REFLECTIONS ON THE CHURCH/STATE PUZZLE

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I. INTRODUCTION

In the past five years, the Supreme Court has decided four important cases involving the Religion Clauses of the First Amendment: *Town of Greece v. Galloway*,[1] *Trinity Lutheran Church v. Comer*,[2] *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,[3] and *American Legion v. American Humanist Association*.[4] By analyzing and reacting to these cases, I hope to offer a perspective on pieces of the church/state puzzle that will help judges and others think more critically about future developments in this consequential area of the law.[5]

Masterpiece Cakeshop and *Trinity Lutheran* are primarily Free Exercise Clause cases. *Town of Greece* and *American Legion* are Establishment Clause cases. Taken together, these

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

2. Trinity Lutheran Church of Columbia, Inc. v. Comer, ___ U.S. ___, 137 S. Ct. 2012 (2017).

3. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, ___ U.S. ___, 138 S. Ct. 1719 (2018).

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

5. In approximately the last five years, the Supreme Court has also decided two important church/state cases under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1 *et seq.* [hereinafter "RFRA"], *see* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014), and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc *et seq.*, *see* Holt v. Hobbs, 574 U.S. 352 (2015). In a third case involving RFRA, Zubik v. Burwell, ___ U.S. ___, 136 S. Ct. 1557 (2016), the Court avoided a ruling on the merits and vacated and remanded so that the courts of appeals could address the arguments made by the parties in response to the order for supplemental briefing. I do not discuss these cases.

cases reflect a weakening of the Establishment Clause in favor of a stronger free exercise right—a trend that will likely increase the presence of majority religions in the public square, to the possible detriment of minority religions. As I explain, this trend is most notable in the continuing shift in Establishment Clause jurisprudence away from the three-part test articulated in *Lemon v. Kurtzman*,[6] with its focus on the present effects of statutes or government practices with religious implications, toward a "historically rooted practice" test. Unlike the *Lemon* test, the "historically rooted practice" test, as articulated in *Town of Greece* and invoked in *American Legion*, fails to account for the religious pluralism of today's society. I therefore counsel caution in eliminating *Lemon* from our Establishment Clause jurisprudence. I also warn against conflating a measured separation of church and state in judicial decisions—still central to the neutrality principle of the Religion Clauses—with hostility to religion.

The Religion Clauses of the First Amendment are familiar: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[7] These Clauses frame the debate about the proper relationship between the government and religion. Although the First Amendment explicitly limits the power of the federal government—"Congress shall make no law"—the Supreme Court ruled in a pair of cases in the 1940s, *Cantwell v. Connecticut*[8] and *Everson v. Board of Education*,[9] that those limits also apply to state governments through the Fourteenth Amendment.

Given the generality of the Religion Clauses, there is no consensus on the breadth of their application. But the ongoing

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6. 403 U.S. 602 (1971). In *Lemon*, the Supreme Court held that Pennsylvania and Rhode Island statutes that provided state funding for non-public, non-secular schools violated the Establishment Clause because they created excessive entanglement of state and church. In reaching that conclusion, the Court adopted the three-part *Lemon* test, which requires that a statute or government practice (1) must have a "secular legislative purpose"; (2) must have a principal or primary effect that "neither advances nor inhibits religion"; and (3) must "not foster an excessive government entanglement with religion." Id. at 612–13 (citations and internal quotation marks omitted).

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

8. 310 U.S. 296 (1940) (Free Exercise Clause).

9. 330 U.S. 1 (1947) (Establishment Clause). Justice Thomas rejects the incorporation of the Establishment Clause against the states, as he made clear in his concurrence in *American Legion*. *See infra* p. 43.

debate reflects two competing visions on the Supreme Court about the proper relationship between the government and religion under our Constitution: the "accommodation vision" and the "separation vision."[10] Painting in broad strokes, the accommodation vision requires government to make ample room for religion in public life, or, to use a favorite phrase of the accommodation advocates, in the public square. This vision favors a narrow application of the Establishment Clause and an expansive application of the Free Exercise Clause. The separation vision requires government to keep a safe distance from religion. It is wary of religion's presence in the public square, favoring an expansive application of the Establishment Clause and a narrow application of the Free Exercise Clause. The separate opinions of the justices in *Masterpiece Cakeshop*, *Trinity Lutheran*, *Town of Greece*, and *American Legion* reflect these competing visions.

II. *MASTERPIECE CAKESHOP*: THE FIGHT FOR RELIGIOUS EXCEPTIONS TO PUBLIC ACCOMMODATIONS LAWS

Some accommodationists seek to expand the Free Exercise Clause by requiring religious exceptions to laws that prohibit discrimination in places of public accommodation. In *Masterpiece Cakeshop*, the Supreme Court considered the demand of a baker for a religious exemption from a law prohibiting discrimination against gay couples.

A. Precedent: Employment Division v. Smith

In a precedent central to *Masterpiece Cakeshop*, *Employment Division v. Smith*,[11] the Court had to decide if a

10. *Compare, e.g.*, Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 147 (1987) (describing the separationist vision), *with, e.g.*, William J. Cornelius, *Church and State—The Mandate of the Establishment Clause: Wall of Separation or Benign Neutrality?* 16 ST. MARY'S L.J. 1, 13–14 (1984) (describing the accommodationist vision); *see also* Carolyn A. Deverich, *Establishment Clause Jurisprudence and the Free Exercise Dilemma: A Structural Unitary-Accommodationist Argument for the Constitutionality of God in the Public Square*, 2006 B.Y.U. L. REV. 211, 262 (2006) (critiquing the separationist view and advocating for an accommodation approach).

11. 494 U.S. 872 (1990).

state, consistent with the Free Exercise Clause, could deny unemployment benefits to persons dismissed from their jobs for violating state criminal laws by using peyote in their religious worship.[12] Prior to *Smith*, the Court had used the balancing test of *Sherbert v. Verner*[13] to evaluate the kind of free exercise claim raised in *Smith*. Under that test, "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest."[14] To the surprise and dismay of many scholars and advocates of the free exercise rights of minorities,[15] the Court, in an opinion by Justice Scalia, abandoned the *Sherbert* balancing test in favor of a sweeping rule to justify the denial of unemployment benefits:

> [T]he right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[16]

Justice Scalia insisted that this rule was not new.[17] The only precedent to the contrary, he said, involved "not the Free

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12. *Id.* at 890.

13. 374 U.S. 398 (1963) (holding that a state may not apply the eligibility provisions for unemployment compensation in a way that requires workers of some faiths to abandon their religious convictions).

14. *Smith*, 494 U.S. at 883 (citing *Sherbert*, 374 U.S. at 402–03).

15. *See The* Smith *Decision: The Court Returns to the Belief-Action Distinction*, PEW RESEARCH CTR.: RELIGION & PUB. LIFE (Oct. 24, 2007), https://www.pewforum.org/2007/10/24/a-delicate-balance/ (describing "significant political protest from religious organizations and civil liberties groups"); Michael McConnell, *Free Exercise Revisionism*, 57 U. CHI. L. REV. 1109, 1111 (1990) (referring to "over a hundred constitutional law scholars" who joined with religious and civil liberties groups in filing a petition for rehearing); *cf. Smith*, 494 U.S. at 919 (Blackmun, J., dissenting) (lamenting the impact that *Smith* would have on minority religious groups and cautioning that courts should not "turn a blind eye to the severe impact of a State's restrictions on the adherents of a minority religion" (citation omitted)).

16. *Smith*, 494 U.S. at 879.

17. Despite Justice Scalia's insistence that the *Smith* test was not new law, the Court had routinely applied *Sherbert*'s strict scrutiny to laws that inhibited the free exercise of religion prior to *Smith*. *See, e.g.*, Hobbie v. Unemp't Appeals Comm'n, 480 U.S. 136 (1987) (striking down denial of unemployment benefits to Seventh-day Adventist fired for refusing to work on Saturday, the sect's Sabbath); United States v. Lee, 455 U.S. 252 (1982) (finding that compelling government interest in maintaining national tax system outweighed claim that payment of social security taxes offends religious belief); Thomas v. Review Bd., 450 U.S. 707 (1981) (striking down denial of unemployment benefits for Jehovah's Witness whose religious beliefs prevented him from manufacturing weapons for war); *see also* McConnell, *supra* note 15, at 1111 (characterizing the "theoretical

Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press."[18] *Smith* was not such a hybrid case. He also said that a ruling in Smith's favor under the *Sherbert* test "would open the prospect of constitutionally required religious exceptions from civic obligations of almost every conceivable kind,"[19] and would require judges to "weigh the social importance of all laws against the centrality of all religious beliefs,"[20] an exercise better left to the legislature in a democratic society. In a concurring opinion, Justice O'Connor, who would have ruled for Oregon on the basis of the *Sherbert* balancing test, lamented its abandonment: "The compelling interest test [of *Sherbert*] reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society."[21]

Justice O'Connor's critique became a rallying cry for critics of the *Smith* decision, who saw its non-accommodation approach to claims for religious exemptions from general laws as a threat to religious freedom and diversity.[22] In 1993, by overwhelming majorities in both Houses, Congress passed the Religious Freedom Restoration Act to restore the applicability of the *Sherbert* balancing test to all federal and state laws.[23] In a 1997 decision, *City of Boerne v. Flores*,[24] the Supreme Court limited the applicability of the Act to federal law, concluding that Congress did not have the power pursuant to the enforcement provision of the Fourteenth Amendment to apply

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argument" in *Smith* as "contrary to the deep logic of the First Amendment"); *but see* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (declining to require federal government to provide a compelling justification for road construction and timber harvesting in a Native American religious site because the actions were neither coercive nor a direct prohibition of religious practice).

18. *Smith*, 494 U.S. at 881 (citations omitted).

19. *Id.* at 888.

20. *Id.* at 890.

21. *Id.* at 903 (O'Connor, J., concurring in the judgment).

22. *See, e.g.*, McConnell, *supra* note 15, at 1136 ("In a world in which some beliefs are more prominent than others, the political branches will inevitably be selectively sensitive toward religious injuries. Laws that impinge upon the religious practices of larger or more prominent faiths will be noticed and remedied. When the laws impinge upon the practice of smaller groups, legislators will not even notice, and may not care even if they do notice.").

23. *See supra* note 5.

24. 521 U.S. 507 (1997).

that law to the states.[25] As a result, critics of the *Smith* decision have been hoping for years to find a case that would prompt the Supreme Court to overturn *Smith* and return to the *Sherbert* balancing test for free exercise challenges to state laws of general applicability, such as anti-discrimination laws.

B. Masterpiece Cakeshop*'s Sidestep*

Masterpiece Cakeshop had the potential to be that case. In 2012, a same-sex couple visited the Masterpiece Cakeshop, a bakery in Colorado, to order a wedding cake.[26] The bakery's owner, Jack Phillips, told the couple that he would not create such a cake because of his religious opposition to same-sex marriage. They filed a complaint with the Colorado Civil Rights Commission claiming a violation of Colorado's anti-discrimination law, which prohibited a place of public accommodation from refusing to provide goods or services on the basis of certain protected characteristics, including sexual orientation.[27] The parties agreed that the bakery was a place of public accommodation, and that Phillips's refusal to sell the couple a wedding cake violated Colorado's anti-discrimination law.[28]

Phillips argued that applying the anti-discrimination law to his refusal violated his First Amendment rights to the free exercise of religion and freedom of speech because requiring him either to bake the cake or face civil fines impermissibly forced him both to participate in an event (a same-sex wedding) prohibited by his religion and express a viewpoint that he abhorred. The Colorado Civil Rights Commission rejected those

25. *See id.* at 536 (finding that Congress exceeded its power under the Constitution and that RFRA, as applied to the states, violated principles "necessary to maintain separation of powers and the federal balance"). Since the Court's announcement of RFRA's inapplicability to the states, twenty-one states have passed their own Religious Freedom Restoration Acts, known as state RFRAs. *See generally, e.g.*, *State Religious Freedom Restoration Acts*, NAT'L CONF. OF ST. LEGISLATURES (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx (showing state RFRAs as of 2015).

26. *See Masterpiece Cakeshop*, 138 S. Ct. at 1723.

27. *Id.* at 1725 (citing Colo. Rev. Stat. § 24–34–601(2)(a) (2017)).

28. *Id.* at 1726.

claims, and so did the Colorado courts.[29] The United States Supreme Court then agreed to hear the case.

This case was appropriately portrayed as a big deal. Twenty-one states and the District of Columbia have laws prohibiting discrimination in public accommodations on the basis of sexual orientation,[30] and the Supreme Court had never recognized a religious exception to anti-discrimination laws. Indeed, in the 1968 case of *Newman v. Piggie Park Enterprises, Inc.*,[31] the owner of a South Carolina barbecue chain claimed that a federal public accommodations law requiring him to serve blacks infringed on his freedom of religion because of his religious objections to integration. The Supreme Court rejected that claim as "patently frivolous."[32] And then there was Justice Scalia's pronouncement in *Smith* that the Free Exercise Clause does not permit an individual to disobey a law of general applicability, like Colorado's anti-discrimination law, on religious grounds. If the Supreme Court recognized the religious exception claim of the *Masterpiece* baker, it would have to overrule *Smith* or somehow find it inapplicable. Going forward, any such decision would have enormous implications for the enforcement of anti-discrimination laws throughout the country.

To the relief of many, the Supreme Court avoided these momentous issues. Justice Kennedy, writing for the seven-member majority, ruled in favor of the baker because he found that Colorado's anti-discrimination law had not been neutrally applied to baker Phillips.[33] Some statements made by the Colorado Civil Rights Commission showed "clear and impermissible hostility toward the sincere religious beliefs that motivated [the baker's] objection."[34] Justice Kennedy also saw

29. *See* Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 283 (Colo. Ct. App. 2015), *cert. denied sub nom.* Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n, No. 14CA1351, 2016 WL 1645027 (Colo. Apr. 26, 2016).

