitment to representative government, deliberation, and political accountability, which are encompassed by the Guarantee Clause, becomes meaningless without an enforceable right to freely communicate political ideas.").

46. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 676 (1998).

47. Greer v. Spock, 424 U.S. 828, 840 (1976).

48. Adderly v. Florida, 385 U.S. 39, 40–41 (1966).

49. Bd. of Educ. v. Pico, 457 U.S. 853, 875 (1982).

50. *See generally* Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377 (2001).

51. Lane v. Franks, 573 U.S. 228, 231 (2014); Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

52. *See*, *e.g.*, Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 208 (2013); Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 140 S. Ct. 2082, 2085–86 (2020). Likewise unconstitutional are government's efforts to limit lobbying efforts of lawyers who work for a publicly funded grantee, like the Legal Services Corporation. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 536–37 (2001).

53. *See infra* Section II.C.

54. *See* Lathrop v. Donohue, 367 U.S. 820, 852 (1961) (Harlan, J., concurring) ("[R]ecogniz[ing] the clear distinction in the wording of the First Amendment between the protections of speech and religion, only the latter providing a protection against 'establishment.'").

is critical to the preservation of religious liberties. While courts lack the means to force or prevent the communication of political messages, they have subject matter jurisdiction to remedy Establishment Clause violations.[55]

B. Sincerely Held Belief

Government speech doctrine recognizes the discretion of public actors to express public ideological preferences—be they democratic, militaristic, capitalistic, or socialistic. Nevertheless, private religious beliefs are constitutionally protected against official dogma. American politicians since the nation's founding have invoked and discussed their religious convictions in the course of public and private statements. The equal right to express personal convictions is essential to the enjoyment of civil freedom and personal identity, regardless of whether the speaker is a public servant or private individual.[56] Affirmations of belief are protected by the Free Exercise and Free Speech Clauses.[57] But the Establishment Clause prohibits government from adopting religious symbols, rhetoric, and ceremony into its official policy, celebration, and position.[58] This Section turns to the premises of free exercise for personal conviction, and the Section that follows balances these concepts with establishment principles against religious government expression.

The Court has been reticent to define or inquire into the nature of constitutionally recognized "religion" out of concern not to interfere, belittle, or encroach upon personal beliefs.[59] It has never confined the protection of free exercise to a particular dogma or set of religious beliefs. In *United States v. Seeger*, the majority avoided the narrow confines of textualism, finding that in granting religious exemption from military service the government lacked authority to differentiate between differing personally meaningful and sincerely held belief systems.[60] A court's task is limited to determining whether a party is sincere in claiming that a set of views is, "in his own scheme of things, religious."[61] In

55. *See* Edwards v. Aguillard, 482 U.S. 578, 593 (1987) ("The Establishment Clause, however, 'forbids *alike* the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma.'" (quoting Epperson v. Arkansas, 393 U.S. 97, 103, 106–07 (1968))).

56. *See id.*

57. *See, e.g.*, *id.*

58. *See id.*

59. *See*, *e.g.*, Emp. Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 886–87 (1990) ("It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field."); United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring) (stating that in cases dealing with religious accommodation there is an "overriding interest in keeping the government . . . out of the business of evaluating the relative merits of differing religious claims"); Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 716 (1981) ("Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.").

60. 380 U.S. 163, 176 (1965) ("The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.").

61. *Id.* at 184–85.

Welsh v. United States, also dealing with conscientious objection, a plurality asserted that Congress "cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other."[62] As a general principle, individual liberty would be at risk were government to dictate which religious beliefs were reasonable and which were irrational. But there must be something about the Free Exercise Clause, else how to differentiate the freedom of speech, which also deals with consciousness. Thus, at some point theology becomes philosophy, but that is a privately protected matter of exercise or speech.

Generally, government cannot question the degree of a person's sincerity or orthodoxy because "courts are not arbiters of scriptural interpretation."[63] But the Court is willing to entertain evidence that the claimant's views refer to some system of sincerely held beliefs, not merely to something "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the free exercise clause."[64] While the Court is unwilling to question the sincerity of a person's belief in order to avoid interfering with the autonomy protected by the Free Exercise Clause, it assumes that certain rituals can have a recognizable religious content. For example, the Court in *McCreary County v. ACLU* found that the Ten Commandments are a "central point of reference in the religious and moral history of Jews and Christians."[65] These private allusions are protected.[66]

Each person shares an equal right to believe and act on personal religious convictions.[67] Where government adopts religious symbols into its speech, however, Establishment Clause concerns for preserving secular self-governance come into play. The State is prohibited from favoring or disfavoring religion.[68] The Establishment Clause keeps government out of religion in order to allow citizens the spiritual space needed to associate, communicate, and listen freely and equally.[69] Strict scrutiny applies in free exercise cases: only a compelling government interest and the least restrictive means for achieving it are adequate to justify curtailment of a person's right to free exercise.[70] That interpretive

62. Welsh v. United States, 398 U.S. 333, 356 (1970) (Harlan, J., concurring).

63. *Thomas*, 450 U.S. at 716.

64. *Id.* at 715–16.

65. 545 U.S. 844, 868 (2005).

66. *See id.*

67. *Id*. at 881–82 (O'Connor, J., concurring).

68. Burt Neuborne eloquently connects the Religion Clauses to self-government guarantees of a free people's right to live without government's ability to crush the human spirit's liberty to select a religious fulcrum for its conscientious beliefs. *See* BURT NEUBORNE, MADISON'S MUSIC 18–19 (2015). *See also* Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 706–09 (2013) (connecting the privileges of "full citizenship" to the prohibition against government endorsement of religion).

69. *See McCreary County*, 545 U.S. at 860.

70. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 570 n.5 (1993) (citing variety of free speech cases for the principle that strict scrutiny applies in free exercise cases); Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) ("The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest

method presumes that, irrespective of religion, people are equal under law without regard to their sincerely held beliefs.

C. Religious Government Content

While the Court has established that secular free speech falls outside the First Amendment, religious government messages are squarely prohibited by the Establishment Clause.[71] Government as speaker adopts perspectives on matters as far removed as health, morality, safety, and education, but those views can neither favor nor disfavor religion. The Supreme Court has found that disagreements about the wisdom of myriad government programs, policies, statutes, and priorities are "normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[72] This is not to deny some overlap between sacred and secular normative principles,[73] but to argue that fusion of government speech with religious symbolism, indoctrination, and practice is an Establishment Clause violation.

A government message alienating to religious minorities creates a class of political outsiders. Incorporating religious symbolism into government speech favors the sincerely held beliefs of some members of society over others. Such action comports neither with the secular purposes of governance nor with the anti-establishment prohibition found in the First Amendment.[74] It imposes state orthodoxy contrary to the Establishment Clause because it interferes with the free exercise of religion. In the same vein but with different emphasis, Justice O'Connor has asserted, "[e]ndorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[75] When policies are formulated for religious purposes, they diminish the equal status of those members of the polity who do not share those purposes. Professor Jessie Hill writes, "[w]hen the government endorses one set of religious beliefs," its conduct stigmatizes and "undermines the equal status and respect to which each citizen is entitled under the Constitution."[76] The

justifies the burden."); Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (using compelling speech analysis to uphold government antidiscrimination law regulating religious university). At times the Court uses a modified version of strict scrutiny in free exercise cases. *See*, *e.g.*, Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829, 835 (1989) (analyzing whether state interests were "sufficiently compelling to override a legitimate claim to the free exercise of religion"); United States v. Lee, 455 U.S. 252, 260 (1982) ("Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax."); Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (finding that state must prove by a "state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause").

71. *See McCreary County*, 545 U.S. at 860.

72. Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

73. I am thinking here of such overlap between secular and religious rules as religious injunctions against murder and criminal statutes to the same effect.

74. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

75. *Id.* at 687–88, *declined to follow Kennedy*, 143 S. Ct. at 2411.

76. B. Jessie Hill, *Anatomy of the Reasonable Observer*, 79 BROOK. L. REV. 1407, 1422 (2014).

Establishment Clause prevents government from involving itself in religious speech or vilifying others in theirs, thereby requiring government to promulgate neutral policies consistent with principles of equal citizenship and personal dignity.

A modern person wearing a religious emblem may regard it as no more than a fashionable item or it may also be a statement of personal faith. A person running up a flag with religious symbol in a public space accepting all comers exercises his freedom of thought, expression, and association.[77] Free exercise principles govern such personal behaviors, including for public servants.[78] Incorporation of a religious symbol into government speech, such as a large cross in the reception area of a government office building or another location where government transacts business or functions as a proprietor, would seem to encroach on establishment principles by signaling a preference for one religious tradition over others.[79] But a government worker enjoys the free exercise right to place a religious symbol on his or her desk, wear it around the neck, or express a preference for one house of worship above others.

Religious objects are typically tied to long-held beliefs, rituals, and traditions. Even when they take on more modern connotation, religious objects remain semantically linked with sectarian sources. Their use in government speech *mutatis mutandis* signals government preference in a matter implicating the Establishment Clause principle of religious and secular separation.[80]

1. Official Creeds

The Establishment Clause prohibits the official adoption of creeds.[81] The provision is meant to advance equal citizenship by preventing factions from exploiting state powers to relegate persons with divergent religious beliefs to outsider status.[82] By mandating against government adoption of religious dogma and symbolism, the Constitution aims to preclude authority, civil status, and social pressures as a means to manipulate public discourse to impose authoritative orthodoxy and legitimacy on matters of private conscience.[83] For constitutional purposes, the concern is not one of content, which is left to the discretion of persons and religious institutions, but of the nature of the government speaker as a safeguard of rights, not an institution for religious orthodoxy.[84]

77. *See* Shurtleff v. City of Boston, 142 S. Ct. 1583, 1587 (2022).

78. David L. Hudson Jr., *Workplace Religious Liberty*, FREEDOM F. INST. (Sept. 16, 2002), https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-religion/free-exercise-clause-overview/workplace-religious-liberty/#:~:text=a%20Senate%20committee.-,Free%2Dexercise%20clause,freely%20practicing%20their%20religious%20faith [https://perma.cc/L4B9-RT8A].

79. Marci A. Hamilton & Michael McConnell, *The Establishment Clause*, NAT'L CONST. CTR. https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/264 (last visited July 12, 2022) [https://perma.cc/4D8N-C9MQ].

80. *Id*.

81. *See generally* BOISI CTR. FOR RELIGION & AM. PUB. LIFE, SEPARATION OF CHURCH AND STATE (2007).

82. *Id.* at 11.

83. Note, *The Establishment Clause and the Chilling Effect*, 133 HARV. L. REV. 1338, 1338 (2020).

84. Hill, *supra* note 76, at 1427–28.

State utterances bring to bear state power to impose a paradigm of religious normalcy. Statements, symbols, and rituals adopted in the name of a government entity take on a character of authority that imposes on believers and unbelievers a social reality, which audiences may find inappropriate or sacrilegious. Liturgy and icons take the place of public displays and thereby grant official sanction to religious referents with which not all citizens agree.[85] The imbroglio allows the State to manipulate religious doctrine, rejects and repudiates outsider voices, and invests religious ideology with state influence. The intent of the government speaker to be inclusive cannot entirely shed the historical meaning of religious symbols.[86] They retain an objective significance, which government fuses, when the State adopts them into official communication of messages to the public. The objective features of religious messages are tied to the ritual, sacral, and sacerdotal. They are understood to audiences irrespective of the subjective reason—holiday, beneficent, and otherwise—that the government actor attributes to them.[87]

The Religion Clauses require courts to interpret cases at the intersection between objective and subjective meaning. That is, there is one feature of religious speech that is purely individual, and therefore protected by the Free Exercise Clause, and another that is adopted into the actual messages of official state organs of power, where the Establishment Clause comes into play. In current doctrine, the Supreme Court often reaches narrow, presentist conclusions about religious symbols that appear in traditional public forums like streets and parks.[88]

Cases further unpacked in Part III demonstrate the extent to which the Court downplays the objective meaning of religious symbols and of ceremonial deism.[89] Government messages upheld against Establishment Clause challenges include a cross on public property,[90] a crèche at a holiday display,[91] and sectarian prayer before legislative sessions.[92] Of the Court's present-mindedness in the Establishment Clause area, Professor Douglas Laycock writes sardonically, "[i]f a Christian cross has sufficient secular meaning to fall outside the Establishment Clause, then so might sectarian prayer,"[93] his point being that a government speaker could argue that all manner of religious messages, including crosses and prayers, are secular. He continues, tongue-in-cheek, "[i]f the message of the cross is 'predominantly secular,' why not 'Jesus Christ save the United States and this

85. *Id*.

86. *Id*. at 1428.

87. *Id.*

88. Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45 (1983) ("[S]treets and parks which 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'") (citing Hague v. CIO, 307 U.S. 496, 515 (1939)).

89. *Infra* Part III.

90. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2069 (2019).