30. *See Map of States with Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT (Sept. 18, 2019), http://www.lgbtmap.org/equality-maps/non_discrimination_laws. Guam and Puerto Rico also have such laws. *See id.*

31. 390 U.S. 400 (1968). The law at issue was the Civil Rights Act of 1964. *See id.* at 400.

32. *Id.* at 402 n.5.

33. *Masterpiece Cakeshop*, 138 S. Ct. at 1724 (pointing out that "whatever the outcome of some future controversy involving facts similar to these, the Commission's actions here violated the Free Exercise Clause; and its order must be set aside").

34. *Id.* at 1729.

hostility in the Commission's "difference in treatment" of the Masterpiece baker's case from the cases of three other bakers who refused on the basis of conscience to bake cakes with images conveying disapproval of same-sex marriage.[35] The Commission found that those bakers had not violated the public accommodations law. In Justice Kennedy's view, that differential treatment justified Phillips's concern that "the State's practice was to disfavor the religious basis of his objection."[36]

Although the Court declined to decide whether a business operator like Phillips is exempted from public accommodations laws because of his religious beliefs, several of the Justices hinted at their views. In the first line of a concurrence, Justice Gorsuch, joined by Justice Alito, cited *Smith* for its holding that "a neutral and generally applicable law will usually survive a constitutional free exercise challenge."[37] He then pointedly observed that "*Smith* remains controversial in many quarters."[38] Still, he agreed with Justice Kennedy that the Colorado Commission had violated *Smith*'s neutrality principle because it

35. *Id.* at 1730.

36. *Id.* at 1731. In the cases of concern to Justice Kennedy, there were three complaints from an individual who had approached bakers asking them to bake wedding cakes with explicit messages, based on the Bible, condemning same-sex marriage. *See id.* at 1730–31. The bakers refused to bake those cakes. *Id.* When the individual seeking those cakes filed complaints with the Commission, it concluded that the bakers acted lawfully in refusing service because they were legitimately concerned that the messages on the cakes, which they deemed to be hateful, would be attributed to them, and because "each bakery was willing to sell other products, including those depicting Christian themes, to the prospective customers." *Id.* at 1730. As Justice Kennedy saw it, when Phillips made his compelled speech argument—that an implicit pro-gay marriage message on the wedding cake would be attributed to him—or when he insisted that he would sell any of his other products to gay or lesbian customers, the Commission ignored those arguments or dismissed them as irrelevant. *Id.* Hence, in Justice Kennedy's view, the Commission showed hostility to the religious basis of Phillips's objection.

In dissent, Justice Ginsburg noted a crucial difference between Phillips's refusal to bake a wedding cake for the same-sex couple and the refusal of the other bakers to bake wedding cakes with messages condemning same-sex marriage: "Phillips declined to make a cake he found offensive where the offensiveness of the product was determined solely by the identity of the customer requesting it," a clear violation of Colorado's public accommodations law. "The three other bakers declined to make cakes where their objection to the product was due to the demeaning message the requested product would literally display." *Id.* at 1750–51 (Ginsburg & Sotomayor, JJ., dissenting).

37. *Id.* at 1734 (Gorsuch & Alito, JJ., concurring).

38. *Id.*

found the religious beliefs of the *Masterpiece* baker "offensive."[39]

In another concurring opinion, Justice Thomas, joined by Justice Gorsuch, agreed with Justice Kennedy's "hostility to . . . religion" rationale but also expressed approval of the baker's free speech claim.[40] Justice Thomas saw the baker as an artist who expressed himself through his cakes. The decision of the Colorado Commission thus compelled the baker to convey a message that he rejected. Justice Thomas apparently viewed the baker's claim as the kind of hybrid described by Justice Scalia in *Smith*—a claim that implicates the "Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press"—to which *Smith*'s rule does not apply.[41]

Taken together, the Gorsuch and Thomas concurrences indicate unmistakable hostility to *Smith*. One way or another, by overturning *Smith* or writing around it, Justices Gorsuch and Thomas seem determined to create a religious-belief exception to public accommodations laws when they next have an opportunity to do so, if they can persuade their colleagues.[42]

Recently, however, the Court passed on an opportunity to do just that.[43] Two bakers from Oregon, the Kleins, filed a petition for certiorari challenging a finding that they violated Oregon's anti-discrimination law by refusing to bake a wedding

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39. *Id.*

40. *Id.* at 1740 (Thomas & Gorsuch, JJ., concurring) (asserting that the Colorado court's "reasoning flouts bedrock principles of our free-speech jurisprudence and would justify virtually any law that compels individuals to speak," and that "[i]t should not pass without comment").

41. *See Smith*, 494 U.S. at 881.

42. There is further evidence that four justices are determined to undo *Smith*. Justice Alito recently filed a statement concurring in the denial of a certiorari petition with free exercise implications because unresolved factual questions in the case made it "difficult if not impossible" to decide the issues raised in the petition. *Kennedy v. Bremerton Sch. Dist.*, ___ U.S. ___, 139 S. Ct. 634, 635 (2019) (denying certiorari) (Alito, Thomas, Gorsuch & Kavanaugh, JJ., concurring) (concerning whether a public-school athletic coach has a First Amendment right to pray in the presence of his students). At the end of his statement, Justice Alito noted that "the Court drastically cut back on the protection provided by the free exercise clause" in *Smith*. *Id.* at 637. He then added that the Court had not been asked to "revisit" *Smith* in this particular case—an invitation for future such petitions. *Id.*

43. *See, e.g.*, Valerie Brannon, *Supreme Court Vacates Another Opinion Applying Antidiscrimination Laws to Religious Objectors* 1, CONG. RESEARCH SERV.—LEGAL SIDEBAR 10311 (June 19, 2019), *available at* https://fas.org/sgp/crs/misc/LSB10311.pdf.

cake for a same-sex couple.[44] The Kleins asked the Court to overturn *Smith* and find that Oregon's anti-discrimination law violated their free exercise rights.[45] Instead, the Court simply granted the certiorari petition, vacated the decision of the Oregon Court of Appeals, and remanded for reconsideration in light of *Masterpiece Cakeshop*.[46] The import of such a GVR order is always uncertain. In *Klein*, it could just mean avoidance of a difficult issue that the Court did not want to revisit so soon.[47] However, there was evidence in the record that one of the Oregon commissioners participating in the administrative decision had made public statements arguably hostile to the legal position of the Kleins. Hence, the *Masterpiece Cakeshop* concern with hostility to religion by the state agency enforcing the public accommodations law might have been in play.[48]

C. The Portent of Masterpiece Cakeshop

I am dismayed by the prospect that the Supreme Court might create a religious exception to anti-discrimination laws.[49]

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44. Klein v. Or. Bureau of Labor & Indus., 410 P.3d 1051 (Or. Ct. App. 2017), *cert. granted*, *judgment vacated*, ___ U. S. ___, 2019 WL 2493912 (Mem).

45. *See id.* at 1059.

46. Klein v. Or. Bureau of Labor & Indus., ___ U.S. ___, No. 18-547, 2019 WL 2493912 (Mem), at *1 (U.S. June 17, 2019). "GVR" stands for certiorari *granted*, lower court decision *vacated*, and case *remanded*. A GVR order indicates that the lower court should reconsider the case in light of new legal doctrine or cases decided after the lower court decision but before the Court grants a writ of certiorari. GVRs are sometimes construed as "a subtle (or not so subtle) hint that the court below might wish to try again, else the Supreme Court might be roused to actually reverse." Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—and an Alternative*, 107 MICH. L. REV. 711, 715 (2009).

47. *See* Linda Greenhouse, Opinion, *The Supreme Court Is Showing an Instinct for Self-Preservation, at Least Until Next Year's Election*, N.Y. TIMES (June 20, 2019), https://www.nytimes.com/2019/06/20/opinion/supreme-court-abortion-census.html/.

48. The standard for inquiry articulated by the Oregon Court of Appeals in *Klein* differed from the Court's inquiry in *Masterpiece Cakeshop*, which presented a zero-tolerance mentality. Even "subtle departures" from neutrality can poison the well under *Masterpiece Cakeshop*, whereas *Klein* required the decisionmaker to have prejudged the issue so extensively "as to be incapable of determining its merits on the basis of the evidence and arguments presented." *Klein*, 410 P.3d at 1078 (citation omitted).

49. The Court may soon have another opportunity to do so in *Fulton v. City of Philadelphia*, in which a petition for certiorari has been filed asking the Court to address whether Philadelphia violated the free exercise rights of a religious agency by excluding it from the city's foster care system because it refused to consider same-sex couples for foster-care placements. *See* Petition for a Writ of Certiorari*, Fulton v. City of Phila.*, No.

The warning shot about *Smith* from Justices Gorsuch and Alito in Justice Gorsuch's *Masterpiece Cakeshop* concurrence signals an attempt to overrule *Smith* and return to the *Sherbert* balancing test for state laws affecting religious practice.[50] If that happened, the justices would confront two issues in a case like *Masterpiece Cakeshop*. In a place of public accommodation, is a law that compels the owner to provide goods or services to same-sex couples, despite the owner's religious objections to same-sex marriage, a substantial burden on the free exercise of religion? If so, does a compelling government interest justify that burden? In my view, the answer to the substantial burden question is no; the answer to the compelling interest question is yes.

If, like the baker, you believed that same-sex marriage was religiously offensive and any degree of participation in same-sex marriage was wrong, what freedom would you have to express or practice that belief? Obviously, you could express that belief at home to anyone within earshot. You could stand in your town square and loudly proclaim your hostility to same-sex marriage. You could pray openly against same-sex marriage in a place of worship or anywhere you pray, and exercise your belief by attending a house of worship where such ceremonies are prohibited. In short, in our free society, with its robust protections for freedom of worship and freedom of speech, you have many opportunities to express your objections to same-sex marriage and practice your belief.

Nevertheless, if you decided to open a business offering goods and services to the public, you would no longer be praying or speaking in the privacy of your home or the sanctity of a place of worship. Instead, you would be participating in a marketplace, licensed and regulated by the government in many ways to protect the health and safety of the public. When you choose to go into business, you should know that your business is governed by anti-discrimination laws, like Colorado's public

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19-123 (Jul 22, 2019) (petitioning for writ of certiorari to the Third Circuit in *Fulton v. City of Phila.*, 922 F.3d 140 (3d Cir. 2019)); *see also* Mark Rienzi, *Symposium: The Calm Before the Storm for Religious-Liberty Cases?* SCOTUSBLOG (Jul. 26, 2019), https://www.scotusblog.com/2019/07/symposium-the-calm-before-the-storm-for-religious-liberty-cases/ (noting that the Supreme Court could "revisit or narrow *Smith*" if it granted certiorari in *Fulton*).

50. *See Masterpiece Cakeshop*, 138 S. Ct. at 1734 (Gorsuch & Alito, JJ., concurring); *id.* at 1740 (Thomas & Gorsuch, JJ., concurring).

accommodations statute forbidding the denial of goods and services to potential customers because of their sexual orientation. Or, as the price of doing business, you should know that the state, pursuant to its police power, might later oblige you to make a sale that you would find religiously offensive.

Does this obligation substantially burden your religious freedom, the first showing required by the *Sherbert* balancing test, even if you are free to express your opposition to same-sex marriage at home, in public, or in your place of worship, and even if you chose to enter a business governed by anti-discrimination laws? Those who supported the baker in the *Masterpiece Cakeshop* case answered that question with a resounding "yes"—your free exercise of religion is substantially burdened in exactly those circumstances. Indeed, Phillips's Supreme Court brief took the position that the First Amendment promises him "and all likeminded believers' freedom to live out their religious identity in the public square."[51] Former Attorney General Sessions similarly defended the free exercise of religion in the public square:

> Americans do not give up their freedom of religion by participating in the marketplace, partaking of the public square, or interacting with government; . . . free exercise of religion includes the right to act or abstain from action in accordance with one's religious beliefs.[52]

Clearly, when Phillips's counsel and former Attorney General Sessions refer to the "public square," they refer to something more than the literal public squares of this country, i.e., those many places where individuals and government interact, including schools, legislative halls, businesses, government offices, and government programs. According to the accommodation vision, the government abridges the free exercise of religion to the extent that it excludes religion from these places, or precludes religious exceptions to general laws that affect religious practices or beliefs. Hence, according to this

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51. Brief for Petitioners at *16, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 3913762 [hereinafter *Masterpiece* Petitioner's Brief].

52. *See* Sarah Posner, *The Christian Legal Army Behind* Masterpiece Cake Shop, NATION (Nov. 28, 2017), https://www.thenation.com/article/the-christian-legal-army-behind-masterpiece-cakeshop/.

expansive version of the accommodation vision, telling baker Phillips that, as the price of doing business, he must bake a cake for a same-sex wedding, contrary to his religious belief, is tantamount to telling him that he cannot pray as he wishes in his place of worship. And to avoid that denial of his religious preference, the courts must accommodate Phillips's free exercise right by protecting him from the application of an anti-discrimination law.

This argument cannot survive the *Sherbert* balancing analysis.[53] Under that framework, the Masterpiece baker must show that his religious exercise was substantially burdened by the requirement that he create the wedding cake. Several factors weigh against him. First, he was engaged in a business that he freely entered, knowing that the state regulated that business for the well-being of his customers. Second, he chose to bake wedding cakes as part of the business. Nobody compelled Phillips to make that choice, and he could change his business to make cakes for special events other than weddings. [54] Third, his characterization of his activity failed to establish that baking a cake for a wedding constitutes substantial participation in the event. Phillips did not claim that the wedding cake had, for example, the sacramental significance of bread and wine in a Roman Catholic or Eastern Orthodox Mass, such that cake-baking itself was a form of religious worship or practice. Given his choices prior to the same-sex couple's cake request, his peripheral involvement, if any, in the wedding ceremony that he opposed, and his freedom to express opposition to same-sex marriage in other settings, the baker's substantial-burden claim ignores the factors that minimize that burden.

Moreover, even if one concluded that the law imposed a substantial burden on Phillips's religious belief, this burden was justified by a compelling government interest—avoiding the indignity imposed on same-sex couples exercising their right to

53. *See Sherbert*, 374 U.S. at 406.

54. This is not a case like *Sherbert*, in which an individual was forced to choose between forsaking her religious beliefs or being ineligible for a government benefit. *See id.* (finding a substantial burden where law required petitioner "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand").

marry by denying them a public service available to others.[55] Indeed, avoiding harm to others is an important consideration in the free exercise analysis.[56] That consideration should doom any claim for a religious exception to anti-discrimination laws in the public square.

III. *TRINITY LUTHERAN*: THE ASCENDENCY OF THE FREE EXERCISE CLAUSE OVER THE ESTABLISHMENT CLAUSE

A. Accommodation for Religious Institutions

In *Trinity Lutheran*, a different kind of Free Exercise case with Establishment Clause implications, the Court had to decide if the exclusion of a religious organization from participation in a public program on separationist grounds violated the free exercise rights of the organization. Missouri's Department of Natural Resources offered grants to public and private schools, non-profit daycare centers, and other non-profit organizations to help them purchase rubber playground surfaces made from recycled tires. When the Trinity Lutheran Church applied for such a grant for its pre-school and daycare learning center, the Department denied the grant because the Missouri Constitution has a provision, justified on Establishment Clause grounds, stating that "no money shall ever be taken from the public

55. *See Masterpiece Cakeshop*, 138 S. Ct. at 1746 (describing the interests asserted by the state of Colorado as avoiding the "denigrat[ion] [of] the dignity of same-sex couples [and] assert[ion] [of] their inferiority" (quoting Brief for Respondents, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, at *39, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4838415 (quoting J.E.B. v. Alabama ex rel. T. B., 511 U.S. 127, 142 (1994) and Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring)).

56. *See* Christopher C. Lund, *Religious Exemptions, Third Party Harms, and the Establishment Clause*, 91 NOTRE DAME L. REV. 1375, 1476 (2016) (asserting that "[t]he general principle . . . that burdens on third parties matter . . . is well established"); Christopher C. Lund, *Exploring Free Exercise Doctrine: Equal Liberty and Religious Exemptions*, 77 TENN. L. REV. 351, 371 (2010) (referring to commentators who "see RFRA as deeply problematic because they believe it gives far too much power to religious claimants to avoid their legal obligations," thus giving religious people both "a presumptive right to disobey the law" and "undue preference over their nonreligious counterparts"); *see also* JOHN STUART MILL, ON LIBERTY 22–23 (3d ed. 1864) (discussing the harm principle).

treasury, directly or indirectly, in aid of any church, sect or denomination of religion."[57]

Writing for a seven-member majority, Chief Justice Roberts noted the agreement of the parties that the Establishment Clause does not prevent Missouri from including Trinity Lutheran in the playground program. As he put it, however, that agreement "[d]oes not . . . answer the question under the Free Exercise Clause, because we have recognized that there is 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels."[58]

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57. *Trinity Lutheran*, 137 S. Ct. at 2017–18 (quoting MO. CONST. art. I, § 7). Called Blaine Amendments after Congressman James Blaine of Maine, who tried unsuccessfully in 1875 to add language of this type to the First Amendment, such provisions are still found in the constitutions of thirty-eight states. *See, e.g.*, Mike McShane, *Does a Justice Kavanaugh Mean that Blaine Amendments are History?* FORBES (July 10, 2018), https://www.forbes.com/sites/mikemcshane/2018/07/10/does-a-justice-kavanaugh-mean-that-blaine-amendments-are-history/#ed0c576e743a; Charlie Melcombe & Stanley Carlson-Thies, *Supreme Court Upholds Equal Treatment for Faith-Based Organizations to Access Public Funding*, INST'L RELIGIOUS FREEDOM ALLIANCE (Aug. 10, 2017), http://www.irfalliance.org/supreme-court-upholds-equal-treatment-for-faith-based-organizations-to-access-public-funding/. In origin, Blaine Amendments were designed to block public funding for Catholic schools. McShane, *supra* this note; Melcombe & Carlson-Thies, *supra* this note.

58. *Trinity Lutheran*, 137 S. Ct. at 2019. The phrase used by the Chief Justice, "play in the joints," appears often in cases dealing with the tension between the Establishment Clause and the Free Exercise Clause. However, it does not always refer to the tension "between what the Establishment Clause permits and the Free Exercise Clause compels." For example, in the case in which the phrase was first used, *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), it described the space between what the Establishment Clause prohibits and the Free Exercise Clause prohibits: "[W]e will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts, there is *room for play in the joints* productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* at 669 **(**emphasis added). Justice Ginsburg has explained the phrase differently: "This Court has long recognized that the government may . . . accommodate religious practices . . . without violating the Establishment Clause." Cutter v. Wilkinson, 544 U.S. 709, 713 (2005) (citing Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987), and noting that Locke v. Davey, 540 U.S. 712 (2004) acknowledges the "'play in the joints between' the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause"). And there is this version in *Locke* itself: "There are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause," *Locke*, 540 U.S. at 719 (finding a state statute prohibiting state aid to secondary students pursuing theology constitutional under the First Amendment), a meaning contrary to the one invoked by the Chief Justice. In short, "play in the joints" is a slippery phrase with no settled meaning.

Referring to *Smith* and its progeny, the Chief Justice wrote that

> in recent years, when this Court has rejected free exercise challenges, the laws in question have been neutral and generally applicable without regard to religion. We have been careful to distinguish such laws from those that single out the religious for disfavored treatment.[59]

Missouri had engaged in such disfavored treatment because its categorical exclusion of religious institutions from a program otherwise open to public and private schools meant that these institutions had to "renounce [their] religious character" to participate.[60] Thus, the program "impos[ed] a penalty on the free exercise of religion."[61]

Given that the Missouri law was not a neutral law of general applicability, the Court evaluated it under the "strictest scrutiny,"[62] noting that it could "be justified only by a state interest of the highest order."[63] The state defended the law with its desire to "skate[] as far as possible from religious establishment concerns."[64] But Chief Justice Roberts was not impressed: "In the face of the clear infringement on free exercise before us, that interest cannot qualify as compelling."[65] The Court held that Missouri could not exclude Trinity Lutheran from the playground-grant program.

In dissent, Justice Sotomayor, joined by Justice Ginsburg, rejected the majority's premise that *Trinity Lutheran* was primarily a free exercise case. Indeed, she chided the majority for mentioning the Establishment Clause only to note the parties' agreement that inclusion of the church in the program would not violate the Establishment Clause. Constitutional questions, she said, "are decided by this Court, not the parties' concessions."[66]

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59. *Trinity Lutheran*, 137 S. Ct at 2020.
60. *Id.* at 2024.
61. *Id.* at 2019.
62. *Id.* at 2022 (citing *Sherbert*).
63. *Id.* at 2019 (citation and internal quotation marks omitted).
64. *Id.* at 2024.
65. *Id.*
66. *Id.* at 2028 (Sotomayor & Ginsburg, JJ., dissenting).

For Justice Sotomayor, the key question in the case was whether the public funds at issue subsidized religion—"the touchstone," as she saw it, "of establishment jurisprudence."[67] Justice Sotomayor answered that question by rejecting the notion that the playground surfaces of Trinity Lutheran's learning center are somehow separate from the religious beliefs and worship of the church. She did not see how those playground surfaces could be confined to "secular use any more than lumber used to frame the church's walls, glass stained and used to form its windows, or nails used to build its altar."[68] In her view, whenever "funds flow directly from the public treasury to a house of worship,"[69] the government is directly funding religious exercise in violation of the Establishment Clause. Missouri avoided that violation by excluding churches from participation in the playground-grant program, and Justice Sotomayor concluded that it should not be ordered to do otherwise.[70] Indeed, as she saw it, Missouri was prohibited by the Establishment Clause from doing what Chief Justice Roberts said the Free Exercise Clause required it to do.

B. How Much Accommodation?

The accommodation rationale of *Trinity Lutheran*, focusing on a government grant program available to public and private organizations seeking to improve their playground surfaces, evoked a hard question about the consequences of the separation vision of the Establishment Clause. If religiously affiliated organizations provide important services, such as education, daycare, nutrition, or home health care, what purpose is served by denying public support for these programs other than preserving a strict separation between church and state? According to Justice Sotomayor, "what purpose" is the wrong question: the use of public funds to subsidize the ostensibly non-religious activities of a church or religiously affiliated

67. *Id.* at 2030.

68. *Id.*

69. *Id.* at 2028–29.

70. *Id.* at 2040 ("A State's decision not to fund houses of worship does not disfavor religion; rather, it represents a valid choice to remain secular in the face of serious establishment and free exercise concerns.").

organization inescapably subsidizes its religious activities, no matter how far removed those non-religious activities are from the core of religious belief and worship.[71] For the adherents of this strict separation vision, keeping religion out of the public square, even in the form of government grant programs, is faithful to the Establishment Clause's intent to keep government and religion as separate as possible. In their view, history is replete with tragic examples of the volatile mix of government and religion.

However, given the decisions of Justice Breyer and Justice Kagan to join the opinion of Chief Justice Roberts in *Trinity Lutheran*,[72] the strict separation vision is now a distinctly

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71. Nevertheless, Justice Sotomayor does not invoke the "wall of separation" metaphor in her *Trinity Lutheran* dissent. *See Trinity Lutheran*, 137 S. Ct. at 2027–41 (Sotomayor & Ginsburg, JJ., dissenting). The phrase does not appear in the Constitution or the drafters' contemporaneous documents. It was first used by Thomas Jefferson, in an 1802 letter to the President of the Danbury Baptist Association. *See* DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 48 (2002) (reproducing Ltr. from Thomas Jefferson, Pres. of the U.S., to Danbury Baptist Assn. (Jan. 1, 1802) [hereinafter "*Danbury Letter*"]). It was adopted by the Supreme Court in *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (holding that a federal law criminalizing bigamy does not violate the Free Exercise Clause), and the Court used it later in *Everson*, 330 U.S. at 16 (holding that a state law reimbursing parents for transportation costs to private schools, including religious schools, did not violate the Establishment Clause). More recently, the authority of that metaphor has been questioned. *See* Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) (noting Jefferson's absence from the country when the Bill of Rights was under consideration by Congress and describing the Danbury Letter as a "short note of courtesy"); *but see* DREISBACH, *supra* this note, at 26 (noting that President Jefferson did not dismiss correspondence like the congratulatory note he received from the Baptist committee in Danbury with "merely a cordial response in kind" and explaining that he "thought such correspondence furnished an occasion for 'sowing useful truth & principles among the people, which might germinate and become rooted among their political tenets'" (quoting Ltr. from Thomas Jefferson, Pres. of the U.S., to Levi Lincoln, Att'y Gen. of the U.S. (Jan 1, 1802)). See *infra* note 170 for a full reproduction of the passage from the Danbury Letter in which President Jefferson used the "wall of separation" metaphor for the first time.

72. Justice Breyer has not supported a strict separation view of the Establishment Clause for some time. *See* Van Orden v. Perry, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in the judgment) (explaining that the Establishment Clause, read against the background of history, cannot "compel the government to purge from the public sphere all that in any way partakes of the religious" (citation omitted)); *see also* Howard Friedman, *Justice Breyer Discusses Establishment Clause*, RELIGION CLAUSE (Jan. 26, 2006), http://religionclause.blogspot.com/2006/01/justice-breyer-discusses-establishment.html (reporting that, in a then-recent dialogue with the Kesher Israel Congregation in the District of Columbia, "[Justice] Breyer said the Establishment Clause was designed not as an 'absolute separation' of church and state, but as a way to 'minimize social conflict based on religion'").

minority vision on the Court. Moreover, the most relevant history does not support the strict separation vision articulated by Justice Sotomayor. As Judge McConnell, a prolific writer on church/state issues, puts it,

> [e]xponents of strict separation are embarrassed by the many breaches in the wall of separation countenanced by those who adopted the First Amendment: the appointment of congressional chaplains, the provision in the Northwest Ordinance for religious education, the resolutions calling upon the President to proclaim days of prayer and thanksgiving, the Indian treaties under which Congress paid the salaries of priests and clergy.[73]

And he argues against the "constitutional rule of secularism"[74] apparently favored by Justice Sotomayor in her *Trinity Lutheran* dissent.[75] He believes that, with respect to government financial-assistance programs, the government must strike a neutral position between religion and secularism, as well as between religions.[76]

Abstractly, that proposition—supporting with public funds the socially valuable programs of religious institutions that mirror the programs of secular institutions—makes sense. The difficulty arises when the ostensibly secular program of a religious institution approaches the core of religious worship. As Justice Sotomayor noted, with *Lemon* still on the books, government aid that has the purpose or effect of advancing religion violates the Establishment Clause,[77] which "prohibits the direct funding of religious activities."[78]

These formidable establishment constraints explain why the majority opinion in *Trinity Lutheran* was greeted so enthusiastically in accommodation quarters. It is a prime

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73. Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 939 (1986). The author was a professor of law at the University of Chicago when he wrote this article and is now a professor at Stanford Law School. In between those academic appointments, however, he was Judge McConnell of the United States Court of Appeals for the Tenth Circuit.