91. Cnty. of Allegheny v. Am. C.L. Union Greater Pittsburgh Chapter, 492 U.S. 573, 573 (1989).

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

93. Douglas Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernism*, 61 CASE W. RESERVE L. REV. 1211, 1248 (2011).

Honorable Court?'"[94] Judicial deference has left unchecked many religious government statements.[95]

The Court has found that interaction between private free exercise rights and the prohibition against government adoption of denominational messages "is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[96] Whether a public message is a reflection of an official's private sentiments or a government injunction is determined through the process of adjudication. Context plays a critical role in determining whether the nation meets its commitment to separation between church and state. Under these circumstances, one scholar recommends the use of a "rebuttable presumption of persisting religious meaning [that] . . . counteracts courts' tendency to ignore or paper over the history of religious division and exclusion that continues to inform an utterance's present meaning."[97] A more objective review of religious symbolism, one that looks on a symbol's meaning through time, would rely on heightened review to determine whether a symbol used in a government display is centrally related to a religious practice. Such a rebuttable presumption would seem consistent with the principle of neutrality that long governed assessment of whether government speech favors "one religion over another, or religion over irreligion."[98] The Establishment Clause's limit on religious government speech preserves the individuality guaranteed under the Free Exercise Clause.

2. Government Speech about Religion

While government cannot adopt religious messages into its official policies, it can support cultural enterprises containing religious messages. Take, for example, a picture of Jesus as a babe in the arms of Mary. The painting no doubt can have meaningful religious connotations, but hung in a state-sponsored museum among various works of art it is a statement about religion, not government adoption of a religious message.[99] Justice Alito noted that paintings with religious connotations and scenery may reflect the donor's or creator's devotional values, but they signify many differing messages.[100] Justice O'Connor makes the

94. *Id*. at 1249.

95. *See id*. at 1237.

96. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

97. B. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning Over Time*, 59 DUKE L.J. 705, 756 (2010).

98. McCreary Cnty. v. Am. C.L. Union of Ky., 545 U.S. 844, 875 (2005).

99. Lynch v. Donnelly, 465 U.S. 668, 683 (1984). An excellent example of this display of religious iconography is the fine arts collection "Encountering the Buddha: Art and Practice Across Asia," which includes a model of a Tibetan Buddhist prayer shrine room, found in the U.S. Smithsonian Museum National Museum of Asian Art. *See Encountering the Buddha: Art and Practice Across Asia*, SMITHSONIAN**,** https://asia.si.edu/exhibition/encountering-the-buddha-art-and-practice-across-asia/ (last visited July 9, 2022) [https://perma.cc/34V4-EUA6].

100. Pleasant Grove City v. Summum, 555 U.S. 460, 476 n.5 (2009) ("Museum collections illustrate this phenomenon. Museums display works of art that express many different sentiments, and the significance of a donated work of art to its creator or donor may differ markedly from a museum's reasons for accepting and displaying the work. For example, a painting of a religious scene may have been commissioned and painted to

similar point that "a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content."[101] Justice Brennan distinguished religious government speech from reading the Bible in a public university's literature class.[102]

One might quite simply say that context matters for Establishment Clause analysis. Take, for instance, the Biblical tale contained in *The Song of Songs*. God is not explicitly mentioned in it;[103] the book can be taught in a secular setting as a nuptial story or as a tale of God's closeness to Israel.[104] Indeed, culling libraries for books with any mention of God would be tantamount to religious persecution and censorship, targeting those who wish to read them. Public libraries contain religious texts on bookshelves, which by no means connotes government religious observance. Partly, such holdings satisfy the interest of the curious (some of whom may be anti-religious), but they also facilitate the fundamental right of citizens to freely exercise their religious convictions by checking books out of public libraries.[105] Such public collections of religious text benefit the marketplace of ideas. Religion then becomes a view tolerated like any other core personal opinion, but not entwined with public policy.

Religious displays in expressly historical settings differ from those in religious contexts. The Court in *Lynch v. Donnelly* found that even a crèche in celebration of a Christian holiday, an event with sectarian roots, did not violate the Establishment Clause.[106] The crèche was surrounded by a Christmas tree, a Santa house, candy-striped poles, and other Christmas holiday decorations. The Court recognized that the object carried a religious message but thought that the surroundings gave it a festive connotation. "[D]isplay of the crèche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass,' or the exhibition of literally hundreds of religious paintings in governmentally supported museums."[107] That logic, though, is not so obvious, because the root of Christmas lies firmly in the Christian tradition.

express religious thoughts and feelings. Even if the painting is donated to the museum by a patron who shares those thoughts and feelings, it does not follow that the museum, by displaying the painting, intends to convey or is perceived as conveying the same 'message.'").

101. *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring).

102. *Id.* at 712 (Brennan, J., dissenting).

103. Only an indirect mention of God, if that, is made in the *Song of Songs* at 8:6. The term in question, which appears conspicuously in all other parts of the Bible, is יָהּ. But in the *Song* it appears not alone but as a suffix at the end of 8:6, "שַׁלְהֶבֶתְיָה šalhebetyāh, combining the rare word for "flame", שַׁלְהֶבֶת šalhebet (on this analysis, found only here and in Job 15:30 and Ezekiel 21:3) with the final -yah representing the name of the Deity." *Does Song of Songs 8:6 contain a reference to YHWH?*, BIBLICAL HERMENEUTICS, https://hermeneutics.stackexchange.com/questions/12949/does-song-of-songs-86-contain-a-reference-to-yhwh (last visited July 12, 2022) [https://perma.cc/DF5Y-S4GL]. The verse can be translated as: Set me as a seal upon your heart, as a seal upon your arm, for love is strong as death, jealousy is fierce as the grave. Its flashes are flashes of fire, the very flame of the Lord. Or as: Set me like a cylinder seal over your heart, like a signet on your arm. For love is as strong as death, passion is as unrelenting as Sheol. Its flames burst forth, it is a blazing flame. *Id.*

104. GIANNI BARBIERO, SONG OF SONGS: A CLOSE READING 39 (Michael Tait trans., 2011).

105. *Religion in American Libraries Q&A*, AM. LIBR. ASS'N (Feb. 18, 2010), https://www.ala.org/advocacy/intfreedom/religionqa [https://perma.cc/6TQ9-AVNP].

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

107. *Id.* at 683.

The Court's equivocation between religious holiday exhibits and gallery collections overlooks the objective message of the crèche, that Christ was born the king of angels to whom the three wise men came to give homage.[108] The Magi's anticipation, search, recognition, and acceptance of Jesus's messianic mission are the basis for a holiday, Epiphany, directly connected to the religious aspects of Christmas.[109] The crèche depicts the worship of baby Jesus in his divine manifestation.[110] The historical meaning of the object is undeniable. The Court takes the view that social settings can change the crèche's meaning. To the contrary, the crèche expresses preference for a particular creed, a government message the Establishment Clause expressly prohibits.

Neutrality should be the rule in government speech, not a display of preference for religious beliefs and rituals. Chief Justice Burger, in his opinion in *Lynch*, calls to mind the "unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789."[111] But religious statements of public officials are constitutional because the Free Exercise Clause protects personal beliefs. Politicians and government employees alike can invoke God through their speeches, in daily conversations, by attending houses of worship, or by eating corn at church functions. Those are matters and events of private faith. The government has very limited authority to alter the religious insignia worn by a public official.[112] Indeed, the constitutional tolerance of sincerely held beliefs, as opposed to establishment of religion, explains the difference between historical tolerance of religious utterances and intolerance of mingling religious speech into state matters.

The dichotomy between private and government religious speech best explains what Justice O'Connor in a concurrence calls the commemorative "references to religion in public life and government."[113] The constitutional balance of free expression and religious establishment helps to channel the meaning of Justice Scalia's challenging words: "[i]f religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at

108. Margaret Salazar-Porzio, *Who Arrives on the 12th Day of Christmas? Three Wise Men, of Course*, NAT'L MUSEUM AM. HIST. (Jan. 6, 2014), https://americanhistory.si.edu/blog/2014/01/what-really-happened-on-the-12th-day-of-christmas.html [https://perma.cc/75EA-4FSL]. ("According to the Gospel of Matthew, the men found the divine child in Bethlehem by following the North Star across the desert. According to later writings, the Kings (Melchior from Europe, Caspar from Arabia, and Balthazar from Africa) arrived twelve days after Jesus' birth. They travelled by horse, camel, and elephant (respectively) to present the newborn baby Jesus with three symbolic gifts: gold, because Jesus was royalty as 'King of the Jews;' frankincense, which represented the baby's holy nature as the Son of God; and myrrh to signify Jesus' mortality. Each gift foreshadowed Jesus' future crucifixion as a means to cleanse humanity of its sins."); *Lynch*, 465 U.S. at 711 (Brennan, J., dissenting) ("The essence of the crèche's symbolic purpose and effect is to prompt the observer to experience a sense of simple awe and wonder appropriate to the contemplation of one of the central elements of Christian dogma–that God sent His Son into the world to be a Messiah.").

109. Amber Inscore Essick & John Inscore Essick, *Distinctive Traditions of the Epiphany*, *in* CTR. FOR CHRISTIAN ETHICS BAYLOR UNIV., CHRISTMAS AND EPIPHANY 69, 69 (Robert B. Kruschwitz ed., 2011).

110. Laycock, *supra* note 93, at 1213.

111. *Lynch*, 465 U.S. at 674.

112. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, RELIGIOUS GARB AND GROOMING IN THE WORKPLACE: RIGHTS AND RESPONSIBILITIES (2014), https://www.eeoc.gov/laws/guidance/religious-garb-and-grooming-workplace-rights-and-responsibilities [https://perma.cc/N8U4-NG2W].

113. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 35 (O'Connor, J., concurring).

all."[114] Herein lies the very balance that must be made between the religious government speech prohibited by the Establishment Clause, on the one hand, and the free exercise of religion, on the other.

Free exercise is a guarantee that has historically outweighed any concerns about state establishment of religion.[115] Government employees and elected officials have just as much right to refer to "Almighty God" and similar religious tropes so long as they express personal sentiments.[116] On the other hand, the statement in official government speech—whether in the form of a statute, executive order, or judicial act—is establishment. The Establishment Clause is meant "to avoid channeling political activity along religious lines and to reduce any tendency toward religious divisiveness in society," but to allow individuals to engage each other on religious and secular subjects enriches the marketplace of ideas.[117] Public officials are members of civil society who retain their fundamental right to religious expression. That too explains why military chaplains are charged with providing soldiers and sailors with religious succor, not with expressing that any religious view is orthodox.[118] So too as Justice Brennan has explained, it would be hostility, rather than neutrality, to deprive prisoners and others religious ministration "cut off by the state from all civilian opportunities for public communion."[119] Hence military chaplaincy is consistent with the Free Exercise Clause and, unless it favors one religion over others, consistent with the principle of separation housed in the Establishment Clause.

The Religion Clauses protect two things. The integrity of individuals to enjoy religious conscience or non-religious conscience is a prerogative of individuals. To prevent public interferences with what amounts to personal conviction on metaphysical matters, the First Amendment guards against civic divisiveness.[120] History alone cannot resolve the conflicts that inevitably arise in the breach.

Justice O'Connor asserted in *Lynch* that a court determining whether public displays of historically linked religious symbols are invidiously motivated must look to "social facts."[121] If historical facts are not enough for determining meaning under the Establishment Clause, neither is social meaning. Even if some reasonable segment of the public perceives a religious symbol like the crèche in purely secular terms, its reference remains tied to historical reality. Put differently, establishment review must identify both the referent (say a cross, Mogen David, or khanda) and what listeners believe the government is talking about,

114. McCreary Cnty. v. Am. C.L. Union of Ky., 545 U.S. 844, 893 (2005) (Scalia, J., dissenting).

115. *See* Lane v. Franks, 573 U.S. 228, 242 (2014) (quoting Garcetti v. Ceballos, 547 U.S. 410, 418 (2006)) ("[I]f an employee speaks as a citizen on a matter of public concern, the next question is whether the government had 'an adequate justification for treating the employee differently from any other member of the public' based on the government's needs as an employer.").

116. Town of Greece v. Galloway, 572 U.S. 565, 587–88 (2014).

117. McDaniel v. Paty, 435 U.S. 618, 642 (1978) (Brennan, J., concurring).

118. *See McCreary Cnty.*, 545 U.S. at 875 ("[I]f the government cannot pay for military chaplains a good many soldiers and sailors would be kept from the opportunity to exercise their chosen religions.").

119. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 299 (1963) (Brennan, J., concurring).

120. *McCreary Cnty.*, 545 U.S. at 876.

121. Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring).

religious or secular.[122] Audience or speaker ignorance of historical symbolism, by a specific group of people or some abstract reasonable group of people, does not change meaning.[123] Context, however, can help to determine whether a government message is religious or about religion.

Risks of establishment violation can arise where the government claims its message is secular despite the presence of words, symbols, or rituals historically connected to religious beliefs and practices. The choice of government speech can signal preferences that favors some creed over others, thereby establishing religious belief through government speech. Where mention of the Deity is in general terms, it arguably has strong historic ties to practices as they appear in documents.[124] Adoption of religious government messages, however, is expressly prohibited by the First Amendment.[125] Context of the government statement helps to define whether it reflects the private sentiments of members of the government or the public imprimatur of an institution of state power.