74. *Id.* at 940 (concluding that the government can "pursue its legitimate purposes even if to do so incidentally assists the various religions").

75. *See* 137 S. Ct. at 2030 (Sotomayor & Ginsburg, JJ., dissenting) (pointing out that "[t]he Church has a religious mission, one that it pursues through the Learning Center").

76. McConnell, *supra* note 73, at 940.

77. *See Trinity Lutheran*, 137 S. Ct. at 2029 (Sotomayor & Ginsburg, JJ., dissenting).

78. *Id.*at 2030.

example of the accommodation vision of the Religion Clauses of the First Amendment: a narrow view of the Establishment Clause and an expansive view of the Free Exercise Clause.

I am not troubled by the *Trinity Lutheran* outcome on its facts. Playgrounds are far from the core of religious worship. The challenge going forward, however, will be the formulation of a limiting principle so that the free exercise rationale of *Trinity Lutheran*—that government may not impose an impermissible choice on a religious institution—does not engulf the Establishment Clause in cases where there is a demand for the inclusion of religious institutions in public benefits programs that fall closer to the core of worship.

Those cases are surely coming,[79] and the justices know it. In a controversial footnote in *Trinity Lutheran*, the likely price for getting some of the other justices to join his opinion, Chief Justice Roberts wrote: "This case involves express discrimination based on religious identity with respect to

79. *See* Association of Christian Schools International News Release, *ACSI Hails Landmark Supreme Court 7-2 Ruling in Religious Liberty Case* (June 26, 2017), *available at* https://www.acsi.org/Documents/Legal%20Legislative/LAC/Trinity%20Lutheran%20SCOTUS%20Ruling_web.pdf ("This victory means that government cannot discriminate against religious organizations and exclude them from receiving a generally available public benefit simply because they are religious. It calls into question state Blaine amendments which have been used to exclude faith-based institutions from public programs of general application."). The Supreme Court has now granted certiorari in such a case. *See* Espinoza v. Mont. Dep't of Revenue, No. 18-1195, ___ U.S. ___, 139 S. Ct. 2777 (June 28, 2019) (granting certiorari). *Espinoza* addresses whether it violates principles of free exercise or equal protection for a state court to invalidate a state program as violating its state constitution because it would benefit religious institutions. The Montana Supreme Court struck down a state tax-credit program for parents sending their children to private secular or religious schools. Espinoza v. Mont. Dep't of Revenue, 435 P.3d 603, 612 (Mont. 2019), *cert. granted*, ___ U.S. ___, 139 S. Ct. 2777 (2019). However, after the Montana Supreme Court's decision, the state stopped providing tax credits altogether (to both secular and religious schools), so the question before the Court is whether invalidating the program on state constitutional grounds violates the Free Exercise Clause. *See* Erwin Chemerinsky, *Chemerinsky: Weighty Matters Load the Supreme Court's Next Term*, A.B.A. J. (Oct. 3, 2019, 6:00 AM CDT), http://www.abajournal.com/news/article/chemerinsky-an-exceptionally-important-term-at-the-supreme-court. For this reason, several scholars have suggested that *Espinoza* may not be a useful vehicle for expanding *Trinity Lutheran*'s holding. *See id.*; Linda Greenhouse, *Religious Crusaders at the Supreme Court's Gates*, N.Y. TIMES (Sept. 12, 2019), https://www.nytimes.com/2019/09/12/opinion/supreme-court-religion.html (comparing *Espinoza* to a civil rights era case, *Palmer v. Thompson*, 403 U.S. 217 (1971), which held that a Mississippi city's decision to close its public swimming pools altogether, rather than integrate them, did not violate the equal-protection right of its black citizens because both white and black residents were deprived of a place to swim).

playground resurfacing. We do not address religious uses of funding or other forms of discrimination."[80] In a concurring opinion joined by Justice Thomas, Justice Gorsuch took strong exception to this footnote, calling it an "ad hoc improvisation" that

> some might mistakenly read . . . to suggest that only "playground resurfacing" cases, or only those with some association with children's safety or health, or perhaps some other social good we find sufficiently worthy, are governed by the legal rules recounted in and faithfully applied by the court's opinion.[81]

Like the drama that will unfold in the public square in a sequel to *Masterpiece Cakeshop*, the sequel to *Trinity Lutheran* will be divisive and portentous, forcing lower courts, and eventually the Supreme Court, to weigh the competing Free Exercise and Establishment Clause concerns generated by these public benefit cases.

IV. *TOWN OF GREECE*: TRADITION AND RELIGIOUS MINORITIES

Protecting religious minorities has long been at the forefront of First Amendment jurisprudence.[82] The Court's 2014 decision in *Town of Greece* reversed that paradigm, favoring a majority religious practice over the concerns of religious minorities.

A. Precedent: Marsh v. Chambers

Marsh v. Chambers,[83] decided in 1983, is essential for understanding *Town of Greece*. The *Marsh* Court "found no First Amendment violation in the Nebraska Legislature's

80. *Trinity Lutheran*, 137 S. Ct. at 2024 n.3.

81. *Id.* at 2026 (Gorsuch & Thomas, JJ., concurring in part).

82. *Cf. Smith*, 494 U.S. at 902 (O'Connor, J., concurring in the judgment) (pointing out that "the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups"); *Everson*, 330 U.S. at 8–10 (explaining that the chief evil addressed by the Establishment Clause is hostility toward religious dissenters).

83. 463 U.S. 783 (1983).

practice of opening its sessions with a prayer delivered by a chaplain paid from state funds."[84] Noting that Congress had practiced legislative prayer since the Constitution's framing, and that the majority of state legislatures then used legislative prayers, the Court concluded that "legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause."[85]

Relying on history and tradition to justify Nebraska's legislative prayer, the Court in *Marsh* chose not to apply the Establishment Clause test set forth in *Lemon*.[86] This three-part test—requiring a secular legislative purpose, a principal or primary effect that neither advances nor inhibits religion, and an effect that does not foster an "excessive entanglement with religion"[87]—was not casually derived. Instead, it reflects "consideration of the cumulative criteria developed by the Court over many years."[88] And it is a stringent test. The statute or governmental practice at issue has to meet each part of the test to survive an Establishment Clause challenge. That stringency prompted the majority in *Marsh* to rely on history and tradition as a more congenial way to analyze the constitutionality of Nebraska's legislative prayer.[89]

B. Town of Greece*'s Message to Minority Religious Groups*

Town of Greece pushed the boundaries of *Marsh* into new territory. In 1999, Greece assigned a town employee to find someone to lead the assembled in prayer at the start of each meeting of the town council. The employee made calls every

84. *Town of Greece*, 572 U.S. at 575 (describing *Marsh*, 463 U.S. at 792).

85. *Id.*

86. *Lemon*, 403 U.S. at 607 (finding statute that provided state funding for non-public, non-secular schools in violation of the Establishment Clause because it created excessive entanglement of state and church).

87. *Id.* at 612–13. The *Lemon* test has been applied to governmental practices as well as to statutes. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984) (applying *Lemon* test to uphold city's practice of displaying a crèche among other Christmas decorations, such as a Santa Claus house and reindeer).

88. *Lemon*, 403 U.S. at 612.

89. *Marsh*, 463 U.S. at 786. In dissent, Justice Brennan chided the majority for this refusal to apply *Lemon*. *See id.* at 797 ("The Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal 'tests' that have traditionally structured our inquiry under the Establishment Clause.").

month to congregations mentioned in a local newspaper or local directory, both of which listed only Christian churches, until she found an available clergyperson. As a result, all the prayer leaders from 1999 to 2007 were Christian. Most of their prayers invoked "Jesus," "Christ," "your Son," or the "Holy Spirit," and they usually closed with phrases like "in the name of Jesus Christ" or "in the name of your Son." Often, the prayer leader would ask the members of the public to stand during the prayer.[90]

Not surprisingly, two residents—one a Jew, the other an atheist—sued the town, asserting that it had violated the Establishment Clause by preferring Christians over other prayer leaders and by sponsoring sectarian prayers. They sought an injunction that would limit the town to "inclusive and ecumenical" prayers that referred only to a "generic God" and would not associate the government with any one faith or belief.

The complaining residents lost in the district court but won before the Second Circuit, which applied a modified version of the *Lemon* test and concluded that the town's prayer practice impermissibly endorsed Christianity.[91] But the Supreme Court held, in a five-to-four decision written by Justice Kennedy, that the town's prayer practice did not violate the Establishment Clause.[92]

As in *Marsh*, the Court in *Town of Greece* relied on history and tradition, and ignored *Lemon*, in finding Greece's prayer practice constitutional. Indeed, the parties in their briefing did not even argue that *Lemon* governed.[93] Still, Justice Kennedy

90. *Town of Greece*, 572 U.S. at 571–72.

91. Galloway v. Town of Greece, 681 F.3d 20 (2d Cir. 2012). The "endorsement test" was first developed by Justice O'Connor in *Lynch*. *See* 465 U.S. at 687 (O'Connor, J., concurring). Justice O'Connor explained that there were "two principal ways" in which government might violate the Establishment Clause: by fostering "excessive entanglement" between government and religious institutions, or by communicating endorsement or disapproval of religion. *Id.* at 687–91. The endorsement test combines the purpose and effects prongs of the *Lemon* test into one "endorsement prong." The Supreme Court adopted Justice O'Connor's formulation of the endorsement test in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) 573, 594–97 (1989) (describing the rationale of the majority opinion in *Lynch* as "none too clear" and relying on Justice O'Connor's concurrence to apply the endorsement test).

92. *Town of Greece*, 572 U.S. at 575.

93. The Town of Greece discussed *Lemon* in its petition for certiorari, primarily to characterize it as inapplicable to the case. *See* Petition for Writ of Certiorari, *Town of*

felt the need to justify once again the choice made in *Marsh* to "carve out an exception" to the court's Establishment Clause jurisprudence: "The Court in *Marsh* found those [*Lemon*] tests unnecessary because history supported the conclusion that legislative invocations are compatible with the Establishment Clause."[94] Thus, he said, any Establishment Clause test "must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change,"[95] and the relevant inquiry in *Town of Greece* was "whether the prayer practice . . . fits within the tradition long followed in Congress and the state legislatures."[96]

The plaintiffs argued that the town's prayer practice did not fit within that tradition because the sectarian language of the prayers violated the Establishment Clause principle of neutrality, and the impact of the prayers on some members of the public violated its prohibition against government coercion of religious practice. Non-Christians seated in the public meeting space at the town hall during the prayer would feel that they must "remain in the room or even feign participation in order to avoid offending the representatives who sponsor the prayer and will vote on matters citizens bring before the board."[97]

Justice Kennedy rejected the sectarian-prayer argument with notable heat. These seriatim statements capture his tone:

> An insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court's cases.[98]

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Greece v. Galloway, 572 U.S. 565 (2014) (No. 12-696), 2012 WL 6054799, at *18–*19. Similarly, the complaining citizens did not primarily rely on *Lemon* in their brief, arguing instead that the town's prayer practice was unconstitutionally "coercive." *See* Brief for Respondents, *Town of Greece v. Galloway*, 572 U.S. 565 (2014) (No. 12-696), 2013 WL 5230742, at *17–*18; *but see* Brief of Erwin Chemerinsky & Alan Brownstein as Amici Curiae in support of Respondents, *Town of Greece v. Galloway*, 572 U.S. 565 (2014) (No. 12-696), 2013 WL 5323367 at *3–*4 (advocating reliance on *Lemon*).

94. *Town of Greece*, 572 U.S. at 575.

95. *Id.* at 577.

96. *Id.*

97. *Id.*

98. *Id.* at 578.

> The decidedly Christian nature of these prayers must not be dismissed as the relic of a time when our Nation was less pluralistic than it is today.[99]
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> Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy.[100]
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> *****
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> The First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech. Once it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian.[101]

Are there any protections for religious minorities in this embrace of sectarian legislative prayer? Not many:

> If the course and practice over time shows that the invocation denigrates nonbelievers or religious minorities, threatens damnation, or preach[es] conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court.[102]

In other words, nonbelievers and religious minorities attending a council meeting in Greece must be pummeled with threats of damnation or conversion before they might have a cognizable grievance about sectarian legislative prayer.

As for coercion, Justice Kennedy noted that some of the plaintiffs stated at trial that "the prayers gave them offense and made them feel excluded and disrespected," but, he pointed out, "[o]ffense . . . does not equate to coercion."[103] To the contrary, he said, "[o]ur tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial

99. *Id.* at 579.
100. *Id.* at 581 (citation omitted).
101. *Id.* at 582.
102. *Id.* at 583.
103. *Id.* at 589.

prayer delivered by a person of a different faith."[104] If they cannot tolerate such a prayer, and they chose to "exit the [council] room during a prayer they find distasteful, their absence will not stand out as disrespectful or even noteworthy."[105] If they chose to remain in the room, their "quiet acquiescence will not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed."[106]

Justice Kagan wrote the principal dissent—joined by Justices Ginsburg, Breyer, and Sotomayor—in which she agreed with the decision in *Marsh*. She did not believe that a town hall meeting must "become a religion-free zone."[107] She accepted Justice Kennedy's description of the issue as "whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures."[108] But unlike Justice Kennedy, she concluded that it did not.

Whereas the prayer practice in *Marsh* "ha[d] [not] been exploited to proselytize or advance any one . . . faith or belief,"[109] Justice Kagan noted that the prayers in the Greece council meetings were "constantly" and "exclusively" Christian.[110] Hence those prayers violated the Establishment Clause's neutrality requirement, which prohibits the government from favoring or aligning itself with any particular creed.[111]

Addressing the issue of coercion, Justice Kagan envisioned a Muslim resident of Greece, present at the council meeting only because she wants to conduct some business. The Muslim woman (who could be a member of any religious minority) immediately faces a dilemma described by Justice Kagan:

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104. *Id.* at 584 (citation omitted).