3. Government Speech with Religious Content

The Establishment Clause prohibits governments from using platforms to favor or disfavor sincerely held religious beliefs. Freedom from state interference preserves the equal right of citizens to decide whether and how to worship. Excessive judicial modesty in this area would leave at risk vulnerable minority religious speech and practices.[126] The first order question requires judges to determine whether government speech is religiously motivated. Otherwise, state agents are at liberty to express views on matters of policy, politics, philosophy, economics, sociology, efficiency, and so forth.

The First Amendment scheme sets judicial review as the institutional safeguard against state encroachment into religious convictions and practices.[127] Professor Richard Schragger recognizes certain limitations to that premise. He writes that "pragmatic and philosophical limits" should govern judicial enforcement of Establishment Clause limits.[128] His claim is consistent with commitment

122. *See* AMICHAI KRONFELD, REFERENCE AND COMPUTATION: AN ESSAY IN APPLIED PHILOSOPHY OF LANGUAGE 83 (1990) (distinguishing listener's pragmatic understanding and hearer's epistemic identification).

123. *Id.* at 84.

124. An example of this point is the reference to the "Creator" in America's statement of sovereign purpose. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."); Alexander Tsesis, *The Declaration of Independence and Constitutional Interpretation*, 89 S. CAL. L. REV. 369, 375 (2016).

125. U.S. CONST. amend. I.

126. To speak in any detail about judicial modesty would be far beyond the scope of this Article. Suffice it to say that some of the most important defenses of the theory can be found in CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) and Cass R. Sunstein, *Leaving Things Undecided*, 110 HARV. L. REV. 4, 7 (1996). The classic study of judicial minimalism is found in ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

127. Justice Stone long ago pointed out the power of the judiciary to rely on more exacting scrutiny to review matters where religious rights are at stake. United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) (listing restrictions on religion, speech, and voting as implicating "more exacting scrutiny").

128. Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEX. L. REV. 583, 629 (2011).

to separate government institutions in the American "constitutional culture."[129] Separation of powers "constitutes an implicit expectation that those branches will fulfill their own duties"; albeit, as he admits, "this expectation constitutes the purest of rhetorical jurisprudence."[130]

Such a reserved approach to judicial review makes sense in certain spheres, such as national economics, where courts tend to defer to legislative policies.[131] But in the field of Establishment Clause jurisprudence, the judiciary does not overreach by setting limits on any government symbolism that tends to advance religious orthodoxy by favoring some religious tradition over others. No pragmatic or philosophical limits prohibit judicial enforcement of what is textually articulated in the Constitution.

The existence of the Establishment Clause indicates that there are means of reviewing whether government actions endorse views associated with a specific creed. Schragger, who is more focused on the fuzzy area, goes on to assert, "[w]hile religious motivations are out-of-bounds, they are not too out-of-bounds."[132] There is inherent ambiguity here of what for him would constitute "too out-of-bounds." That winks at the Supreme Court's underenforcement in the Establishment area, which—as demonstrated later—allows for a chipping away at the wall of separation between church and state.[133] Justice O'Connor in her seminal concurrence to *County of Allegheny v. ACLU* warned against adoption of an Establishment Clause doctrine with "no discernible measure for distinguishing between permissible and impermissible endorsements."[134] One would be hard-pressed to find in the words or history of the First Amendment the degree of latitude Professor Schragger suggests.

To color in the grey area between government endorsement and underenforcement, Schragger draws attention to the underenforcement of any meaningful review of "politicians' statements endorsing God or a particular religion."[135] Such practices are not matters of Establishment, however, because they express personal worship. Such self-determination is guaranteed to government employees. Public servants do not lose their individual liberties.[136] Public respect for the private religious viewpoint is not inconsistent with the constitutional prohibition against government adoption of religious messages. Government adoption of religious speech sends the "message to nonadherents that they are outsiders, not full members of the political community."[137]

129. *Id.*

130. *Id.* at 650.

131. *See* Williamson v. Lee Optical, Inc., 348 U.S. 483, 487–88 (1955).

132. Schragger, *supra* note 128, at 624.

133. *See infra* notes 317–39 and accompanying text.

134. Cnty. of Allegheny v. Am. C.L. Union Greater Pittsburgh Chapter, 492 U.S. 573, 594 (1989).

135. Schragger, *supra* note 128, at 625.

136. City of San Diego v. Roe, 543 U.S. 77, 83 (2004) ("[A] public employee's speech is entitled to Pickering balancing only when the employee speaks 'as a citizen upon matters of public concern' rather than 'as an employee upon matters only of personal interest.'") (quoting Connick v. Myers, 461 U.S. 138, 147 (1983)).

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

The standard against establishment of religion is contained in the U.S. Constitution.[138] Schragger nevertheless asserts that at the national level the political stakes involved "are significantly higher than the political stakes at the local level."[139] He assiduously points out that local treatment of parochial schools is in practice interpreted prudentially: "the political stakes at the local level, and the imposition of national religious-favoring or religious-disfavoring norms by the Court, Congress, or the President contributes more to the creation of religious-political factions than do local ones."[140] Therefore, he concludes that localities must be given the latitude to resolve "religiously infused disputes and encouraging some regulatory experimentation and diversity encourages a healthy religious pluralism."[141]

But the point of federalism is not only to allow for local experimentation. Federalism should also be understood as a uniform national mandate against religious speech or symbolism being adopted into official communiques.

The Establishment Clause has been incorporated since 1947 through the Fourteenth Amendment against the states.[142] The framers of the Constitution determined to put that provision at the forefront of the entire Bill of Rights because of the long history of brutal and extended wars waged in the name of religion.[143] The Preamble to the Constitution, which sets out the principles of American democracy, mandates the secular purpose of governance to the establishment of Justice.[144] The best-known of the Early Republic works that were written in opposition to religious establishment is *Memorial and Remonstrance against Religious Assessment*.[145] Its author, James Madison, wrote in it against the levying of state taxes in support of Christian worship.[146] Madison argued that such laws violated "equality which ought to be the basis of every law."[147] The document relies on phraseology found in the Declaration of Independence, calling religious

138. U.S. CONST. amend. I.

139. Schragger, *supra* note 128, at 645.

140. *Id.*

141. *Id.*

142. Everson v. Bd. of Educ., 330 U.S. 1, 14–15 (1947).

143. Multiple books, plays, pamphlets, and newspapers appeared at the time of the American Revolution detailing the ruinous dangers of religious wars. *See*, *e.g.*, JOHN LEACOCK, THE FALL OF BRITISH TYRANNY: OR AMERICAN LIBERTY TRIUMPHANT 6 (1776) ("A religious war is the worst of wars."); ABBÉ RAYNAL (GUILLAUME-THOMAS-FRANÇOIS), A PHILOSOPHICAL AND POLITICAL HISTORY OF THE SETTLEMENTS AND TRADE OF THE EUROPEANS IN THE EAST AND WEST INDIES bk. XIX, at 222–23 (J. Justamond trans. 1786) (London, J. Mundell & Co. 1798) ("The concourse of persons of all sects in North America has necessarily diffused the spirit of toleration into distant countries, and put a stop to religious wars in our climates."); NOAH WEBSTER, SKETCHES OF AMERICAN POLICY 47 (1785) (arguing that banishing clergymen from civil offices is on a par with "religious establishments, sacramental tests, articles of faith, partial exclusion from emoluments, and that illiberal pride which sanctifies our own opinions and damns all others"); 2 WILLIAM GODWIN, ENQUIRY CONCERNING POLITICAL JUSTICE, AND ITS INFLUENCE ON MORALS AND HAPPINESS 171–76 (Philadelphia, Bioren & Madan 1796) (discussing the injurious consequence of religious establishment).

144. U.S. CONST. pmbl. ("We the People of the United States, in Order to form a more perfect Union, *establish* Justice . . . .") (emphasis added).

145. James Madison, Memorial and Remonstrance Against Religious Assessments, *in* 8 THE PAPERS OF JAMES MADISON 296–306 (Robert A. Rutland & William M. E. Rachal eds., 1973) (1785).

146. *Id.*

147. *Id.*

worship an "unalienable right."[148] Two centuries later, Justice O'Connor echoed Madison's warning that collecting taxes to fund Christian religion would "degrade[] from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority."[149] Madison believed that a sectarian tax would send an exclusionary government message. Political "representation must be made equal," he implored, so that "the voice either of the Representatives or of the Counties will be that of the people" as a whole, not only that of a certain faction.[150] Public policy should remain independent of religious preferences. Government expression must be tied to the equal status of the people, regardless of their religious convictions.

Madison's *Memorial and Remonstrance* called for a neutral government message, which is necessary to establish justice and equality among a diverse citizenship. Neutrality in matters of religious beliefs prevents government from pressuring believers or unbelievers. It would be a divisive, unfair, and preferential act for government to exclude religious groups from public benefits, entitlements, or privileges. Staying above the fray of religious disputes is constitutionally mandated at the local and national levels. The Supreme Court has established a national doctrine that "prohibits government from abandoning secular purposes in order to put an imprimatur on one religion" that "favor[s] the adherents of any sect or religious organization."[151] The clearest meaning of neutrality toward equal private worship is the Establishment Clause's prohibition against the abandonment of secular purposes in preference for any sect or creed.[152] In a pluralistic state, persons of all faiths enjoy equality. Messages by the government favoring one religion over others by adoption of its symbols into official communications grants the imprimatur of state power. It favors a group based on its religious views.

III. SYMBOLIC ESTABLISHMENT OF RELIGION

A trend in recent Supreme Court precedents that interpret the Establishment Clause has been to downplay governmental uses of symbols historically linked to religious observation. The Rehnquist and Roberts Courts have taken a prudential approach, downplaying official incorporations of religious images.[153] Cases in this area tend to favor free exercise principles, without giving adequate weight to antiestablishment arguments.

Symbols speak loudly. Professor Frederick Schauer points out that "a distinction between symbols and speech in the strictest sense would be artificial and,

148. *Id.* The Declaration of Independence had been written nine years before by Madison's close associate Thomas Jefferson.

149. *Id.*

150. *Id.*

151. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 8–9 (1989).

152. Larson v. Valente, 456 U.S. 228, 244 (1982).

153. *See generally* Cnty. of Allegheny v. Am. C.L. Union Greater Pittsburgh Chapter, 492 U.S. 573 (1989); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019).

for [some] purposes, erroneous."[154] The First Amendment counterposes religious establishment through government speech or other government action from free exercise of religion and free speech. Both of the latter are protected with the strictest scrutiny; the elasticity of each is guarded by principles of liberty, democracy, and equality.[155] But just as compelling is the injunction against establishment of religion, which comes semantically and syntactically at the head of the First Amendment. Speech ordinarily takes on meaning based on speakers, audiences, words, syntaxes, and matters discussed.[156] Religious symbols too can be understood differently based on the situations and forums in which they appear. All that is reserved to the individual choice of private citizens and civil servants. But the Constitution treats religious government utterances differently. Neutrality in religion implies and entails a prohibition against religious government speech.

A. Signs of Divinity in Government Speech

As the nation has become increasingly diverse, the Supreme Court has dealt with several seminal cases reviewing whether the State expressed a preference for religion. The first case directly challenging government's religious message, *Stone v. Graham*, was decided in 1980.[157] The Court held that requiring public schools to display copies of the Ten Commandments was unconstitutional.[158] The Court's reasoning was based on a three-part test that had been formulated nine years before in *Lemon v. Kurtzman*.[159] That model for decisions in Establishment Clause jurisprudence, which in recent years became increasingly contested, first by factions of Justices and then the majority of the Court, determined whether a statute has a secular purpose, whether its "principal or primary effect" is neither to advance nor to inhibit religion, and whether it fosters "an excessive government entanglement with religion."[160]

The display in *Stone* included the first five commandments, all of which directly speak of God. Although the final commands were arguably secular in content—prohibiting murder, adulty, theft, perjury, and covetousness—they did not save the statute from the charge of state overreach. The Court harbored no uncertainty about the underlying meaning of the Ten Commandments, finding them to be "undeniably a sacred text in the Jewish and Christian faiths."[161] But the majority was not remiss to reconfirm the Constitution's protection of "private

154. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 96 (1982).
155. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).
156. *See* A.H. GARDINER, THE THEORY OF SPEECH AND LANGUAGE 17–61 (1932).
157. 449 U.S. 39, 39–40 (1980) (per curiam).
158. *Id.* at 42.
159. *Id.* at 40.
160. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).
161. *Stone*, 449 U.S. at 41.

devotion."[162] The display expressed government's support for a religious message.[163]

That does not mean that public schools are completely barred from discussions about the Ten Commandments. Nothing in *Lemon* prevented teachers from discussing them in classrooms, displaying their depiction in works of art, or assigning them for homework because of their cultural and historical relevance. The display found unconstitutional in *Stone*, however, was problematic because it entangled public schools in religious indoctrination.[164]

There followed *Lynch v. Donnelly*, which found no establishment violation in a city's yearly Christmas display of a crèche with its Christian message of Jesus's divinity alongside secular symbols.[165] The Court in *Lynch*, as it had done in *Stone*, based its holding on *Lemon*, but the majority made clear that not all future litigation had to follow the three-part test.[166] The challenge was brought against the public display of a crèche consisting of "the traditional figures, including the Infant Jesus, Mary and Joseph, angels, shepherds, kings and animals, all ranging in height from 5" to 5'."[167] The display was yearly sponsored, financed, and maintained by the municipality to express the central religious significance of the holiday. The city's control was direct, unlike *Shurtleff* where briefly flying a Christian symbol on municipal property was the choice of a private group and the City lacked any meaningful involvement in its members' selection of imagery.[168]

Chief Justice Burger, writing for the *Lynch* majority, conceded that the crèche is "[o]f course . . . identified with one religious faith."[169] Despite its sectarian message, he found its holiday display among other seasonal symbols did not amount to establishment of religion. Because the placement of the object was secular and not "motivated wholly by religious considerations," the Court found "insufficient evidence to establish that the inclusion of the crèche is a purposeful

162. *Id.* at 42.