105. *Id.* at 590. For a similar perspective, see *Ill. ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 232–33 (1948) (Jackson, J., concurring) (expressing skepticism toward Establishment Clause claim where child could "join religious classes [at his public school] if he cho[se] . . . or . . . stay out of them" because, although "the Constitution . . . protects the right to dissent," it "may be doubted" whether it offers "protect[ion] . . . from the embarrassment that always attends nonconformity").

106. *Town of Greece*, 572 U.S. at 590.

107. *Id.* at 616 (Kagan, Ginsburg, Breyer & Sotomayor, JJ., dissenting).

108. *Id.* at 622.

109. *Id.* at 627 (quoting *Marsh*, 463 U.S. at 794–95).

110. *Id.*at 627–28.

111. *Id.*at 629 (noting that the prayer practice in Greece could not rely on "the protective ambit of *Marsh* and the history on which it relied").

> She does not wish to be rude to her neighbors, nor does she wish to aggravate the Board members whom she will soon be trying to persuade. . . . And she thus stands at a remove, based solely on religion, from her fellow citizens and her elected representatives.[112]

In reality, that Muslim woman has only three options: acquiesce in the prayer practice by standing with everyone else when the minister asks them to do so; sit and seem disrespectful; or leave the council chambers. She does not want to do any of those. At the heart of her dilemma is government coercion.

C. The Accommodation Vision Gone Awry

As I have written before,[113] *Town of Greece* is a terrible decision, an example of the accommodation vision gone awry. Justice Kennedy gave primacy in the public square—here, the public meeting space in a town hall—to Christian prayer, without understanding its impact on those who do not share Christian beliefs. As Professor Neuborne put it, until *Town of Greece*,

> [t]he Court always asked whether the nonbelieving hearer was made to feel like an outsider in her own land. After *Town of Greece*, nonbelieving hearers subjected to government-sponsored religious speech may well be told "Get a thicker skin. After all, this is a Christian country. You're here as a tolerated guest."[114]

Or, as longtime Supreme Court observer Linda Greenhouse explained,

> [c]lassically, the Supreme Court invoked the religion clauses of the First Amendment . . . on behalf of minority religions. Rulings on behalf of Jehovah's Witnesses who wouldn't salute the flag, Amish parents who wouldn't send their children to high school and non-Christians who

112. *Id.* at 630, 631.

113. *See* Kermit V. Lipez, *George Washington, Elena Kagan, and the Town of Greece, New York: The First Amendment and Religious Minorities*, 16 J. APP. PRAC. & PROCESS 1 (2015).

114. BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT 143–44 (2015).

> objected to organized prayer in public school form the backbone of the First Amendment canon.[115]

But in *Town of Greece*, "the court's concern . . . flipped," and the Court invoked the accommodation vision of the Establishment Clause on behalf of a majority religion.[116]

That flip would not have occurred if the Court had applied the *Lemon* test to Greece's prayer practice. Although using a prayer to solemnize the deliberations of the council meets the secular-purpose requirement of the *Lemon* test, Greece's prayer practice fails *Lemon*'s neither-advance-nor-inhibit requirement. That practice advanced Christianity, exclusively offering Christian prayers that "sen[t] a message to nonadherents that they [were] outsiders, not full members of the political community, and an accompanying message to adherents that they [were] insiders, favored members of the political community."[117] What followed was the religious divisiveness that the Establishment Clause was designed to prevent.[118]

That likelihood of a negative outcome for Greece's prayer practice if the *Lemon* test had been applied explains Justice Kennedy's decision to eschew *Lemon* in favor of a test that would "acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change."[119] *Lemon* does not include an historical analysis that revisits a country in the late eighteenth century that was almost exclusively Christian. Instead, its purpose, effect, and excessive-entanglement prongs focus on the here and now in a country that is far more religiously diverse than the country known to the Framers.

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115. Linda Greenhouse, *How the Supreme Court Grasps Religion*, N.Y. TIMES (May 10, 2018), https://www.nytimes.com/2018/05/10/opinion/supreme-court-religion.html.

116. *Id.*

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

118. *See Van Orden*, 545 U.S. at 698 (Breyer, J., concurring in the judgment) (explaining that one of the "basic purposes" of the Establishment Clause is "to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike"); *see also* Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1834 (2009) (referring to "the prevention of division along religious lines or of alienation" as "the themes that dominate contemporary thought about disestablishment").

119. *Town of Greece*, 572 U.S. at 577.

If history and tradition control the contemporary application of the Establishment Clause, it is easy to understand Justice Kennedy's comfort with the exclusively Christian prayers offered in the town of Greece. However, his comfort is not shared by the non-Christians who, he said, could "leave the room." And that is why the debate over the preservation of the *Lemon* test is so consequential. The elimination of *Lemon* in favor of a historically rooted practice test would most likely mean, over time, the greater presence of historically dominant Christian traditions in the public square, even as our country becomes more pluralistic.[120]

V. *AMERICAN LEGION* AND THE FUTURE ROLE OF RELIGION IN THE PUBLIC SQUARE

Recently decided by the Court, *American Legion* addressed the constitutionality of a thirty-two foot[121] concrete Latin cross[122] on public land. With much more disarray among the Justices, this case renewed the debate about the use of history and tradition in Establishment Clause jurisprudence and the preservation of the *Lemon* test.

120. *See* Philip A. Hamburger, *Equality and Diversity: The Eighteenth-Century Debate about Equal Protection and Equal Civil Rights*, 1992 SUP. CT. REV. 295 (1992) (describing religious—and overtly Christian—character of early civil-rights discourse).

121. Actually, if one considers the pedestal on which the Cross stands, it is about forty feet high. *See* Marty Lederman, *Three Things About the "Peace Cross" Case that Everyone Should—But Not Quite Everyone Does—Agree Upon*, BALKINIZATION (Feb. 25, 2019), https://balkin.blogspot.com/2019/02/three-things-about-peace-cross-case.html.

122. In *American Legion*, the Court described the "Latin cross" as follows:

> The Latin form of the cross "has a longer upright than crossbar. The intersection of the two is usually such that the upper and the two horizontal arms are all of about equal length, but the lower arm is conspicuously longer." G. Ferguson, Signs & Symbols in Christian Art 294 (1954). See also Webster's Third New International Dictionary 1276 (1981) ("latin cross, n.": "a figure of a cross having a long upright shaft and a shorter crossbar traversing it above the middle").

American Legion, 139 S. Ct. at 2075 n.6.

A. Two Precedents: Van Orden v. Perry *and* McCreary County v. ACLU of Kentucky

In 2005, the Supreme Court decided two so-called passive symbol cases, *Van Orden v. Perry*[123] and *McCreary County v. ACLU of Kentucky*[124]—both involving displays of the Ten Commandments—that framed the doctrinal debate in *American Legion*. In *Van Orden*, the Court upheld the constitutionality of a six-foot granite monolith displaying the Ten Commandments erected in 1961 between the state capital and the supreme court building in Austin, Texas. Justice Breyer's concurrence holding that monument consistent with the Establishment Clause became the controlling opinion of the Court in *Van Orden*.[125] In *McCreary*, in which the Court declared unconstitutional two Kentucky-courthouse displays of the Ten Commandments installed in 1999, Justice Breyer provided the fifth vote for the majority. However, the analytical approaches he adopted in the two cases were quite different.

In his concurrence in *Van Orden*, Justice Breyer applied a multi-factor analysis that requires the exercise of "legal judgment" rather than reliance on any particular test.[126] In *McCreary*, Justice Breyer joined a decision written by Justice Souter applying the *Lemon* test and concluding that the displays failed the first prong of the *Lemon* test because the displays were religiously motivated and not neutral. As Justice Souter put it, "we have not made the purpose test a pushover for any secular claim."[127] With these models of decisionmaking before the Court in *American Legion*,[128] the Justices had to choose between them.

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123. 545 U.S. 677 (2005).

124. 545 U.S. 844 (2005).

125. Justice Breyer's concurrence controls because, under Supreme Court practice, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, 'the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds.'" Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Ga., 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell & Stevens, JJ.)).

126. *Van Orden*, 545 U.S. at 700 (Breyer, J., concurring).

127. *McCreary*, 545 U.S. at 864.

128. *See American Legion*, 139 S. Ct. 2067, at 2074–76; *see also id.* at 2083 (discussing *Van Orden*, *McCreary*, and the secular motivations behind placement of Ten Commandments monuments around the country in the 1950s).

B. A Plethora of Opinions

In 1918, a committee appointed in Prince Georges County, Maryland, to design and erect a World War I memorial settled on the large Latin cross that now stands at the terminus of the National Defense Highway, which connects Washington, D.C., to Annapolis.[129] Known as the Bladensburg Cross or Peace Cross, it sits on a large pedestal that displays the American Legion's emblem and the words "Valor," "Endurance," "Courage," and "Devotion." The pedestal also features a large plaque listing the names of the forty-nine local men who died in the War and explaining that the monument is "dedicated to the heroes of Prince Georges County, Maryland who lost their lives in the great war for the liberty of the world."[130]

Over the years, memorials honoring the veterans of other conflicts have been added to the surrounding area, which is now known as Veterans Memorial Park, but the limited space around the Peace Cross has left the closest of these other monuments 200 feet away.[131] In 1961, the Maryland-National Capital Park and Planning Commission acquired the Cross and the land on which it sits to preserve the monument and address traffic safety concerns.[132] Since then, the Commission has spent $117,000 to maintain and preserve the Cross, and it budgeted an additional $100,000 for renovations and repairs to the Cross in 2008.[133]

In 2012, the American Humanist Association[134] sued the Commission, alleging that the Cross's presence on public land

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129. *Id.* at 2076–77. The County erected the monument in 1925 with the assistance of the American Legion. *Id.* at 2077. The Cross is apparently an impressive sight, particularly at night. "Approaching from the south on Bladensburg Road (or probably from any other direction), the illuminated concrete Latin cross, forty-feet tall, dominates the landscape like a beacon. It appears unexpectedly, seemingly out of nowhere and lacking any evident context, and as you approach the oddity of it will only deepen, as you come to see that it stands alone on a grassy, crescent-shaped traffic island at the intersection of two very busy thoroughfares." Lederman, *supra* note 121.

130. *American Legion*, 139 S. Ct. 2067, at 2077.

131. *Id.* at 2077–78.

132. *Id.* at 2078.

133. *Id.*

134. The Association is an organization whose mission is "to advance an ethical and life-affirming philosophy free of belief in any gods and other supernatural forces." *Frequently Asked Questions*, AM. HUMANIST ASS'N (2019), https://american humanist.org/ /about/faq/.

and its maintenance by the Commission violated the Establishment Clause,[135] and seeking "removal or demolition of the Cross, or removal of the arms from the Cross, to form a non-religious slab or obelisk."[136] The American Legion intervened to defend the Cross.[137] The district court held the display constitutional under both the *Lemon* test and the factors in Justice Breyer's *Van Orden* concurrence.[138] Using the same criteria, the Fourth Circuit reversed.[139] The Commission and the American Legion both petitioned for certiorari, which the Court granted. The American Legion urged the Court to abandon the *Lemon* test.[140] The Commission advocated the applicability of both *Lemon* and Justice Breyer's approach in *Van Orden*.[141]

By a vote of seven to two, the Court vacated the judgment of the Fourth Circuit and remanded. The appeal produced seven opinions. The syllabus of the Court's decision offers a summary of the Justices' votes that almost defies description.[142] Justice Alito, joined by Chief Justice Roberts and Justices Kavanaugh, Breyer and Kagan, wrote a five-member majority opinion. Within that majority opinion is a four-member plurality opinion, written by Justice Alito and joined by Chief Justice Roberts and Justices Kavanaugh and Breyer. It is a plurality opinion because

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135. *American Legion*, 139 S. Ct. at 2078. Several area residents were also plaintiffs in that action. *Id.*

136. *Id.*

137. *Id.*

138. Am. Humanist Ass'n v. Md.-Nat'l Capital Park, 147 F. Supp. 3d 373 (D. Md. 2015)), *rev'd*, 874 F.3d 195 (4th Cir. 2017).

139. Am. Humanist Ass'n v. Maryland-Nat'l Capital Park & Planning Comm'n, 874 F.3d 195 (4th Cir. 2017).

140. Reply Brief for the American Legion Petitioners, *Am. Humanist Ass'n v. Am. Legion*, ___ U.S. ___, 139 S. Ct 2067 (2019) (No. 17-1717), 2019 WL 644950, at *6–*9.

141. Brief for Petitioner Maryland-Nat'l Capital Park & Planning Comm'n, *Am. Humanist Ass'n v. Am. Legion*, ___ U.S. ___, 139 S. Ct 2067 (2019) (No. 18-18), 2018 WL 6706089, at *20, *54.

142. *American Legion*, 139 S. Ct. at 2067 (reporting that "ALITO, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-B, II-C, III, and IV, in which ROBERTS, C.J., and BREYER, KAGAN, and KAVANAUGH, JJ., joined, and an opinion with respect to Parts II-A and II-D, in which ROBERTS, C.J., and BREYER and KAVANAUGH, JJ., joined. BREYER, J., filed a concurring opinion, in which KAGAN, J., joined. KAVANAUGH, J., filed a concurring opinion. KAGAN, J., filed an opinion concurring in part. THOMAS, J., filed an opinion concurring in the judgment. GORSUCH, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined.").