163. *Cf.* Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 391–92 (1985) ("In this environment, the students would be unlikely to discern the crucial difference between the religious school classes and the 'public school' classes, even if the latter were successfully kept free of religious indoctrination. . . . Consequently, even the student who notices the 'public school' sign temporarily posted would have before him a powerful symbol of state endorsement and encouragement of the religious beliefs taught in the same class at some other time during the day."), *overruled on other grounds by* Agostini v. Felton, 521 U.S. 203, 235 (1997).

164. *Stone*, 449 U.S. at 42.

165. 465 U.S. 668, 687 (1984).

166. *Id*. at 679–85 ("In the line-drawing process we have often found it useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion. But, we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.") (citation omitted).

167. *Id.* at 671.

168. *See* Shurtleff v. City of Boston, 142 S. Ct. 1583, 1584 (2022) ("Boston's lack of meaningful involvement in the selection of flags or the crafting of their messages leads the Court to classify the third-party flag raisings as private, not government, speech.").

169. 465 U.S. at 685.

or surreptitious effort to express . . . governmental advocacy of a particular religious message."[170]

In a concurrence, without referring to any evidence, Justice O'Connor wrote that the crèche did not send a "message to adherents that they are insiders, favored members of the political community."[171] Both the holding and O'Connor's concurrence are conclusory, unconvincing, and analytically unsound. A government adopting a life-size symbol of the birth of Christ is not neutral. It does not treat all religions equally but favors one and not others. Like the Chief Justice, O'Connor acknowledged that the crèche has an "'objective' meaning."[172] Yet, instead of making this empirical information determinative of religious entanglement, she focused on the city's presumed intent.[173] Based on the celebratory context of the display, she agreed that the crèche was merely a symbol of the "public holiday" with a "cultural significance even if they also have religious aspect[]."[174]

In one of two dissents, Justice Brennan, writing for three other Justices, faulted the majority for "brush[ing] aside" concerns about the religious meaning of the crèche and for "muting [its] religious content."[175] In another dissent, Justice Blackmun regarded the presence of the city's crèche at the public display to be an obvious violation of the First Amendment, and pointed out that the government's message was offensive because it required religious citizens to downplay the symbols' sacral meaning, despite its place in their religious observance, and made non-Christians "feel alienated by its presence."[176]

Justice Brennan also recognized the objective religious distinctiveness of the crèche, which was the only item to display a message of "sectarian exclusivity."[177] The crèche was religious government speech. It was not simply a statement about religion, as would be the case in the state college study of "the Bible or Milton's *Paradise Lost* in a course on English literature;" to the contrary, it expressed "solidarity with the Christian message of the crèche" and "dismiss[ed] other faiths as unworthy of similar attention and support."[178] Nor was it an item worn by a public official to commemorate personal devotion. Rather, it was prominently displayed to commemorate the birth of the Messiah.

Brennan also dissented in *County of Allegheny v. ACLU*, which involved displays of the crèche in a government building and a separate Christmas tree and menorah on a street.[179] The majority held that a crèche placed on a county

170. *Id.* at 680.
171. *Id*. at 688 (O'Connor, J., concurring).
172. *Id.* at 690–93.
173. *Id*. at 690.
174. *Id.* at 691.
175. *Id.* at 725 (Brennan, J., dissenting).
176. *Id.* at 726–27 (Blackmun, J., dissenting).
177. *Id.* at 700 (Brennan, J., dissenting).
178. *Id.* at 712–13.
179. 492 U.S. 573, 578 (1989).

courthouse's main stairwell was unconstitutional.[180] But a majority of Justices determined that religious objects—a forty-five foot Christmas tree and an eighteen foot Jewish menorah—were constitutionally displayed by the county when set side-by-side with a "sign saluting liberty."[181] These were quite separate symbols that the Court did not bother to compare or differentiate. Nor did it rely on evidence, but rather its gut conclusion to find the religious symbolism was offset by the proximity of the symbol to liberty.

Had it looked more closely, the majority might have found that the Christmas trees signaled merriment and festiveness, the menorah expressed a gratitude to God for either military victory under the leadership of Judah Maccabee or for divine miracle of light.[182] Despite the religious connotations of both, the Court found both symbols to carry secular meanings.[183] The majority apparently believed that a side-by-side display of two separate religious objects cannot be establishment of religion since they signal government's tolerance of two incompatible dogmas, differing on such core beliefs as holiday celebrations and Jesus's divine status.[184]

The meaning of a religious symbol placed in a prominent government building, a courthouse, the majority found to be significantly different than museum displays of religious objects in settings of historical, artistic, and cultural relevance. The factfinder is required to determine whether the weight of the evidence indicates that symbols were used for secular purposes.[185] Religious symbols can connote messages about their sacred sources, or they can be adopted to engage in religious practice. Hence, Justice Stevens pointed out in his opinion to *County of Allegheny* that even display of religious figures on government reliefs alongside other historical lawgivers may not be taken to advance religion.[186] Yet, on that point Justice Stevens's argument was conclusory; he took judicial notice that images of religious figures who were also lawmakers are uncontroversial, without evaluating any evidence for or against that proposition.[187]

Contrary to the majority in *County of Alleghany*, Justice Brennan refused to disregard the specific Christian and Jewish meanings of the Christmas tree, crèche, and menorah.[188] Professor Laycock similarly asserts, "[t]he Christmas tree . . . neither secularized nor Christianized the menorah; together, the tree and the menorah communicated symbols of two holidays, two faiths, and a message

180. *Id.* at 598–602 ("[T]he crèche in this lawsuit uses words, as well as the picture of the Nativity scene, to make its religious meaning unmistakably clear. 'Glory to God in the Highest!' says the angel in the crèche—Glory to God because of the birth of Jesus.").

181. *Id.* at 619–20.

182. *Id.* at 582–87.

183. *Id.* at 613–14.

184. *Id.* at 646 (Stevens, J., concurring in part and dissenting in part) ("Governmental recognition of not one but two religions distinguishes these cases from our prior Establishment Clause cases.").

185. *See id.* at 597 (majority opinion).

186. *Id.* at 652–53 (Stevens, J., concurring in part and dissenting in part).

187. Justice Souter made the same assumption in his dissent to *Van Orden v. Perry*, 545 U.S. 677, 740–41 (2005) (Souter, J. dissenting), and Justice Stevens did the same in *id.* at 707–10 (Stevens, J., dissenting).

188. Cnty. of Allegheny v. Am. C.L. Union Greater Pittsburgh Chapter, 492 U.S. 573, 637 (1989) (Brennan, J., dissenting).

of religious pluralism."[189] Their geographic proximity did not alter the historically charged message that each communicated to the public. Their secular meaning did not disentangle them from age-old religious connotations.

Quite a different matter is raised where, as in *Stone*, God is directly invoked in a government display. The Court, nevertheless, divided sharply in two cases challenging public display of the Ten Commandments. In *McCreary County v. ACLU*, a civic organization challenged the posting of the Ten Commandments in two separate Kentucky courtrooms.[190] Even the county's chosen translation—the well-known 1611 King James Bible—caused controversy.[191] At first, the Commandments stood as separate, standalone displays, but as public controversy grew around them and a civil liberties organization filed suit, the counties surrounded these displays with secular documents like the Magna Carta and the Declaration of Independence, neither of which are religious symbols despite their several references to God.

The majority in *McCreary* rejected the counties' argument that the display had a secular purpose in the context of the Declaration of Independence's mention of divinity.[192] Justice Souter pointed out that the Declaration nowhere confirmed the claim that the Ten Commandments' divine sanctions influenced the Declaration's principles of republican government.[193]

The Court also found the display to differ from the relief in the Supreme Court Chamber, which features religious leaders who also played significant roles in developing the rule of law in their several cultures. The religious text selected by the State of Kentucky, to the contrary, included, "[t]hou shalt have no other gods before me," rendering the displays religious—not merely about religion but an expression of religious orthodoxy.[194] Such explanation expanded the reach of the Establishment Clause in combating religious government communication since there is "no textual definition of 'establishment,'" but it certainly means more than a simple prohibition against a national church.[195] The Free Exercise Clause provides a balancing of free belief and speech, which sometimes outweigh establishment factors.[196]

189. Laycock, *supra* note 93, at 1217.

190. 545 U.S. 844, 850–52 (2005).

191. For an extensive discussion of various translations of the Ten Commandments and their religious significance, see Paul Finkelman, *The Ten Commandments on the Courthouse Lawn and Elsewhere*, 73 FORDHAM L. REV. 1477, 1482–1500 (2005); Caroline Mala Corbin, *Justice Scalia, the Establishment Clause, and Christian Privilege*, 15 FIRST AMEND. L. REV. 185, 206–08 (2017).

192. *McCreary Cnty.*, 545 U.S. at 872–73. I've demonstrated elsewhere that the Declaration of Independence profoundly communicates the principles of liberal equality for the common good intrinsic to American constitutional governance. *See generally* ALEXANDER TSESIS, CONSTITUTIONAL ETHOS: LIBERAL EQUALITY FOR THE COMMON GOOD (2017).

193. *McCreary Cnty.*, 545 U.S. at 872–73.

194. Jerry Sayler, *"No Other Gods Before Me."*, ABBEVILLE INST. PRESS (Nov. 30, 2017), https://www.abbevilleinstitute.org/no-other-gods-before-me/ [https://perma.cc/TVR5-PZJ7].

195. *McCreary Cnty.*, 545 U.S. at 874–75.

196. *See generally* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (holding that a public university denial of funding to a religious organization was viewpoint discrimination that occurred in a limited public forum).

In a concurrence written to *Van Orden v. Perry*, Justice Scalia expressed a very different sentiment, regarding even sectarian government views to be legitimate.[197] He was convinced "that there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment or, in a nonproselytizing manner, venerating the Ten Commandments."[198] That case upheld, against an establishment challenge, a Ten Commandment display at the Texas State Capital grounds, which had been placed among broad-ranging religious monuments.[199] Justice Breyer was the swing-vote in the cases, voting in the *McCreary* and *Van Orden* majorities, despite their divergent outcomes, while the other eight Justices remained steadfast in their understandings of religious symbols on public grounds.[200] The *Van Orden* Court based its decision on an "unbroken history" of religion in public life,[201] foreboding future interpretations of the Establishment Clause.

B. Ceremonial Deism

Over the last decade and a half, Justices' reliance on historical-sounding arguments has made significant impact on Establishment Clause jurisprudence. Perhaps unexpectedly, however, Justices who hold to a strong form of historicism often demonstrate preference for custom rather than consistency with the First Amendment's clear language. According to the most accurate description of the Establishment Clause's meaning in the late-eighteenth century, the provision was meant "to prevent the federal government from interfering with . . . established churches" in states, which were predominantly Protestant in denomination.[202] That early focus on institutional independence from federal interference adds important perspective into how best to contextualize public actors' religious speech in public contexts. Moreover, constitutional recognition of independence for religious institutions was evident in 1940 with the incorporation of the Establishment Clause through the Due Process Clause; this expanded to state actors the Establishment Clause's prohibition against government interference.[203]

197. Van Orden v. Perry, 545 U.S. 677, 677–78 (2005) (Scalia, J., concurring).

198. *Id.* at 692.

199. *Id.* at 698.

200. *Id.* at 679 (plurality opinion).

201. *Id.* at 686.

202. *See* Michael J. Klarman, *The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 125 (2020) (surveying religion in the historical context of American society); Daryl J. Levinson, *Looking for Power in Public Law*, 130 HARV. L. REV. 31, 103 (2016) ("Several states established different religions (which the Establishment Clause, as it was originally understood, protected against federal interference)."); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1823 (2004) ("[T]he Religion Clauses emerged from the Founding Congress as local-protecting; the clauses were specifically meant to prevent the national Congress from legislating religious affairs while leaving local regulations of religion not only untouched by, but also protected from, national encroachment."); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 317 (1986) ("The original intention behind the establishment clause . . . seems fairly clearly to have been to forbid establishment of a national religion and to prevent federal interference with a state's choice of whether or not to have an official state religion.").

203. Cantwell v. Connecticut, 310 U.S. 296, 311 (1940).

Too often the modern Court's penchant for upholding state-sponsored religious symbolism in public settings—which is evident in cases like *Marsh v. Chambers*[204] and *Town of Greece v. Galloway*[205]—overrides the rigorous analysis necessary to determine whether government speech constitutes a religious message, prohibited under the First Amendment. Moreover, even on its own terms, both in its review of ceremonial deism and religious monuments, the Court's historical accounts tend to be quite selective and arguably result-oriented.