Justice Kagan declined to join two parts of Justice Alito's opinion. Thus, where Justice Kagan joined Justice Alito's opinion, Justice Alito wrote for a majority of the Court; where she did not join, Justice Alito wrote for only a four-member plurality. Then, Justices Kavanaugh, Kagan, and Breyer each wrote a concurring opinion. Although Justices Thomas and Gorsuch also wrote concurrences, they concurred only in the judgment to vacate, writing separately to distance themselves from Justice Alito's majority opinion. Justice Ginsburg dissented, joined by Justice Sotomayor.

C. Justice Alito's Opinion

In his introduction to the majority opinion, Justice Alito invoked a theme that dominated the opinions of the Justices—the link between the "removal or radical alteration"[143] of the Cross and the public perception of hostility to religion. Part I of his opinion described the evolution of the cross from a symbol of Christianity to one with various contemporary meanings, some of which are "now almost entirely secular."[144] And he also noted that its use as a World War I symbol reflected "the Cross's widespread acceptance as a symbol of sacrifice in the war."[145]

This emphasis on the secular significance of the Cross reflected a factor important to Justice Breyer in *Van Orden*, where he wrote that the Ten Commandments, in certain contexts, can convey "a secular moral message (about proper standards of social conduct) . . . [a]nd . . . a historical message (about a historic relation between those standards and the law)."[146] To a considerable extent, Justice Breyer's *Van Orden* concurrence provided a roadmap for Justice Alito's opinion.

Part II, divided into four subparts (A, B, C, and D), is the heart of Justice Alito's opinion; its subparts B and C, which commanded a majority of the Court, created new law.

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143. *Id.* at 2074.

144. *Id.*; *see also id.* at 2074–75 (describing secular crosses such as "[t]he familiar symbol of the Red Cross" and those that appear as the registered trademark for businesses and secular organizations, like Blue Cross/Blue Shield, the Bayer Group, and Johnson & Johnson).

145. *Id.* at 2076.

146. *See Van Orden*, 545 U.S. at 701.

1. New Law: Subparts B and C

In subparts B and C, Justice Alito gave four reasons why the *Lemon* test does not apply to "monuments, symbols or practices that were first established long ago."[147] First, identifying the original purpose or purposes of an older monument may be "especially difficult."[148] Second, the purposes associated with an established monument may multiply over time.[149] Third, the message conveyed by a monument may also evolve over time.[150] Fourth, given this evolution of purpose and meaning for a monument, any attempt to remove it may "no longer appear neutral, especially to the local community for which it has taken on particular meaning."[151] Justice Alito emphasized this point in stark terms:

> A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion. Militantly secular regimes have carried out such projects in the past.[152]

He then created a presumption of constitutionality for old religious monuments:

> These four considerations show that retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones. The passage of time gives rise to a *strong presumption of constitutionality*.[153]

With Justice Kagan joining this part of Justice Alito's opinion, there is now new law—a presumption of constitutionality for established religiously expressive monuments, symbols, and practices. The *Lemon* test has become irrelevant to Establishment Clause challenges to such items.[154]

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147. 139 S. Ct. at 2082.

148. *Id.*

149. *Id.* at 2083.

150. *Id.*

151. *Id.* at 2084.

152. *Id.* at 2084–85.

153. *Id.* at 2085 (emphasis added).

154. Does this mean that *American Legion* has overruled *McCreary*? Probably not. Those Ten Commandments displays were installed in the summer of 1999. *McCreary*, 545 U.S. at 851. The lawsuit challenging them was filed several months later. In that situation,

2. The Plurality Opinion: Subparts A and D and Justice Kagan's Reservations

Subpart A contains the plurality opinion's extensive criticism of the *Lemon* test, describing its origins, uneven application over the years by the Supreme Court, criticism by some Justices, lower court judges, and scholars, and particular shortcomings in a case "involv[ing] the use for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations."[155]

Having discredited the use of the *Lemon* test for analyzing Establishment Clause challenges to longstanding monuments, Justice Alito explained in subpart D that the Court should draw on history for guidance in deciding *American Legion*, much as it did in deciding the legislative prayers at issue in *Marsh* and *Town of Greece*.[156]

In her concurrence, Justice Kagan explained her refusal to join Justice Alito's opinion in its entirety. She refused to join his critique of *Lemon* in Subpart A because, although a "rigid application of the *Lemon* test does not solve every Establishment Clause problem," she still found value in "that test's focus on purposes and effects . . . in evaluating government action in this sphere."[157] She declined to join Subpart D because, although she too "look[s] to history for guidance, . . . [she would] prefer at least for now to do so case-by-case, rather to sign on to any broader statements about history's role in Establishment Clause analysis."[158]

Given Justice Kagan's dissent in *Town of Greece*, I understand why Justice Alito's reliance in Subpart D on Justice Kennedy's majority opinion in that case made her wary. Justice Kennedy had insisted that the town's Christian legislative prayers should not be regarded as relics of a "less pluralistic" society.[159] But there is a critical difference between the "new"

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the displays seem more new than established. Still, the line between "new" and "established" will surely be the subject of future litigation. *See supra* page 36.

155. 139 S. Ct. at 2081 (footnote omitted).

156. *Id.* at 2087.

157. *Id.* at 2094 (Kagan, J., concurring in part).

158. *Id.*

159. *Town of Greece*, 572 U.S. at 579.

legislative prayer practice in *Town of Greece* and the "old" Cross in *American Legion*. The Cross had stood for eighty-nine years before it was challenged. Greece inaugurated its prayer practice in 1999, and the lawsuit challenging it was filed in 2008.[160] Hence, the specific prayer practice in *Town of Greece* was not nearly so time-honored as the Cross. Understanding this distinction, Justice Alito apparently felt the need to make the prayer practice in *Town of Greece* venerable, not in terms of years, but in its link to an established tradition of legislative prayer in Congress and state legislatures:

> Of course, the specific practice challenged in *Town of Greece* lacked the very direct connection, via the First Congress, to the thinking of those who were responsible for framing the First Amendment. But what matters was that the town's practice "fit within the tradition long followed in Congress and the state legislature."[161]

In other words, for Justice Alito, tradition casts a long shadow that must inform the contemporary application of the Establishment Clause. Does that mean that a new religious monument in a public park or building, compatible with a venerable tradition of placing such monuments in such settings, would survive an Establishment Clause challenge on that basis alone? Justice Alito's language could be read that way. Justice Kagan is reluctant to give history and tradition such determinative force in Establishment Clause jurisprudence.

D. Lemon*'s Fate and the Presumption of Constitutionality*

American Legion raises two questions about the current state of Establishment Clause jurisprudence:

- What is the status of the *Lemon* test?

160. *See Galloway v. Town of Greece*, 732 F. Supp. 2d 195, 197, 205, 209 (W.D.N.Y. 2010) (indicating that the town's prayer practice began in 1999, that one of the plaintiffs raised her objection to it at a town board meeting in 2007, that plaintiffs met with town officials on another occasion in 2007 to raise their objection a second time, and that plaintiffs filed their complaint in 2008).

161. *American Legion*, 139 S. Ct. at 2088–89 (citation omitted).

- Does the "presumption of constitutionality" apply only to old monuments?

1. Lemon

If Justice Kagan had joined Justice Alito's general critique of *Lemon* in Part II-A of his opinion, there might be an argument that *Lemon* is all but dead. But she did not join Part II-A for the express purpose of preserving *Lemon* in some circumstances.[162]

That act of preservation annoyed three of her concurring colleagues. Justice Kavanaugh devoted most of his concurrence to demonstrating the uselessness of *Lemon*.[163] Justice Thomas, who believes that the Establishment Clause should not apply to the states at all, urged the Court to "take the logical next step and overrule the *Lemon* test in all contexts."[164] Justice Gorsuch praised the plurality's critique of *Lemon* and referred to the test as "now shelved."[165] If nothing else, these frustrated critiques confirm that *Lemon* has survived another challenge.

2. The Presumption of Constitutionality

Justice Alito's majority opinion held that "retaining established, religiously expressive monuments, symbols and practices is quite different from erecting or adopting new ones. The passage of time gives rise to a *strong presumption of constitutionality*."[166] Yet, his plurality opinion suggested that practices or displays that imitate or draw upon tradition, whatever their age, should enjoy the same presumption. Justice Kagan wrote separately to distance herself from that conclusion,

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162. Justice Breyer joined Justice Alito's opinion in full, including its broad critique of *Lemon*, even though he had joined Justice Souter's majority opinion in *McCreary* applying the *Lemon* test to the Ten Commandments placed in the Kentucky courthouses. *See American Legion*, 139 S. Ct. at 2091 (Breyer, J., concurring). But it is premature to list Justice Breyer as a *Lemon* rejectionist. At the end of Part II-A, where Justice Alito first refers to "a presumption of constitutionality for longstanding monuments, symbols, and practices," he focuses on the limitations of *Lemon* when applied to such cases as capturing the full extent of *Lemon* rejection in the plurality opinion. *See id.* at 2079–81. This part cannot be fairly read as a rejection of *Lemon* for all purposes.

163. *See American Legion*, 139 S. Ct. at 2092 (Kavanaugh, J., concurring).

164. *Id.* at 2097 (Thomas, J., concurring in the judgment).

165. *Id.* at 2101 (Gorsuch & Thomas, JJ., concurring in the judgment).

166. *Id.* at 2085 (emphasis added).

and Justice Breyer concurred with a limiting observation: "Nor do I understand the Court's opinion today to adopt a 'history and tradition test' that would permit any newly constructed religious memorial on public land."[167]

Justice Kagan's caution and Justice Breyer's observation elicited a remarkable passage in Justice Gorsuch's concurrence. Dismissive of the "presumption of constitutionality" fashioned by the majority ("How old must a monument, symbol or practice be to qualify for this new presumption?"),[168] he insisted that the plurality opinion contained a hidden message about the scope of the presumption of constitutionality that the lower courts should follow:

> Though the plurality does not say so in as many words, the message for our lower court colleagues seems unmistakable: Whether a monument, symbol, or practice is old or new, apply *Town of Greece*, not *Lemon*. Indeed, some of our colleagues recognize this implication and blanch at its prospect. . . . But if that's the real message of the plurality's opinion, it seems to me exactly right—because what matters when it comes to assessing a monument, symbol, or practice isn't its age but its compliance with ageless principles. The Constitution's meaning is fixed, not some good-for-this-day-only coupon, and a practice consistent with our nation's traditions is just as permissible whether undertaken today or 94 years ago.[169]

In other words, in the application of the new presumption of constitutionality, the lower courts should ignore the majority opinion, apply the plurality opinion, and, in so doing, treat old and new monuments, symbols, or practices the same way. Given the competing views of Justice Breyer and Justice Gorsuch on the scope of the presumption, the lower courts will soon see cases featuring this competition.

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167. *Id.* at 2019 (Breyer, J., concurring).

168. *Id.* at 2102 (Gorsuch & Thomas, JJ., concurring).

169. *Id.*

E. Justice Ginsburg's Dissent

In a now familiar pattern (they were also the two dissenters in *Masterpiece Cakeshop* and *Trinity Lutheran*), Justice Ginsburg, joined by Justice Sotomayor, filed a dissent that sounds increasingly like a lonely call for the restoration of the separation vision of the church/state relationship. She even invoked President Jefferson's wall of separation metaphor to bolster her case.[170] And she was unsparing in her criticism of every element of the majority opinion.

Justice Ginsburg had no patience with attempts to secularize the Latin cross, describing it as "the foremost symbol of the Christian faith."[171] And, "[j]ust as a Star of David is not suitable to honor Christians who died serving their country, a cross is not suitable to honor those of other faiths who died defending their nation."[172]

She rejected Justice Gorsuch's suggestion that the "Court's new presumption extends to all governmental displays and practices, regardless of their age."[173] Equally important in a case in which the survival of the *Lemon* test was at stake, she also applied a variant of *Lemon*—the endorsement test[174]—to

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170. *See id.* at 2105 (Ginsburg & Sotomayor, JJ., dissenting) (quoting *Draft Reply to the Danbury Baptist Association*, *in* 36 PAPERS OF THOMAS JEFFERSON 254, 255 (B. Oberg ed. 2009)). President Jefferson's now famous "wall of separation" metaphor, *see supra* note 71, was first used in a letter by Jefferson fourteen years after the adoption of the Bill of Rights:

> Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion or prohibiting the free exercise thereof," thus building a wall of separation between church and State.

Reynolds v. United States, 98 U.S. 145, 164 (1878) (quoting *Danbury Letter*, *supra* note 71); *see also supra* note 71 (discussing the history of the metaphor in Supreme Court jurisprudence).

171. *American Legion*, 139 S. Ct. at 2104.

172. *Id.*

173. *Id.* at 2104 n.2.

174. *See* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 704–06 (2002) (explaining the transformation of the purpose-and-effects prong of the *Lemon* test into the endorsement test). Elaborated in cases such as *Lynch* and *County of Allegheny*, involving challenges to religious displays, such as a crèche or menorah on city and county property, the endorsement test asks

demonstrate the unconstitutionality of the Cross when viewed by a reasonable observer familiar with "the pertinent facts and circumstances surrounding the symbol and its placement."[175]

In an unusual locution even for a dissent, Justice Ginsburg presented herself as the reasonable observer: "*As I see it*," she wrote, "when a cross is displayed on public property, the government may be presumed to endorse its religious content."[176] With Justice Ginsburg's first-person perspective came her identity as a Jew. She explained the significance of that identity for the reasonable non-Christian observer:

> To non-Christians, nearly 30% of the population of the United States, . . . the State's choice to display the cross on public buildings or spaces conveys a message of exclusion. It tells them they are outsiders, not full members of the political community.[177]

She then put that outsider status in theological terms:

> Under one widespread reading of Christian scripture, non-Christians are barred from eternal life and, instead, are condemned to hell . . . . On this reading, the Latin cross symbolizes both the promise of salvation and the threat of damnation by dividing the world between the saved and the damned.[178]

Exaggeration for effect? Perhaps. But Justice Ginsburg's invocation of the damned was no more melodramatic than Justice Alito's invocation of "militantly secular regimes" roaming the land "tearing down monuments with religious

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whether the display has the "effect of 'endorsing' religion," *American Legion*, 139 S. Ct. at 2105 (quoting *County of Allegheny*, 492 U.S. at 592); *see also* note 91, *supra* (describing how the endorsement test modified the purpose-and-effects prongs of the *Lemon* test).