Marsh upheld Nebraska's payment from the public funds for the religious services of a legislative chaplain and the publication of his invocations.[206] The majority's refusal to follow the *Lemon* test, under which the practice likely would have been a form of state entanglement, was a sign of things to come.[207] Chief Justice Burger found that the long-standing practice of hiring chaplains to pray at the inception of each session was constitutional. The same individual had been chaplain of the Nebraska legislature for sixteen years.[208]

The majority premised that "prayer was deeply embedded in the history and tradition of this country" and found it to be a practice that was consistent with a traditional part of "opening of sessions of legislative and other deliberative public bodies."[209] That practice was part of government's "tolerable acknowledgment of beliefs widely held."[210] Burger's rationalization overlooked that the prayer session was government-supported expression of faith, not solely a public acknowledgement of commemoration, a historical lesson, or a description of religious sentiments.

The majority's deferential approach denied meaningful review of religious practices. Prayers are not merely descriptive. Neither are they attributable to individual legislators' decisions to invoke the name of God, calling perhaps on the Deity's good will for the successes of democratic practices and institutions; therefore, legislative deism is not a matter of free exercise by legislators who might want to express gratitude or call for the Deity's propitious succor.

Prayers offered prior to the commencement of legislative sessions are religious in practice, not in description. Furthermore, the chaplain's salary was paid from public funds at the prompting of the Nebraska government, which hired him, "to convey a particularized message."[211] Under "the surrounding

204. 463 U.S. 783, 795, 603 (1983).

205. 572 U.S. 565, 603 (2014).

206. *Marsh*, 463 U.S. at 783–84.

207. Van Orden v. Perry, 545 U.S. 677, 686 (2005) (plurality opinion) ("Many of our recent cases simply have not applied the *Lemon* test. . . . Whatever maybe [its] fate in the larger scheme of Establishment Clause jurisprudence, we think it is not useful in dealing with [this] sort of passive monument . . . ."). For a time, some scholars, like Kent Greenawalt, predicted that *Marsh's* historicism would only be a temporary aberration, not yet able to make out from his vantage point that in the years to come the Court would increasingly rely on historical analysis and less on the three-part *Lemon* formula. Kent Greenawalt, *O'er The Land of the Free: Flag Burning as Speech*, 37 UCLA L. REV. 925, 943 (1990).

208. *Marsh*, 463 U.S. at 783.

209. *Id.* at 786.

210. *Id.* at 792.

211. Spence v. Washington, 418 U.S. 405, 410–11 (1974).

circumstances the likelihood was great that the message would be understood by those who viewed [or heard] it."[212] The invocations offered, at least on one occasion, directly referenced Christian doctrine but were later altered to be Judeo-Christian focused.[213]

The Nebraska legislature had done more than tolerate personal or associational prayer. It had chosen a chaplain of a particular denomination—Presbyterian—for more than a decade and a half.[214] The rare occasion when guest ministers had been invited to lead prayer did not gainsay the evident favoritism shown to particularized, religious messages before the legislative body of the State. With the audience saying amen, an outsider to that liturgy might for good reason feel excluded from the opening message of the Nebraska government session.

A much different historical view came from Justice Brennan, writing in dissent. He recalled Jefferson's commitment to a wall of separation between church and state.[215] Furthermore, Madison's sentiments were explicitly against legislative chaplaincy.[216] The history behind legislative prayer speaks more to political will and majoritarian imposition than undisputed practice. Professor Christopher Lund points out that repeated dissenting voices had to no avail challenged the chaplain's invocations prior to legislative sessions.[217]

Justice Brennan would have found ceremonial deism to violate the *Lemon* test. The purpose of paying a minister, which was for a governmental body to seek Divine guidance and intervention, was in direct contradiction of the Establishment Clause.[218] The primary effect of sponsoring prayers was also obviously religious.[219] It entangled government to oversight and monitoring of religious affairs; such roles ran contrary to the principle against government supervision of religious institutions.[220] A legislative prayer institutionalized a religious practice. At stake were not the private prayers of individuals or legislative associates; the Free Exercise Clause played no role in the resolution of the case.

A follow-up to *Marsh* came in 2014. The Court in *Town of Greece v. Galloway* adopted an even more expositive affinity to historic method, not so much as giving a nod to any other interpretive test nor recognizing that incorporation

212. *Id.*

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

214. *Id.*

215. Epperson v. Arkansas, 393 U.S. 97, 103–04 (1968).

216. Madison is quoted in *Marsh*, 463 U.S. at 807–08 (Brennan, J., dissenting) ("Is the appointment of Chaplains to the two Houses of Congress consistent with the Constitution, and with the pure principle of religious freedom? In strictness, the answer on both points must be in the negative. The Constitution of the U.S. forbids everything like an establishment of a national religion. The law appointing Chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes. Does not this involve the principle of a national establishment, applicable to a provision for a religious worship for the Constituent as well as of the representative Body, approved by the majority, and conducted by Ministers of religion paid by the entire nation.").

217. Christopher C. Lund, *The Congressional Chaplaincies*, 17 WM. & MARY BILL RTS. J. 1171, 1185 (2009).

218. *Marsh*, 463 U.S. at 797 (Brennan, J. dissenting).

219. *Id.* at 798.

220. *Id.* at 798–99.

prohibited states from sponsoring religions.[221] Instead, the later opinion relied on ad hoc judicial reasoning. The case involved multiple instances of explicit Christian references such as: "We ask this in the name of our brother Jesus," and "We acknowledge the saving sacrifice of Jesus Christ on the cross."[222] For Justice Kennedy, writing the majority opinion, the Establishment Clause matter was decided because the municipal government's aim was not based on animus nor was it coercive.[223] The Court's approach did not take into adequate account the need for neutrality of speech in Establishment jurisprudence. As Justice Kagan pointed out in dissent, "month in and month out for over a decade, [were] prayers steeped in only one faith."[224] The pastor's message was persistent and ongoing for a generation of legislative sessions. The meetings opened with explicitly Christian prayers, yet the majority looked not at whether the state-sponsored expression had the purpose, primary effect, nor entanglement with religion.

C. Religious Symbolism

In 2019, the Court entrenched a formalistic version of historicism yet further in *American Legion v. American Humanist Association*, finding a thirty-two-foot cross maintained by government funds to be neutral in character.[225] The decision did not come entirely as a surprise.

At an earlier date, during oral arguments, a member of the Court had expressed the view that crosses were universal symbols in honor of the dead.[226] In *Salazar v. Buono*, the Court considered a cross first erected by a private party in the Mojave Desert that Congress later designated a National Memorial.[227] Subsequently, Congress passed a land transfer statute, transferring title to the Veterans of Foreign Wars, a private organization, in exchange for a different piece of

221. 572 U.S. 565, 603 (2014).

222. *Id.* at 572.

223. *Id.* at 585–86, 589.

224. *Id.* at 616 (Kagan, J., dissenting).

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

226. The exchange proceeded thus:

JUSTICE SCALIA: The cross doesn't honor non-Christians who fought in the war? Is that—is that—

MR. ELIASBERG: I believe that's actually correct.

JUSTICE SCALIA: Where does it say that?

MR. ELIASBERG: It doesn't say that, but a cross is the predominant symbol of Christianity and it signifies that Jesus is the son of God and died to redeem mankind for our sins, and I believe that's why the Jewish war veterans—

JUSTICE SCALIA: It's erected as a war memorial. I assume it is erected in honor of all of the war dead. It's the—the cross is the—is the most common symbol of—of—of the resting place of the dead, and it doesn't seem to me—what would you have them erect? A cross—some conglomerate of a cross, a Star of David, and you know, a Moslem half moon and star?

MR. ELIASBERG: Well, Justice Scalia, if I may go to your first point. The cross is the most common symbol of the resting place of Christians. I have been in Jewish cemeteries. There is never a cross on a tombstone of a Jew.

(Laughter).

Transcript of Oral Argument at *38–39, Salazar v. Buono, 130 S. Ct. 1803 (2010) (No. 08-472), 2009 WL 3197881.

227. Department of Defense Appropriations Act, Pub. L. 107-117, § 8137(a), 115 Stat. 2230, 2278 (2002).

land in the National Preserve.[228] The district court had issued an injunction to dismantle the cross because the land transfer appeared like an "improper attempt to evade the permanent injunction."[229] A plurality of the Supreme Court, however, simply accepted the land transfer as completed and remanded for the lower court to assess whether "in light of the change in law and circumstances effected by the land-transfer statute, the 'reasonable observer' standard continued to be the appropriate framework through which to consider the Establishment Clause concerns."[230]

The dissent in *Buono* argued that "a court cannot start from a baseline in which the cross has already been transferred."[231] Therefore, when it was designated a national memorial, the congressional action that "chang[ed] the identity of the owner of the underlying land could no longer change the public or private character of the cross. The Government has expressly adopted the cross as its own."[232] The War Memorial status, Justice Stevens wrote, did not make the "unadorned Latin Cross . . . secular."[233]

The Peace Cross in the *American Legion* case was more clearly a state action than had been the case in *Buono*. In the former, the thirty-two-foot cross was placed at a traffic island and was maintained by a state entity, Maryland-National Capital Park and Planning Commission, in Bladensburg, Maryland.[234] The symbol, Justice Ginsburg pointed out in dissent, "objectively, 'convey[s] a message that religion or a particular religious belief is favored or preferred.'"[235]

The majority in *American Legion* recognized that the cross is the "preeminent Christian symbol."[236] It sought to neutralize that fact, but no amount of rhetoric can alter a cross into a secular symbol. According to Justice Alito's majority opinion, on the other hand, the cross has come to be a monument for all soldiers fallen during the First World War, without distinction of religion.[237] His conclusion relied on no testimony or written evidence that any non-Christian veteran or temple took that universalist position on the cross. Rather, the decision focused on the abstract question of how a hypothetical audience would perceive a cross

228. Salazar v. Buono, 559 U.S. 700, 709 (2010).

229. Buono v. Norton, 364 F. Supp. 2d 1175, 1178 (C.D. Cal. 2005), *aff'd sub nom.* Buono v. Kempthorne, 527 F.3d 758 (9th Cir. 2008), *rev'd and remanded sub nom.* Salazar v. Buono, 559 U.S. 700 (2010).

230. *Salazar*, 559 U.S. at 720.

231. *Id.* at 741 (Stevens, J., dissenting).

232. *Id.* at 746.

233. *Id.* at 747.

234. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2103–04 (2019) (Ginsburg, J., dissenting).

235. *Id.* at 2105 (quoting Cnty. of Allegheny v. Am. C.L. Union Greater Pittsburgh Chapter, 492 U.S. 573, 592 (1989)).

236. *Id.* at 2074. The cross was apparently in existence even before the Roman Emperor Constantine adopted the symbol in the early fourth century. BRUCE W. LONGENECKER, THE CROSS BEFORE CONSTANTINE: THE EARLY LIFE OF A CHRISTIAN SYMBOL 11 (2015).

237. *Am. Legion,* 139 S. Ct. at 2074 ("After the First World War, the picture of row after row of plain white crosses marking the overseas graves of soldiers who had lost their lives in that horrible conflict was emblazoned on the minds of Americans at home.").

in a similar circumstance.[238] This hypothetical mode of analysis simply disregarded the cross's objectively religious meaning.

Nowhere in his opinion to *American Legion* did Justice Alito give serious consideration to how local Jews, Hindus, Muslims, or atheists perceive the cross, demonstrating his own Christian understanding. The cross's meaning seems in his opinion to be contextualized by the evolution of its meaning in one town, Bladensburg, where it stood for ninety years.[239] That rhetorical device enabled the majority to avoid a broader historical analysis of the cross as a symbol with real historical reference, directed at the legitimacy of Christianity and the belief in the death and rebirth of Christ. Nothing, for instance, speaks of the crusaders carrying the cross out front as they slaughtered Jewish men, women, and children, after first extorting money from them wherever possible.[240]

Justice Kavanaugh, in a concurrence to the opinion, acknowledged the "sense of distress and alienation" of the cross on "Jewish war veterans."[241] He recommended that Maryland dismantle the Bladensburg cross, but did not believe such a course of action to be mandatory.

Rather than reflecting on the significance of the cross to religious outsiders, however, Justice Alito's opinion demonstrated concern that removing the symbol "may no longer appear neutral."[242] Here his argument sympathized with some presumed parties, rather than relying on any recognizable legal standard other than formalistic historiography. Such a reading entrenches historical practice without subjecting it to anything like rigorous legal analysis. In his hands, the cross seems to be permanent and immovable because it "may express many purposes and convey many different messages, both secular and religious."[243] Such a conclusion seems to have no limits to preventing the state from retaining existing religious symbols.

In addition, Justice Alito found no explanation for why the cross was originally erected,[244] although it was clearly selected by the American Legion for its religious message. That there were multiple reasons for placing the cross did not gainsay the monument's clear religious preference on government land. The cross is not a neutral symbol that honors all the war dead. The majority overlooked the obvious and recognizable historic symbolism of the cross.

238. *Id.* at 2076 ("This national debate and its outcome confirmed the cross's widespread resonance as a symbol of sacrifice in the war.").

239. *Id.* at 2078.

240. ROBERT MICHAEL, A HISTORY OF CATHOLIC ANTISEMITISM 68 (2008).

241. *Am. Legion*, 139 S. Ct. at 2093–94 (Kavanaugh, J., concurring).

242. *Id.* at 2084 (majority opinion).

243. *Id.* at 2087.

244. *Id.* at 2082.

IV. INTERPRETIVE METHODOLOGIES & ESTABLISHMENT

In a pluralistic polity with divergent religious beliefs, tolerance requires judicial vigilance against government indoctrination. The Establishment Clause field is one of the most in-flux of all constitutional areas, creating degrees of uncertainty among lower courts, practitioners, and academics. Various configurations of Justices have severally adopted the relatively stringent *Lemon* test,[245] the reasonable-audience-centered endorsement test,[246] and the more permissive forced-coercion[247] and socially-constructed-history analyses.[248] Doctrinal evolution has led to increasing tolerance of religious symbols on public properties. This Part examines which of them better prevents government speech that establishes religion. It argues that conveying a particularized religious message that is likely to be understood by observers violates the principle barring religious government speech.

A. Fusion of Religious and Governmental

Religious freedom requires government neutrality in matters of belief. The right to pursue personal convictions on matters of religion is fundamental. Religious tolerance requires government separation from matters of personal faith. Individuals, whether in their private or public capacities, retain the liberty to choose a creed through which to filter their behaviors, beliefs, worldviews, and aspirations.

Where government joins the religious observance, its conduct entangles with observation of rituals, systems of beliefs, and attitudes toward other faiths. Religion involves relationships between humans and humans, humans and institutions, or institutions and institutions. The Establishment Clause expressly prohibits government from adopting a set of practices tied to specific religious institutions and individuals.[249]

To prevent the interweaving of religion and secular institutions, the Court has created a variety of tests. None has been fully satisfactory. In *Lemon v. Kurtzman*, the majority found unconstitutional two states' laws that provided government funding to supplement the salaries of non-public school teachers who taught secular subjects at sectarian and non-sectarian schools.[250] The states' programs required constant oversight in the distribution of public funds.

245. Lynch v. Donnelly, 465 U.S. 668, 684 (1984); Aguilar v. Felton, 473 U.S. 402, 409–14 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203, 209 (1997). It is interesting to see that despite the opposite judgments in *Aguilar*, 473 U.S. at 409, and *Agostini*, 521 U.S. at 233–34, both rely on *Lemon* as the rule of decision. The latter decision is written by Justice O'Connor, who came to articulate a modification of the *Lemon* test, that is known for its endorsement review. *See infra* Section IV.B.

246. *Cf. Agostini*, 521 U.S. at 235.

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

248. Marsh v. Chambers, 463 U.S. 783, 790 (1983).

249. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

250. *Id.* at 625.

Government audits were required to prevent the largess from being spent for religious reasons.[251]

The states' supervision threatened possible intrusion into matters of conscience as it might merge the operation of nonpublic, religious schools and secular instructions, as might occur with study of the Bible. The three-part test noted above has come into increasing desuetude: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[252] State surveillance of teachers entangled the state in the inculcation of religion.[253]

The opinion disaggregated secular administration and religious conduct. Chief Justice Burger's opinion maintained the need for separate values of the Establishment Clause against government engagement in religious messages and of the Free Exercise Clause for government guarantees.[254]

The purpose prong of the *Lemon* test has rarely been used to find a violation, as when the Court invalidated a law that prohibited the teaching of evolution because of its impermissibly sectarian purpose.[255] The Court even found that with the passage of time, a law originally passed with sectarian motives can become secular, as with Sunday closing laws.[256]

The entanglement prong required government's messages to be severed from religious content, but the Court has rarely invoked it, even prior to *Lemon*'s falling out of favor with the Roberts Court majority.[257] Earlier cases parsing entanglement were sparce. In *Larkin v. Grendel's Den*, the Court held against a state statute that vested power to governing bodies of churches and schools to veto liquor license applications for the operation of businesses within the proximity of churches and schools.[258] The law impermissibly entangled religious

251. *Id.* at 607–10.

252. *Id.* at 612–13 (citing Bd. of Educ. v. Allen, 329 U.S. 236, 243 (1968)) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

253. *Id.* at 619.

254. *Id.* at 625.

255. Epperson v. Arkansas, 393 U.S. 97, 107–08 (1968).

256. In *McGowan v. Maryland*, 366 U.S. 420, 444–45 (1961), the Court found that while Sunday closing laws had originally been passed for sectarian purposes, they no longer expressed religious connotations.

257. Even before this term, when the Court held the *Lemon* test to be unconstitutional, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022), several members of the Roberts Court bluntly disagreed with the long-standing precedent. *See*, *e.g.*, Shurtleff v. City of Boston, 142 S. Ct. 1583, 1606 (2022) (Gorsuch, J., concurring) ("*Lemon* has long since been exposed as an anomaly and a mistake."). The almost gleeful willingness to overturn precedent based on a rather loosely worded rejection of prior Court reasoning bodes ill for the predictive principle of stare decisis. *See*, *e.g.*, Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2479 (2018) ("An important factor in determining whether a precedent should be overruled is the quality of its reasoning, . . . and as we explained in *Harris*, *Abood* was poorly reasoned . . . ."); June Med. Servs. L. L. C. v. Russo, 140 S. Ct. 2103, 2151–52 (2020) (Thomas, J., dissenting) ("[T]his Court has recently overruled a number of poorly reasoned precedents that have proved themselves to be unworkable . . . ." (citing Knick v. Twp. of Scott, 39 S. Ct. 2162 (2019)); Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485 (2019). The Roberts Court has proved itself an adroit player in actuating Justice Brennan's earlier observation "that the most important rule in constitutional law is the rule of five—meaning that with five votes on the Court you can do anything." H. Jefferson Powell, *Constitutional Virtues*, 9 GREEN BAG 2d 379, 381 (2006).

258. Larkin v. Grendel's Den, Inc., 459 U.S. 116, 117, 127 (1982).

institutions in "issues with significant economic and political implications."[259] The Court would not allow for "a fusion of governmental and religious functions."[260] Likewise, in *Board of Education v. Grumet*, entanglement condemned a state statute that created a school district especially for a religious enclave, which likewise created "purposeful and forbidden 'fusion of governmental and religious functions.'"[261] That rule prevented government policies from taking on the character of religious observances.

In recent years, the excessive entanglement test has come under sharp attack. It had little effect in *Lynch*, where the Court upheld as constitutional a nativity scene depicting the worship of Jesus as the born savior.[262] The test had in fact largely been abandoned. In *American Legion*, the Court continued to bid what has become a long farewell to the *Lemon* test.[263] Justice Alito was unable to find a majority to entirely discard it, but he refused to follow it, choosing what he found to be a "more modest approach that focuses on the particular issue at hand and looks to history for guidance."[264] That claim to judicial modesty based on a simple reading of history was belied by the choice to selectively decide the case under precedents more formalistic and lenient than *Lemon* in allowing for government speech to include a thirty-foot-high religious symbolism. Finally, the Court overturned *Lemon* in *Kennedy v. Bremerton School District*,[265] relying on "separate writings,"[266] a plurality and concurrences, in an emboldened decision that hammered away at the wall of separation between church and state.[267]

Justice Alito supported his argument with precedents upholding legislative prayer in *Marsh v. Chambers* and *Town of Greece v. Galloway*.[268] Lost on the Court is the message conveyed by a preeminently religious Christian symbol. The Court found in *American Legion* that the "original purpose or purposes" for erecting the cross were difficult to ascertain.[269] The Bladensburg Cross had long ceased to express the private views of those persons who in 1925 had dedicated it as a war memorial. No free exercise issue could have been at play. There remained only the clear message of support for Christian symbolism.

Second, Justice Alito asserted that "if the original purpose of a monument was infused with religion, the passage of time may obscure that sentiment."[270] The Court was wishing away two millennia worth of references to the cross as a symbol of God sending his only begotten son, Jesus Christ, to redeem the world

259. *Id.* at 127.
260. *Id*. at 126–27.
261. Bd. of Educ. v. Grumet, 512 U.S. 687, 702 (1994) (quoting *Larkin*, 459 U.S. at 126).
262. *See supra* text accompanying notes 165–78; *see generally* Lynch v. Donnelly, 465 U.S. 668 (1984).
263. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019).
264. *Id.*
265. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022).
266. *Id*. at 2449 (Sotomayor, J., dissenting).
267. Space does not allow for a full critique of *Kennedy*. I will in a future article deal with the historical issues raised by the majority.
268. *See supra* text accompanying notes 202–22; Marsh v. Chambers, 463 US 783, 795 (1983); Town of Greece v. Galloway, 572 U.S. 565, 591–92 (2014).
269. *Am. Legion*, 139 S. Ct. at 2082.
270. *Id.* at 2083.

from original sin. The cross figures prominently in the writings of Irenaeus of the second century. Indeed, the tradition predated him, as Jesus asserted, "[w]hosoever doth not bear his cross . . . and follow after me, cannot be my disciple."[271] And the Apostle Paul mentioned, "[t]he doctrine of the cross is foolishness to those who perish, but to us who are saved it is the power of God."[272] And again, Irenaeus writes, "God forbid that I should glory in anything save in the cross of Christ, by whom the world is crucified to me, and I unto the world."[273] Paul, who was crucial in the effort to define the practices and traditions of the early church in the Mediterranean world, taught that "we preach Christ crucified."[274] No wonder the Emperor Constantine, who convened the Council of Nicaea in 325 CE, ordered for the cross to be carried aloft before the ranks of his soldiers and to serve as a military standard. It was he who convened the critically authoritative Council of Nicaea, which adopted the definitive Christian Creed of Christ's divinity.[275] The cross is thus not, as Justice Alito would have it, an ambiguous sign but one that retains its Christian meaning, which associates it with religious worship and meditation.

The *American Legion* majority's third interpretive premise was that communities "may come to value" religious monuments and symbols "without necessarily embracing their religious roots."[276] Nowhere does Justice Alito flesh out whom he refers to as the "community." The decision does not explain whether it refers to members of the majority or minority of a population. Nor does he explain how to resolve disputes bound to arise among community members about the meaning of age-old religious symbols. That leaves at the discretion of a judge whether government has incorporated religious symbolism into its message. The majority did not even bother to refer to the record below to identify relevant evidence for this premise. Rather, it seems to adopt a judicial presumption that offers hardly any framework for identifying whether a symbol violates the Establishment Clause's bar against entanglement of government speech with religion.

The cross sends an unambiguous message. It clearly refers to Christian tradition, dating to the religion's founding in the first century. The cross has no ritual or sacral significance to any other religion nor to interfaith expression. As Professor Laycock puts it, "[t]o Christians, the story of the cross offers an extraordinary promise . . . . [b]ut to non-Christians, the cross offers an equally extraordinary threat."[277] The religious and ethnic background of community members will influence how they apprehend the government's message, but that does not diminish the need for objective religious government neutrality.

271. Irenaeus, *Against Heresies*, book 1, chapter 3, section 5, *in* 1 ANTI-NICENE FATHERS 446 (Alexander Roberts & James Donaldson eds., Global Grey 2021) (1867) (ebook).

272. *1 Corinthians* 1:18.

273. *Galatians* 6:14.

274. *1 Corinthians* 1:23.

275. Philipp Niewöhner, *The Significance of the Cross Before, During, and After Iconoclasm: Early Christian Aniconism in Constantinople and Asia Minor*, 74 DUMBARTON OAKS PAPERS 185, 185 (2020).

276. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2084 (2019).

277. Laycock, *supra* note 93, at 1240.

The majority's final argument in *American Legion* was that removing the cross may "no longer appear neutral" after having been so long a city landmark.[278] This is said in a perfunctory style—with Justice Alito writing no more than an unsupported paragraph—affecting to give constitutional substance to religious sensibilities. One wonders who would feel offended if the cross were to be moved to a cemetery as a monument to fallen Christian soldiers of World War I. That option would have respected the free exercise rights of those who lost their lives in the service of the United States, the religious sentiments of their families, and the views of non-religious members of the community.

Rather than simply avoiding the *Lemon* test, as did the majority, in his concurrence Justice Kavanaugh asserted, "the *Lemon* test is not good law."[279] And Justice Gorsuch, also writing separately, viewed it as a "misadventure."[280] More recently, writing in a concurrence to *Shurtleff*, Justice Gorsuch claimed relying on the *Lemon* test is "myopic" and "a kind of children's game."[281] Finally in *Kennedy*, the Court overturned *Lemon* as part of its activist pattern of giving inadequate weight to the doctrine of stare decisis.[282] The articulation of the Establishment in *Lemon*, nevertheless, offers the available mode of analysis to prevent government from adopting religious symbols into its messages. Whatever modifications might be made to tweak the three-part *Lemon* analysis to allow for greater religious autonomy under the Free Speech Clause, judicial review of whether government's message creates excessive entanglement between the religious and secular realms serves as a check against state-sponsored orthodox communications. That test is more protective than the historical and originalist perspectives endorsed by the current Court.[283] The millennial history of religious wars should serve to remind us of the stakes at play in the framers' decision to ratify the Establishment Clause.[284] The framers were well aware of the internecine religious wars that drew so many colonists to sail away from the Continent to the Americas. Favoring one set of sacred beliefs over others or atheism threatens to create outgroups whose values, rituals, and creeds are inconsistent with the officially sanctioned ideology.