175. *Id.* at 2106 (quoting Salazar v. Buono, 559 U.S. 700, 721 (2010)). *Salazar*, like *American Legion*, concerned the constitutionality of a cross on public land. The district court had ordered removal of the cross, but the Supreme Court did not decide the critical question of whether the display violated the Establishment Clause. Instead, the Court vacated and remanded the case on the narrow ground that the district court had applied the wrong standard in granting relief to the petitioner. *Salazar*, 559 U.S. at 714. Because of its narrow holding, *Salazar* had little bearing on *American Legion* despite the factual similarities between the cases.

176. *American Legion*, 139 S. Ct. at 2106 (Ginsburg & Sotomayor, JJ., dissenting) (emphasis added).

177. *Id.* (citations and internal quotation marks omitted).

178. *Id.* at 2107 n.6 (citation and internal quotation marks omitted).

symbolism."[179] These resorts to hyperbole by ordinarily restrained justices capture well the high stakes in *American Legion*.

F. The Conundrum of the Cross

Justice Ginsburg's critique of the majority's secularization of the Cross is powerful. Invoking a visual image in the opening line of her dissent ("An immense Latin cross stands on a traffic island at the center of a busy three-way intersection in Bladensburg, Maryland"),[180] Justice Ginsburg said, in effect, that any observer driving through that intersection would see the Cross for what it is: the preeminent symbol of Christianity.[181] And since the Cross could not be in that public place without government permission, she said that the government may be "presumed to endorse its religious content."[182] Although this presumption of endorsement could be overcome in some situations, she saw no possibility of that here: "Every Court of Appeals to confront the question has held that 'making a . . . Latin cross a war memorial does not make the cross secular,' it 'makes the war memorial sectarian.'"[183] From that perspective, the Cross violated a core value of the Establishment Clause—government neutrality between religions.[184]

But I think that perspective is too narrow. It allows the quintessential nature of the Cross as a Christian symbol to so dominate the neutrality analysis that nothing else about the Cross matters—its age, origins, physical setting, or acceptance by the community where it stands. In the way that Justice Breyer explained in his *Van Orden* concurrence, and reiterated in his

179. *Id.* at 2085.

180. *Id.* at 2103 (Ginsburg & Sotomayor, JJ., dissenting).

181. Justice Alito had said so previously. *See Salazar*, 559 U.S. at 725 (Alito, J., concurring in part, and concurring in the judgment) ("The cross is of course the preeminent symbol of Christianity. . . ." (citation omitted)).

182. *American Legion*, 139 S. Ct. at 2106 (Ginsburg & Sotomayor, JJ., dissenting).

183. *Id.* at 2108 (citation omitted).

184. *See*, *e.g.*, *McCreary*, 545 U.S. at 874–81 (describing the Supreme Court's longstanding use of the neutrality principle as an "interpretive guide" in Establishment Clause cases); Brendan Beery, *Prophylactic Free Exercise: The First Amendment and Religion in a Post-Kennedy World*, 82 ALB. L. REV. 121, 123 & n.18 (2018) (collecting cases for the proposition that, "[a]ccording to the Supreme Court, the principle undergirding the Establishment Clause is neutrality").

American Legion concurrence, these factors do matter. As Justice Breyer wrote in *American Legion*, the record of the case indicates that

> the organizers of the Peace Cross acted with the undeniably secular motive of commemorating local soldiers; no evidence suggests that they sought to disparage or exclude any religious group; the secular values inscribed on the Cross and its place among other memorials strengthen its message of patriotism and commemoration; and . . . the Cross has stood on the same land for 94 years, generating no controversy in the community until this lawsuit was filed. . . . In light of all these circumstances, the Peace Cross cannot reasonably be understood as "a government effort to favor a particular religious sect" or to "promote religion over nonreligion."[185]

Having demonstrated to his satisfaction that the Bladensburg Cross did not offend the neutrality principle of the Establishment Clause, Justice Breyer could have ended his analysis there. But he went on to make a point about hostility to religion made by Justice Alito in his majority opinion: "as the Court explains, ordering [the Cross's] removal or alteration at this late date would signal 'a hostility toward religion that has no place in our Establishment Clause traditions.'"[186] At first glance, that observation seems odd. Justice Breyer has just explained that the Bladensburg Cross can be viewed, under all of the circumstances, as a secular symbol. If that is so, why would the alteration or removal of a secular symbol reveal an unwarranted hostility to religion? The answer lies in the conundrum of the Cross. Inescapably, as Justice Ginsburg demonstrates, the Cross is a religious symbol. But if that fact overwhelms the other aspects of the Cross noted by Justice Breyer, the neutrality principle of the Establishment Clause becomes so exacting that there is no place for religious symbols in the public sector,

185. *American Legion*, 139 S. Ct. at 2091 (Breyer & Kagan, JJ., concurring). In support of Justice Breyer's reading of the record on disparagement or exclusion of any religious group, Professor Marty Lederman of Georgetown Law School notes that "Prince Georges County was virtually all-Christian during World War I and the record doesn't reflect any basis for the government to have had reason to believe that any of the 49 soldiers commemorated by the Cross weren't Christian." Lederman, *supra* note 121.

186. *American Legion*, 139 S. Ct. at 2091 (Breyer & Kagan, JJ., concurring) (quoting the majority opinion, 125 S. Ct. at 2854).

whatever their provenance. That rigidity would reflect an unwarranted hostility to religion. As Justice Breyer wrote in his *Van Orden* concurrence:

> [T]he Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious. . . . Such absolutism is not only inconsistent with our national traditions, . . . but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid.[187]

Agreeing with this analysis, I do not find the outcome of the *American Legion* case troubling. But I do find the opinions of some of the Justices explaining that outcome unsettling for two reasons. First, there is the ambiguity in Justice Alito's use of history in Establishment Clause jurisprudence. Such history can be used in two ways: to defend what is old or to justify what is new. If I thought that Justice Alito viewed history only as he suggests he does at times in his opinion—as a defense for the survival of old religious monuments or practices ("The passage of time gives rise to a strong presumption of constitutionality"[188])—I would be less troubled by his opinion. But I have little confidence that Justice Alito holds that limited view of the importance of history. Indeed, by invoking *Town of Greece* to explain his *American Legion* decision, he suggested that history can justify new religious monuments and practices that conform to old traditions.[189]

As I have noted, Justice Kagan refused to join subpart D of Justice Alito's opinion because she did not want "to sign on to any broader statements about history's role in Establishment Clause analysis."[190] And Justice Breyer, reflecting a similar unease, explained in his concurrence how we should read Justice Alito's opinion: "Nor do I understand the Court's opinion today to adopt a 'history and tradition test' that would permit any newly constructed religious memorial on public land."[191] There

187. *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment).

188. *American Legion*, 139 S. Ct. at 2085.

189. *Id.* at 2087–89 (citing *Town of Greece*'s holding that the town's relatively new prayer practice was constitutional because it "[f]it within the tradition long followed in Congress and the state legislatures").

190. *Id.* at 2094 (Kagan, J., concurring in part).

191. *Id.* at 2091 (Breyer & Kagan, JJ., concurring).

are the seeds of future controversy in these statements of concern about Justice Alito's use of history.

My second source of concern is Justice Gorsuch's concurrence. Unlike most of his colleagues, who seemed to recognize the difficulty and sensitivity of the Cross case,[192] Justice Gorsuch failed to acknowledge the religious diversity of this country. In a challenge to the well-established theory of "offended observer" standing[193] in Establishment Clause cases, he belittled—with the pointed use of scare quotes—the objections of the members of the American Humanist Association who "regularly" come into "unwelcome direct contact" with the Cross "while driving in the area."[194] He saw their objections as symptomatic of a greater problem:

> In a large and diverse country, offense can be easily found. Really, most every governmental action probably offends *somebody*. No doubt, too, that offense can be sincere, sometimes well taken, even wise. But recourse for disagreement and offense does not lie in federal litigation.[195]

Echoing *Town of Greece*, where Justice Kennedy said that attendees at council meetings offended by the opening prayers could leave the room, Justice Gorsuch said that an "offended viewer" may "avert his eyes."[196] Given that the offended observers in these passive-symbol cases are almost always

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192. Justice Kavanaugh, at the end of his concurrence, offered an unusual consoling note to the losing plaintiffs:

> I have deep respect for the plaintiffs' sincere objections to seeing the cross on public land. I have great respect for the Jewish war veterans who in an amicus brief say that the cross on public land sends a message of exclusion. I recognize their sense of distress and alienation.

Id. at 2093 (Kavanaugh, J., concurring). Hence, he said, "[i]t is appropriate to. . . restate this bedrock constitutional principle. All citizens are equally American, no matter what religion they are, or if they have no religion at all." *Id.* at 2094.

193. *Id.* at 2098 (Gorsuch & Thomas, JJ., concurring).

194. *Id*.

195. *Id.* at 2103. For a defense of observer standing, *see* Brief of Law Professors as Amici Curiae in support of Respondents at *4–*5, *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019) (No. 17-1717), 2019 WL 582080 (drawing on Lee v. Weisman, 505 U.S. 577 (1992) (concerning prayer at public high school graduation and finding that student had standing because she would hear—regardless of whether she would be forced to participate in—the prayer at graduation)).

196. *American Legion*, 139 S. Ct. at 2103 (Gorsuch & Thomas, JJ., concurring) (citation omitted).

religious minorities, Justice Gorsuch's admonition that they just look away betrayed insensitivity to their concerns.

Equally disquieting is his zeal to dismantle *Lemon*, which led him to assert that "not a single Member of the Court even tries to defend *Lemon* against these criticisms,"[197] thereby dismissing the significance of Justice Kagan's embrace of *Lemon* in her concurrence and Justice Ginsburg's application of *Lemon* in her dissent. And I have already noted Justice Gorsuch's strange message to lower court judges that they should ignore any suggestion in the majority opinion that the new presumption of constitutionality should be limited to old monuments.[198]

Finally, Justice Gorsuch did not conceal his contempt for the passive-symbol litigation that he attributes to *Lemon*. By discarding *Lemon* and offended-observer standing, he wanted to save "the federal judiciary from the sordid business of having to pass aesthetic judgment, one by one, on every public display in this country for its perceived capacity to give offense."[199] With the Establishment Clause thus diminished (the ardent desire of the accommodation advocates), there would be more room for a dominant religion in the public square. That prospect, rather than the specific outcome of *American Legion*, makes the case a

197. *Id.* at 2101 (internal quotation marks omitted).

198. *See* text accompanying note 173, *supra*.

199. *Id.* at 2103. Would those public displays include a Latin cross on the roof of city hall during the Christmas season or during the forty days of Lent? This very question arose between the Justices in a 1989 passive-symbol case involving the constitutionality of a crèche and a menorah in public buildings in Pittsburgh. In that case, the court found the placement of the crèche unconstitutional and the placement of the menorah constitutional. *County of Allegheny*, 492 U.S. at 601–02, 20–21. That outcome prompted an exchange between Justice Kennedy and Justice Blackmun. In his concurring and dissenting opinion, Justice Kennedy stated that he thought that the Establishment Clause "forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall." *Id.* at 661 (Kennedy, J., concurring in the judgment in part and dissenting in part). Citing Justice Kennedy's use of the word "permanent," Justice Blackmun asked in his majority opinion, "for Justice Kennedy, would it be enough of a preference for Christianity if that city each year displayed a crèche for 40 days during the Christmas season and a cross for 40 days during Lent (and never the symbols of other religions)?" *Id.* at 607 (Blackmun, J.). Although Justice Kennedy did not answer the question in that case, it is now clear how Justice Gorsuch would answer. Given his views on offended-observer standing, he would say that anyone offended by the cross should not be allowed to seek relief in court, thereby sparing the courts from that "sordid business" of passing aesthetic judgment on it. *American Legion*, 139 S. Ct. at 2103. Instead, they should address their concerns to the city council. *Id.*

troubling harbinger if Justice Gorsuch wins more allies for his views.[200]

VI. CONCLUSION

I began this essay by observing that there are two competing visions on the Supreme Court about the proper relationship between the government and religion under our Constitution—accommodation and separation. Although that remains true after *American Legion*, the separation vision is steadily losing ground, with Justices Ginsburg and Sotomayor its only remaining adherents. Justice Breyer and Justice Kagan reflected elements of both visions in their *American Legion* opinions, with a decided accommodation tilt. Even without them, the accommodation advocates now have five sympathetic justices in their camp with the arrival of Justice Kavanaugh.

Hence, these advocates will continue to pursue their two most cherished goals: overturning *Smith* and *Lemon*. In their view, overruling the former will dramatically increase the presence of religion in the public square under the Free Exercise Clause, and overruling the latter will do so under the Establishment Clause. The outcomes in *Town of Greece* and *American Legion* provide a preview of the beneficiaries of that shift in Establishment Clause jurisprudence—Christian denominations with their grounding in the early history of this country. Arguably, using the challenge to public accommodation laws in *Masterpiece Cakeshop* as a guide, overturning *Smith* might have the same effect in free exercise jurisprudence. The *Masterpiece* baker grounded his objection to same-sex marriage in his understanding of Christian teaching that "marriage is a sacred union between one man and one woman, and that it represents the relationship of Jesus Christ and His Church."[201]

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200. Implicitly, seven of the justices rejected Justice Gorsuch's views on offended-observer standing by reaching the merits of *American Legion*. At least on that issue, his only ally may be Justice Thomas. He has much more support for his zeal to dismantle *Lemon*, with implications far beyond these passive symbol cases.