278. *Am. Legion*, 139 S. Ct. at 2084.

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

280. *Id.* at 2101 (Gorsuch, J., concurring).

281. Shurtleff v. City of Boston, 142 S. Ct. 1583, 1608-09 (2022) (Gorsuch, J., concurring).

282. *See*, *e.g.*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2411 (2022); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

283. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022). ("An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some 'exception' within the 'Court's Establishment Clause jurisprudence.'").

284. Zelman v. Simmons-Harris, 536 U.S. 639, 718 (2002) (Breyer, J., dissenting) ("These Clauses embody an understanding, reached in the 17th century after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens, permits those citizens to 'worship God in their own way,' and allows all families to 'teach their children and to form their characters' as they wish.").

The Bladensburg Cross required regular public monitoring, administrative cooperation in upkeep, and was likely to result in religious divisiveness.[285] It represented a message of public support for a unique religion's symbol of faith.

B. Endorsement

Neither did the *American Legion* majority rely on the reasoning of Justice O'Connor's endorsement test,[286] and *Kennedy v. Bremerton School District* explicitly abandoned it.[287] The test had at one point enjoyed a majority on the bench.[288] It asks whether a reasonable person would find the purpose behind the government's adoption of a symbol to be religious.[289] The question comes down to a judicial decision about whether a reasonable observer "acquainted with text, legislative history, and implementation of the statute" would perceive challenged activity to be a government endorsement of religion.[290] And, second, whether its principle or primary effects advance or inhibit religion.[291] The third prong of *Lemon*, entanglement, is discarded by the test's gloss on *Lemon*. In a dissent to *American Legion*, Justice Ginsburg joined by Justice Sotomayor, found that public use of religious symbols, such as the Bladensburg cross, did effectively express religious endorsement.[292]

Justice O'Connor's endorsement test relied on the purpose and primary effects prongs of the *Lemon* test. These it combined into a singular inquiry of whether the government's message endorsed religious content.[293] The test dispenses with the entanglement prong of *Lemon*, and it has less bite in restricting government uses of religious symbols. O'Connor provided that an "objective observer" is "acquainted with the text, legislative history, and implementation."[294] She explained the interaction of purpose and effect:

> The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An

285. *Cf.* Agostini v. Felton, 521 U.S. 203, 233–34 (1997) (laying out a similar three-part examination for excessive entanglement in the context of federal funding for public school teachers teaching remedial classes in private parochial school).

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

287. *Kennedy*, 142 S. Ct. at 2427.

288. Cnty. of Allegheny v. Am. C.L. Union Greater Pittsburgh Chapter, 492 U.S. 573, 593–94 (1989).

289. Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 773 (1995) (O'Connor, J., concurring) ("[T]he endorsement test necessarily focuses upon the perception of a reasonable, informed observer.").

290. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) (quoting Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring)); *see also* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 35 (O'Connor, J., concurring) ("[T]he reasonable observer must be deemed aware of the history of the conduct in question, and must understand its place in our Nation's cultural landscape.").

291. *Allegheny*, 492 U.S. at 620 ("[T]he constitutionality of its effect must . . . be judged according to the standard of a 'reasonable observer' . . . .").

292. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2106 (Ginsburg, J., dissenting) ("As I see it, when a cross is displayed on public property, the government may be presumed to endorse its religious content.").

293. Lynch v. Donnelly, 465 U.S. 668, 691–92 (1984).

294. *Wallace*, 472 U.S. at 76 (O'Connor, J. concurring).

affirmative answer to either question should render the challenged practice invalid.[295]

The endorsement test granted courts wide discretion to define the meaning of government expressions that contain religious content. Litigants could never be certain courts would reach "consistent answers as to what any beholder, the average beholder, or the ultra-reasonable beholder (as the case may be) would think."[296] Without such quips, voiced by Justice Scalia, the endorsement test left judges faced with symbolism that adopts a semantic or symbolic object into government speech, too much latitude to simply say that the reasonable observer would find it to be religious or not. Such doctrinal uncertainty is unnecessary, where the Court can simply ask whether a symbol—be it a cross, Mogen David, crescent, the aum, or khanda—is supported by government funding, controlled by a government entity, and treated with special public plaudits.

Justice Stevens voiced concern that "[Justice O'Connor's] reasonable observer is a legal fiction, a personification of a community ideal of reasonable behavior determined by the collective social judgment. The ideal human Justice O'Connor describes knows and understands much more than meets the eye."[297] This was all tongue-in-cheek: "[h]er 'reasonable person' comes off as a well-schooled jurist, a being finer than the tort-law model."[298] The standard Stevens expressed in a dissent as "singularly out of place in the Establishment Clause context" because of its inscrutability: "[i]t strips of constitutional protection every reasonable person whose knowledge happens to fall below some 'ideal' standard."[299]

Justice Stevens's observation is keen about the difficulty and uncertainty a court faces in defining the meaning of Justice O'Connor's reasonable observer test. It is a slipknot means for finding that a nativity scene or similar religious object[300] has secular purpose and whose principal effect is not to advance religion. Such understanding no doubt can be presumed, but it ignores the objective historical referent that the third prong of the *Lemon* test finds to be required for Establishment Clause review of government speech. Including contested religious objects in holiday displays, legislative prayers, or monuments on public property communicates government preference, expressly prohibited by the First Amendment.

As has long been recognized, nevertheless, contact between government and religious institutions is inevitable. The free exercise of religion is a right belonging to each citizen. There is a substantive constitutional difference, however, between individual expressions of faith and government sponsorship of it. Critical to just governance is accommodation of the several religions. The test for government speech would do better to identify objective factors rather than conjectures of reasonable persons' perceptions. My intervention asks courts to

295. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).
296. Cap. Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 768 n.3 (1995).
297. *Id.* at 800 n.5 (Stevens, J., dissenting).
298. *Id.*
299. *Id.*
300. *Lynch*, 465 U.S. at 709 (Brennan, J., dissenting).

look at whether a particular statement, symbol, or representation contains an objectively religious statement. If so, the government endorsement or entanglement with that object is a violation of the Establishment Clause principle of neutrality. Such a test would better get at Justice O'Connor's laudable ultimate purpose, to prevent government from making "a person's religious beliefs relevant to his or her standing in the political community."[301] Contrary to her conclusion, religious symbolism, even when coupled with holiday displays, conveys favoritism of a particular religious worship and belief.

The reasonable observer test asks too broadly whether there are some observers of government-sponsored religious displays who would find them secular.[302] In a pluralistic society, there simply could not be one all-embracing understanding, other than the one connecting specific heuristics to unique creeds; and this is especially so with religion, where such strongly held, divergent views are at stake. Government adoption of a symbol that expresses a religious credo encroaches against the First Amendment's prohibition. Many citizens might take government adoption of a religious symbol to be hostile to their beliefs.[303]

The simpler question is whether government speech has been fused with religion, but that goes to the third prong of *Lemon* that was discarded by Justice O'Connor as it has been by other Justices like Alito and Gorsuch. While a Christmas tree lacks religious content, the same cannot be said of symbols that are ubiquitously and historically understood to be religious.[304] They are objects used by hundreds of millions of devotees for worship and prayer. While ordinary people are unlikely to know Supreme Court legal doctrine, they can tell the difference between religious and secular symbols.[305]

Prohibiting government from adopting religious symbols and objects prevents official intrusion into constitutionally barred forms of communications, while maintaining respect for the manifold ties and services provided to religious and secular communities through government programs. Speech about religion, where government comes in contact with a religious institution but does not adopt its expression of faith, is both "necessary and permissible."[306] This includes functions that do not interweave government agencies with religions and

301. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 34 (O'Connor, J., concurring) (quoting Cnty. of Allegheny v. Am. C.L. Union Greater Pittsburgh Chapter, 492 U.S. 573, 627 (1989)).

302. *Pinette*, 515 U.S. at 800 n.5 (Stevens, J., dissenting) ("Instead of protecting only the 'ideal' observer," Justice Stevens would "extend protection to the universe of reasonable persons and ask whether some viewers of the religious display would be likely to perceive a government endorsement.").

303. *Lynch*, 465 U.S. at 701 (Brennan, J., dissenting) ("For many, the City's decision to include the crèche as part of its extensive and costly efforts to celebrate Christmas can only mean that the prestige of the government has been conferred on the beliefs associated with the crèche, thereby providing 'a significant symbolic benefit to religion . . . .'").

304. This is a factor that Justice O'Connor acknowledged to be significant to the Establishment Clause inquiry. *Elk Grove*, 542 U.S. at 36 (O'Connor, J., concurring).

305. Here I am elaborating on a phrase from Justice Stevens: "Many (probably most) reasonable people do not know the difference between a 'public forum,' a 'limited public forum,' and a 'non-public forum.' They *do* know the difference between a state capitol and a church." *Pinette*, 515 U.S. at 807 (Stevens, J., dissenting).

306. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) ("Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts.").

their institutions, such as fire department service, building inspection, zoning applications, and similar universal public functions.[307]

The endorsement test did not totally avoid difficulties in interpreting the actual legislative purpose of a government body consisting of politically motivated individuals with varying legislative intents, political candor, and religious devotions. The difficulty with deriving the nature of that objective and observable meaning of a symbol brings back the need for greater certainty of meaning. Government speech that expresses religious preference, this Article argues, violates the Establishment Clause. A more objective standard, one connected with history, tradition, and entanglement is required to avoid the ambiguities of defining Justice O'Connor's "reasonable observer" and determine whether a religious symbol fuses sectarian dogma to government communication. The crèche on public property during Christmas makes clear that the holiday is connected with belief in the resurrection of Jesus Christ and his birth as savior of mankind from its original sin. So too with the cross, which no reasonable observer can eviscerate from its historical and present-day attachment to one religious tradition. Such cases are not about individual free exercise, but the expression of government assent.

C. Coercion

The coercion test is even more lenient in granting government latitude to incorporate religious symbolism in its official communiques than the endorsement test in allowing government to adopt religious symbols into its messages. This third Establishment Clause test never enjoyed a majority on the Court until *Kennedy* was decided this term. Justice Kennedy relied on it in *Lee v. Weisman*, which held that religious invocation at a school graduation violates central principles of the Establishment Clause.[308] Kennedy found the Clause only prohibits government from "coerc[ing] anyone to support or participate in religion or its exercise," even if it only required students to stand during a rabbi's invocation.[309] This is meant to retain the private sphere to exercise religion freely and meaningfully to protect dissenters.[310] But only one other Justice would have decided the case on coercion grounds. In concurrence, on the other hand, Justice Souter joined by two others critically asserted that "a literal application of the coercion test would render the Establishment Clause a virtual nullity."[311] And Justice Scalia, joined by three others, regarded the coercion test to be insignificant,[312] and acknowledged it to only be a factor for judicial consideration when

307. *Id.*

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

309. *Id.*

310. *Id.* at 593.

311. *Id.* at 621 (Souter, J., concurring).

312. *Id.* at 638 (Scalia, J., dissenting) ("But let us assume the very worst, that the nonparticipating graduate is 'subtly coerced'. . . to stand! Even that half of the disjunctive does not remotely establish a 'participation' (or an 'appearance of participation') in a religious exercise.").

government threatened dissenters with penalties.[313] It was not until *Kennedy*, which was decided this term, that a majority of the Court adopted this flawed test.[314]

The requirement of an explicit coercion to engage in religion may be helpful in explaining why government speech can be about religion without violating the Establishment Clause, as when a publicly funded historical display or an art gallery contains works with religious content. In other settings, however, Kennedy's test ignores the even greater harm to separation of church and state that can come from government speech that is overtly religious. As one scholar puts it, "[i]n the area of government-religious speech, a reliance on coercion alone would essentially read the Establishment Clause out of the Constitution: any observer could avert her eyes from a statue declaring a particular faith as the correct faith."[315] Government's adopting a specifically religious symbol or financing its display as part of a ceremony, prayer, or memorial may not coerce, but it sends a message favoring a particular dogma.

Government coercion is only one type of conduct prohibited by the Establishment Clause, but alone it fails to account for the various factors that judges should employ in adjudication. No doubt, Kennedy is correct that real and substantial coercion of persons to join in prayer would violate the Establishment Clause. But in addition to coercion, findings that particularized government speech is religious (using religious symbolism, partaking in prayer, and so forth) should be outside the pale, without violating anyone's individual and associational rights to freely worship.

The fusion of government with the sacerdotal is diametrically opposite to an express provision of the Constitution meant to guard against state orthodoxy with its manifold threats to public welfare. An approach so restraining religion in public life allows for free exercise of religion by all members of the political community. In addition to coercion, the Constitution prohibits government to associate itself with a sincerely held belief about matters of deep conviction closely related to those of religion and any associative practices.[316] Political activism and argumentation can include religious allusions,[317] statements, and ideals, but under the Establishment Clause they have no place in official public actions.