201. *Masterpiece* Petitioner's Brief, *supra* note 51, 2017 WL 3913762, at *9. It is important to note, however, that there is no single view in Christianity about the rightfulness of same-sex marriage. In fact, a majority of Christians in the United States said in 2015 that same-sex relationships "should be accepted by society," with fifty-four percent of Protestants and seventy percent of Catholics sharing that view. Caryle Murphy, *Most*

Of course, opponents of same-sex marriage might base their religious objections on a faith other than Christianity. In that sense overturning *Smith* might promote religious diversity in a way that overturning *Lemon* would not. When *Smith* was first decided, it was criticized as a threat to religious diversity and the protection of minority religion.[202] That criticism continues.[203] Indeed, there is a consensus in church/state jurisprudence that the Religion Clauses "aim to protect minorities in religious matters" against the majority generally and the politically accountable branches specifically.[204] *Smith* runs counter to that purpose.

Although I have no settled view on the wisdom of overturning *Smith*, I do think that there are reasons for caution. *Smith* operates in the realm of *neutral* laws of general applicability. As both *Masterpiece* and *Trinity Lutheran* show, the requirement of neutrality is not meaningless. Alas, as Justice Scalia said in *Smith*,

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.[205]

Both the federal and state RFRAs confirm Justice Scalia's observation.[206] With their incorporation of the *Sherbert* balancing tests, they reflect solicitude for minority religious

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U.S. Christian Groups Grow More Accepting of Homosexuality, PEW RESEARCH CTR. (Dec. 18, 2015), https://www.pewresearch.org/fact-tank/2015/12/18/most-u-s-christian-groups-grow-more-accepting-of-homosexuality/. By contrast, only thirty-six percent of evangelical Protestants believe that same-sex relationships "should be accepted." *Id.*

202. *See* note 15, *supra*.

203. *See, e.g.*, Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595 (2018).

204. Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919, 924 (2004).

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

206. *See supra* pp. 11–12.

beliefs and practices.[207] And the Court created a firestorm when it essentially overturned the *Sherbert* balancing test in *Smith*.[208] There is a cautionary tale in that firestorm. Stability in the law is an important value.

As for *Lemon*, it does not deserve the derision heaped upon it. Writing for the Court in *Lemon*, Chief Justice Burger said that the Court "gleaned" its three-part test by "consideration of the cumulative criteria developed by the Court over many years."[209] That distilled wisdom should not be jettisoned just because *Lemon* incorporates separation values that frustrate accommodation advocates. To be sure, as the critics of *Lemon* demonstrate in *American Legion*, the Court has ignored *Lemon* in many subsequent Establishment Clause cases.[210] That divergence bespeaks the futility of attempting to use any single test for resolving every Establishment Clause case. Yet, as Justice Kagan intimated in *American Legion*, *Lemon* may remain useful for analyzing cases in which the accommodation costs are high—for example, if there is a demand for a *new* religious monument, arguably grounded in tradition, in a public building or park.[211]

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207. *Cf.* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1470 (1999) (presenting the view that the constitutional rule of *Smith* combined with federal and state RFRAs offers the ideal balance between protecting "the political process" and protecting minority religious practitioners against "the mechanical application of rules that were designed without any thought about religious objectors").

208. *See supra* pp. 11–12.

209. *Lemon*, 403 U.S. at 612; *see also* text accompanying notes 86–89, *supra*.

210. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 662–63 (2002) (upholding school voucher program without using *Lemon* test); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 119 (2001) (ignoring *Lemon* test in holding that allowing religious groups that offer after-school activities to use school facilities does not violate Establishment Clause).

211. I recognize that preserving the *Lemon* test for occasional use evokes Justice Scalia's famous metaphor that the *Lemon* test "stalks [the Supreme Court's] Establishment Clause jurisprudence" like "some ghoul in a late-night horror movie that repeatedly sits up in its grave" whenever its use supports the desired outcome. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring). For Justice Scalia, such occasional use was anathema because he subscribed to a narrow view of the Establishment Clause that bars only coercion "*by force of law and threat of penalty*." *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) (emphasis in original). However, I disagree with that narrow view of the Establishment Clause, and so I am untroubled by the prospect of invoking *Lemon* under appropriate circumstances. *See infra* at pp. 55–56.

Of course, if *Smith* and *Lemon* are to go, the Supreme Court will have to do it in future cases. Meanwhile, with the free exercise issues raised by *Masterpiece* still unresolved, the free exercise implications of *Trinity Lutheran* unexplored, and the scope of the presumption of constitutionality for religious monuments or practices uncertain, there will be plenty of work for the lower courts in these difficult church/state cases. As these cases play out, I hope accommodationist critics of outcomes that disappoint them will stop suggesting that any reliance by judges on separationist values in their opinions reflects "an implicit disdain for the religious world view."[212]

In her dissent in *Trinity Lutheran*, Justice Sotomayor anticipated and responded to this unfair conflation of the separation vision with hostility to religion generally:

> A State's decision not to fund houses of worship does not disfavor religion; rather, it represents a valid choice to remain secular in the face of serious establishment and free exercise concerns. That does not make the State "atheistic or antireligious."[213]

Indeed, as Justice Sotomayor saw it, her strict separation view strengthens religion, for "[h]istory shows that the Religion Clauses separate the public treasury from religious coffers as one measure to secure the kind of freedom of conscience that benefits both religion and government."[214] There can be good faith debate about this proposition. There is no justification, however, for equating its wariness about the role of religion in the public square with religious animus.

Thus, an anti-discrimination law that is neutral about religion could appropriately be applied in a future case like *Masterpiece Cakeshop* to reject the free exercise claim of a

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212. Mark Fischer, *The Sacred and the Secular: An Examination of the "Wall of Separation" and Its Impact on the Religious World View*, 54 U. PITT. L. REV. 325, 340 (1992); *see also* RICHARD J. NEUHAUS, AMERICAN BABYLON: NOTES OF A CHRISTIAN EXILE 204 (2009) (describing those who hold to the separation vision as "*methodological* atheists" who believe that "[o]nly those arguments are to be admitted to public deliberation that proceed *as if* God did not exist"). For more extreme variations on this theme, see Ann Coulter's *Godless: The Church of Liberalism* (2006), John Gibson's *The War on Christmas* (2005), and David Limbaugh's *Persecution: How Liberals are Waging War Against Christianity* (2003).

213. *Trinity Lutheran*, 137 S. Ct. at 2040 (Sotomayor & Ginsburg, JJ., dissenting).

214. *Id.* at 2041.

reluctant baker. The demand for a religious exception from neutral laws is based upon a perceived conflict between their requirements and the right to worship freely. Judges would have to weigh the baker's interest in receiving an exemption to exercise a particular religious view against competing considerations—the right to express that religious view in the home, houses of worship, and many public places; the free choice made by those who pursue businesses regulated by anti-discrimination laws; and the vital protection afforded members of minority groups of all kinds by anti-discrimination laws. Treating the free exercise of religion in the conduct of business as one competing value in that assessment, and deeming it to be less weighty than others in a particular case, would reflect due consideration of all worthy values, not hostility to religion.

And if Justice Kagan's dissent in *Town of Greece* had been the majority opinion, that decision would not have reflected hostility to religion. As she pointed out, town council meetings need not be "religion-free zones."[215] They need only be zones in which the religious diversity of the wider community is honored, not ignored. There is no disparagement of religion in that insistence.

Or, in a sequel to *Trinity Lutheran*, if government excludes religious organizations from a government grant program, and the subject matter of that grant program is so close to the core of religious worship that the "play in the joints" between the Establishment Clause and the Free Exercise Clause favors the Establishment Clause, that difficult judgment would not betray hostility to religion. Rather, it would reflect a weighing of the competing values cited by Justice Breyer in his *Van Orden* concurrence. As he put it, the concerns of the *Lemon* test with government's "excessive interference with, or promotion of, religion" and "excessive government entanglement with religion" still have force.[216] That recognition does not belittle religion.

As I have already noted, I admire Justice Breyer's *Van Orden* methodology, so prevalent in his *American Legion*

215. *Town of Greece*, 572 U.S. at 616 (Kagan, Ginsburg, Breyer & Sotomayor, JJ., dissenting).

216. *Van Orden*, 545 U.S. at 703.

concurrence.[217] Although he had "hostility to religion" very much on his mind in *Van Orden*, he was not worried that Court observers would unfairly criticize the Justices. Rather, he worried that the Court, in making its decision about the constitutionality of the Ten Commandments display on the Texas capital grounds, might not sufficiently appreciate that hostility to religion was a concern at the core of the Religion Clauses of the First Amendment.[218]

After looking at the totality of the circumstances in that case—the physical structure of the granite monument, its donation by a "private civic (and primarily secular) organization," its forty-year presence on the capital grounds without legal objection, and its physical setting, Justice Breyer concluded that the circumstances suggested that the state intended to convey a moral and secular message instead of a religious message with its Ten Commandments monument, and that the display would be so perceived by the public.[219] To order the removal of the Ten Commandments because of the religious nature of the tablets' text would, in those circumstances,

> lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.[220]

This attention to consequences in *Van Orden* is not surprising, as Justice Breyer has long emphasized that judges should consider such consequences in applying statutes or the Constitution. "Since law is connected to life," he has written, "judges, in applying a text in light of its purpose, should look to *consequences*, including 'contemporary conditions, social,

217. *See* text accompanying notes 185–87, *supra*.

218. *See id.* at 699 (expressing concern that "untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious" (internal quotation marks and citation omitted)).

219. *Id.* at 701–04.

220. *Id.* at 704 (citation omitted).

industrial, and political, of the community to be affected.'"[221] This attention to consequences, in turn, provides "an important yardstick to measure a given interpretation's faithfulness to . . . democratic purposes" and enables a judge to assess whether it is "consistent with the people's will."[222]

Although this language may seem too mystical to help judges decide actual cases, that is not so. Historians are adept at discerning purposes in historical events, such as the writing and ratification of the Bill of Rights, and judges use that history in their opinions. Drawing on these sources in *Van Orden*, Justice Breyer recounted the basic purposes of the Religion Clauses:

- to "assure the fullest possible scope of religious liberty and tolerance for all";[223]
- to avoid "divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike";[224] and
- to maintain the "separation of church and state" that has long been critical to the "peaceful dominion that religion exercises in [this] country," where the "spirit of religion" and the "spirit of freedom" are productively "united," "reign[ing] together" but in separate spheres "on the same soil."[225]

These purposes, in turn, reveal that "the relation between government and religion is one of separation, but not of mutual hostility and suspicion."[226] There must be room for religion in the public square without the excessive entanglement that compromises both government and religion.

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221. STEPHEN J. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 18 (2005).

222. *Id.* at 115.

223. *Van Orden*, 545 U.S. at 698 (Breyer, J., concurring) (quoting *Abington*, 374 U.S. at 306 (Goldberg & Harlan, JJ., concurring)).

224. *Id.*

225. *Id.* (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 282–83 (1835) (H. Mansfield & D. Winthrop trans. & eds. 2000)). Justice Breyer's concerns about allaying divisiveness have a solid grounding in history.

226. *Van Orden*, 545 U.S. at 700.

Do these recognitions of purpose offer judges a self-executing guide to deciding church/state cases? Of course not. They simply inform, as Justice Breyer put it, the need for the "exercise of legal judgment" in those inescapable "borderline cases."[227] And, importantly, they do what all principles or purposes or standards do for judges—they provide a framework for assessing the significance of the facts in the dispute before them. In *Van Orden*, Justice Breyer looked at those facts ("the totality of the circumstances"), and, in light of his understanding of the purposes of the Establishment Clause, drawn from history and Supreme Court precedent, concluded that the Ten Commandments display on the Texas capital grounds should remain in place.[228]

I realize that this model of decisionmaking, grounded in constitutional purposes and values, applied to the vast variety of facts in church/state cases, creates an unwelcome unpredictability for those who seek to eliminate the messiness of church/state jurisprudence with bright line rules, a unifying theory of the Religion Clauses, or a single-factor analysis—an impossible enterprise. Church/state jurisprudence is inescapably messy because, as the Justices themselves have recognized, there is "no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible."[229] In short, the church/state puzzle will always remain a puzzle. But judges still have to decide cases. To that end, Justice Breyer's purpose-driven, multi-factor approach provides the best hope for sensible outcomes faithful to the intent of the Religion Clauses.

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227. *Id.*

228. I am not alone in my admiration of Justice Breyer's *Van Orden* concurrence. *See* Richard H. Fallon, Jr., *A Salute to Justice Breyer's Concurring Opinion in* Van Orden v. Perry, 128 HARV. L. REV. 429, 433 (2014) ("[Justice Breyer's] method seems to me to have been exemplary. . . . [H]e interpreted the Establishment Clause as requiring fine line drawing to avoid acutely divisive rulings that would achieve too little good under at least some circumstances. My hat comes off to Justice Breyer's *Van Orden* opinion for candidly shouldering the responsibility that goes with a conception of the judicial role in which good judging requires good judgment.")

229. *Van Orden*, 545 U.S. at 698 (Breyer, J., concurring) (quoting *Abington*, 374 U.S. at 306 (Goldberg & Harlan, JJ., concurring)).