313. *Id.* at 642.

314. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2429 (2022).

315. John M. Bickers, *False Facts and Holy War: How the Supreme Court's Establishment Clause Cases Fuel Religious Conflict*, 51 IND. L. REV. 305, 310 (2018).

316. *Cf.* Frazee v. Illinois Dep't of Emp. Sec., 489 U.S. 829, 833 (1989) ("There is no doubt that '[o]nly beliefs rooted in religion are protected by the Free Exercise Clause' . . . . Purely secular views do not suffice.").

317. *See* Michael W. McConnell, *Five Reasons to Reject the Claim That Religious Arguments Should Be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639, 656–57 (1999) ("[P]olitical history is rife with religious political activists and religious political arguments.").

D. The Crumbling Wall of Historical Separation

The Court's unwillingness to recognize the objective meaning of historically religious symbols clouds Establishment Clause jurisprudence. The majority of *American Legion* concluded a large cross maintained with government funding was a World War I memorial that favored no particular religion.[318] But the cross is no neutral symbol. The significance of its message is not the same for the faithful and the atheist. The cross has a singular religious meaning. Its referent is Christian dogma of resurrection and redemption. The Bladensburg cross conveys a sectarian message. Moreover, the government's repairs, budget, and expenditures for the cross require government's supervision and sponsorship of a religious message in a traditionally public forum.[319] Its message supports the religious ritual of erecting a cross for the Christian casualties of the First World War. The message is by no means neutral as to religion, nor does it memorialize the suffering of non-Christian casualties and veterans. Government's message favors a religion, contrary to the constitutional injunction.

One available alternative course of action would have been to move the cross to a cemetery. In that case, a private party could have taken over its maintenance. In its place at the Bladensburg intersection could have been erected a non-religious monument—an obelisk perhaps—in honor of all World War I soldiers, not just those of the Christian faith.[320] The cross has religious ceremonial connotation that displays like the Vietnam Memorial in Washington D.C. do not.

The majority in *American Legion* did not apply the *Lemon* test, which inquired into whether the government act is secular in purpose, advances or inhibits religion, and causes an excessive government entanglement with religion.[321] Instead of rigor, the Court seems to have given into sentimentality, finding that "[t]he passage of time gives rise to a strong presumption of constitutionality."[322] Elsewhere the majority noted, "[a]ny test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change."[323] Similarly, in an earlier dissent Justice Scalia wrote, "[t]he foremost principle I would apply is fidelity to the longstanding traditions of our people, which surely provide the diversity of treatment . . . but do not leave us to our own devices."[324] Yet, the Court's historicism is often a haphazard method of interpretation. A *reductio ad absurdum* argument might point out that, if taken to its logical conclusion, long standing traditions may lead courts to historical anachronisms not only in religious minority cases but also

318. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2089 (2019).

319. The monument was built through privately donated funds, but subsequently lighting and routine maintenance required additional government funding. Am. Humanist Ass'n v. Md.-Nat'l Cap. Park, 147 F. Supp. 3d 373, 379–80 (D. Md. 2015).

320. *Am. Legion*, 139 S. Ct. at 2086 ("These monuments honor men and women who have played an important role in the history of our country, and where religious symbols are included in the monuments, their presence acknowledges the centrality of faith to those whose lives are commemorated.").

321. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

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

323. Town of Greece v. Galloway, 572 U.S. 565, 577 (2014).

324. Bd. of Educ. v. Grumet, 512 U.S. 687, 751 (1994).

those involving race, sex, and many other suspect categories. The history of a monument should not be determinative of outcome.

In recent cases, the Roberts Court has accepted as legitimate exercises of government power that accept, adopt, or supervise a religious message in public displays.[325] Most recently, a majority placed its thumb on a dynamic cultural meaning interpretation with a penchant for maintaining existing monuments, rather than the obvious referent of the cross to Jesus's crucifixion and universal redemption for the faithful.[326] The Court demonstrates a high degree of deference when it comes to expressly religious symbolism supported by government funds.

Other areas of Establishment Clause jurisprudence fall into the same error of finding that religious referents do not make a purposeful "effort to express some kind of . . . particular religious message."[327] This then sets the stage for majorities arguing that an object with a clearly religious message, subsidized or otherwise fused with government actions, holds a secular meaning—as if the crèche in *Lynch v. Donnelly* can mean anything but the worship of the infant Jesus.[328] Even if three wise men came to visit the baby Jesus, the story has undeniably religious significance. The Gospel of Matthew states that, upon their arrival, the wise men "fell down and worshiped him."[329] Placement of the crèche among festive Christian objects altered its meaning just about as effectively as putting a church into a residential area. They are both surrounded by secular symbols, but the message of the crèche, just as the church, remains undeniably religious.

In *Town of Greece v. Galloway*, the Court found the Establishment Clause was not violated by a sectarian prayer[330]—this despite the undeniable religious content of ministers' Christian message before municipal meetings. The majority left undefined any secular purpose of such an exercise. Surely the message is of

325. Richard Schragger and Micah Schwartzman explain this recent scholarly and intellectual phenomenon to take a religiously antiliberal understanding of law and jurisprudence. This, they explain to be disruptive of the "twentieth century church-state settlement." *See* Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendment*, 104 MINN. L. REV. 1341, 1347 (2020). They further explain that,

> new antiliberalism advocates a church-state doctrine that involves: (1) broad autonomy for religious institutions and persons through robust religious exemptions from general laws; (2) public funding of churches and religious organizations through vouchers or direct grants on par with secular institutions; (3) acceptance of majoritarian public religious expression and displays, including in some cases, a return to school prayer; and (4) the legitimacy of state-enforced moral codes based on religious principles.

Id. at 1423.

326. PAUL CIHOLAS, THE OMPHALOS AND THE CROSS: PAGANS AND CHRISTIANS IN SEARCH OF A DIVINE CENTER 207–08 (2003) (discussing the use of the cross as a central symbol of Christianity that emerged from Pauline proselytizing); DANIEL CARDÓ, THE CROSS AND THE EUCHARIST IN EARLY CHRISTIANITY 142–43 (2019) (discussing early church uses of the cross); JAROSLAV PELIKAN, THE CHRISTIAN TRADITION: A HISTORY OF THE DEVELOPMENT OF DOCTRINE, 3 THE GROWTH OF MEDIEVAL THEOLOGY 129 (1978) (discussing how the redemptive view of Jesus's crucifixion deeply influenced Christian scholasticism).

327. Lynch v. Donnelly, 465 U.S. 668, 680 (1984).

328. *Id.* at 681.

329. *Matthew* 2:11 (King James).

330. Town of Greece v. Galloway, 572 U.S. 565, 581 (2014) ("To hold that invocations must be nonsectarian would force the legislatures sponsoring prayers and the courts deciding these cases to act as supervisors and censors of religious speech . . . .").

the minister's sincerely held beliefs, and those he can invoke anywhere to enjoy his fundamental right to the free exercise of religion.

The Court's historicism entrenches existing state conduct without subjecting it to adequately rigorous scrutiny. The majority in *American Legion* worried that removing the cross "may no longer appear neutral."[331] The same sentimentality, rather than doctrinal analysis, prompted the Court in *Lynch v. Donnelly* to link a forty-year city tradition of erecting a nativity scene among other festive symbols with the "unbroken history of official acknowledgement by all three branches of government of the role of religion in American life."[332] The *Lynch* Court was, however, remiss to distinguish between religious speech and speech about religion. The crèche was the former, a statement supported by government funds for the expression of a message of three wise men arriving at the side of the baby Jesus, whose birth Christians believe had been prophesied.

Separation from the State only strengthens the other bookend of the Religion Clauses. Free exercise of religion plays a critical and vital role in individuals' lives and is a matter of private sincere conviction, not government-authorized speech. Any government official can don a religious symbol as part of a personal display, memento, or pendant worn during work hours or at home. But where the display is sponsored by the government, analysis should differ.

The Establishment Clause comes into play when the message, no matter how long in use, fuses government functions with religion. The Court allowed for long-standing unequal treatment to persist with Sunday closing laws even though they had posed a significant economic and social disadvantage to Orthodox Jews.[333] The Court itself in *McGowan v. Maryland* noted that "[t]here is no dispute that the original laws which dealt with Sunday labor were motivated by religious forces"; nevertheless, despite their undeniable sectarian history, the Court found that closing statutes had taken on "secular motivations."[334] How? Not to a Jewish shop owner who lost an extra day of enterprise for worship on his sabbath day, Saturday, and then by law could not make it up on Sunday. The Constitution does not favor any religion,[335] safeguarding instead freedom of personal worship. This neutrality principle underpinning the Religion Clauses is violated where government speech expressly favors the rituals or symbols of only one segment of the citizenry, even if they are the majority.

The Supreme Court justifies government support for religious symbols and rituals without giving due weight to the obvious religious contents of their messages. This entanglement is evident in legislative prayers, publicly funded

331. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2084 (2019).

332. *Lynch*, 465 U.S. at 671, 674.

333. Braunfeld v. Brown, 366 U.S. 599, 602 (1961).

334. McGowan v. Maryland, 366 U.S. 420, 431 (1961).

335. *Id.* at 564 (Douglas, J., dissenting) ("The First Amendment commands government to have no interest in theology or ritual; it admonishes government to be interested in allowing religious freedom to flourish—whether the result is to produce Catholics, Jews, or Protestants, or to turn the people toward the path of Buddha, or to end in a predominantly Moslem nation, or to produce in the long run atheists or agnostics. On matters of this kind government must be neutral.").

nativity scenes, and religious symbols.[336] The Court cannot wish away the meaning of religious symbols brimming with two-thousand-year-old meanings. A museum display differs in context from any celebration, invocation, or commemoration directly tied to religious observances. In truth, no matter the context, these do not lose their religious meaning. They may, indeed, have secular connotations, but where such long-standing religious meaning is connected to an object or invocation, the government violates the Establishment Clause when it fuses into its properties, functions, and institutions. Papering over the historically recognized religious message for some also overlooks how it is divisive to others. The freedom to adopt these objects into personal speech in no way expands government's ability to fuse it into its messages, functions, and services. The meaning of religious symbols cannot be cleaved from historical, scriptural, and sacral roots.

Justice O'Connor poignantly explained the problem of overstating the importance of "historical longevity alone."[337] Historical practice in matters of religion should only be considered insofar as they do not violate the Constitution. This is as true with the Religion Clauses as it is with the Equal Protection Clause. Past racial and gender discrimination "does not immunize such practices from scrutiny under the Fourteenth Amendment."[338] An earlier Court asserted similarly that "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."[339] Pedigree is not synonymous with constitutionality. Where a court discounts the specific and objective meaning of a symbol, it risks overexerting its adjudicative discretion[340] and, instead, engaging in sophism.

336. There is much truth to Professor Caroline Mala Corbin's statement: "[a]lthough the Court's originalism is not consistent, its approval of practices amicable to Christianity is." Caroline Mala Corbin, *Opportunistic Originalism and the Establishment Clause*, 54 WAKE FOREST L. REV. 617, 620 (2019). Professor Richard C. Schragger makes a similar point, but he is more reconciled with the existing interpretive order: "[t]he long history of religious proclamations, religious references, religious favoritism, and religious behavior by American public officials is thus proof of the Establishment Clause's meaning, not of its underenforcement through time. The nonestablishment principle thus operates within a civic culture that is in the main monotheistic and Christian." Schragger, *supra* note 128, at 632.

337. Cnty. of Allegheny v. Am. C.L. Union Greater Pittsburgh Chapter, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring).

338. *Id.*

339. Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970).

340. I take this concept from an orthogonal but critically important point the Court made in *Thomas v. Chicago Park District*, upholding a permit requirement that contained provisions "reasonably specific and objective, and not leav[ing] the decision 'to the whim of the administrator.'" Thomas v. Chi. Park Dist. 534 U.S. 316, 324 (2002). I take the point of reasonable specificity and objectivity to apply to all three branches of government. That principle applies to religious government speech.

V. CONCLUSION

Government plays many parts in communicating, listening to, paying for, and refining messages.[341] Its policy statements are at the discretion of policymakers, unless constitutionally limited. The Establishment Clause prohibits government speech when it "sends a message to nonadherents that they are outsiders, not full members of the political community."[342] This includes not only government endorsement of but also fusion with religious symbolism, practice, or dogma.

The Free Exercise Clause leaves private parties and public servants alike at liberty to express their convictions. The Establishment Clause, however, prohibits government from favoring, adopting, or fusing its message with religious content or conduct. Doctrine or ritual are constitutionally and conceptually separate from acknowledging, respecting, tolerating, and protecting personal religious practices and convictions. The Constitution evinces respect for religious practice and recognizes the danger to representative democracy from government sponsorship of ritual symbols or its involvement in religion.

341. *See* EMERSON, *supra* note 6, at 697 (asserting that while free speech is often analyzed through a laissez-faire lens, "[t]he reality is . . . that the government itself participates in the system, both as communicator and listener").

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