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When Anti-Establishment Becomes Exclusion: The Supreme Court's Opinion in *American Legion v. American Humanist Association* and the Flip Side of the Endorsement Test

Patrick M. Garry
University of South Dakota School of Law, patrick.garry@usd.edu

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ABSTRACT

In American Legion v. American Humanist Association*, the Court addressed the Establishment Clause issues surrounding a longstanding Latin cross veteran's memorial located on public property. Although the Court upheld the memorial with a narrow ruling, an unresolved issue lurking beneath the surface of passive display cases like* American Legion *is whether a government dismantling of a longstanding religious symbol might itself, under certain circumstances, constitute an independent Establishment Clause violation. Such a dismantling of a religious symbol built decades earlier, before the property became publicly owned, might well be considered a government act hostile to religion, especially as America becomes increasingly secular and government actors demonstrate increasing hostility to religious institutions and beliefs.*

Given the continual drift toward secularism in American society, this Article uses the decision in American Legion *to explore the question of whether government exclusion of religion from the public square in favor of a secularism baseline violates the neutrality doctrine and constitutes its own Establishment Clause infringement. The Court has never ruled that a government exclusion of religion violates the First Amendment, but as* American Legion *demonstrates, the necessity of such a ruling may well arise in the future.*

* Professor of Law, University of South Dakota School of Law; J.D. 1983, University of Minnesota; Ph.D., 1986, University of Minnesota.

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I. INTRODUCTION

In *American Legion v. American Humanist Association*,[1] the Court had an opportunity to define the scope and meaning of the Establishment Clause. The case involved the passive display of a Latin cross now situated on government land.[2] Given the confusion and uncertainty in Establishment Clause jurisprudence, hope existed that *American Legion* might finally settle some big questions: What does it mean to have an establishment of religion? What is the real concern of the Establishment Clause? And who is the Clause meant to serve?

Although the opportunity existed for such resolutions, hope was not high that the Court would finally agree on such fundamental issues. Too much polarization has characterized the Court's Establishment Clause opinions and the mistaken legacies of the Wall of Separation metaphor still hang over that jurisprudence. Moreover, the social and cultural setting underlying Establishment Clause conflicts is in a state of change. American society is becoming less religious and more secular. Christianity no longer exerts a dominant hold on a democratic society that continues to move away from religious affiliations.

In light of the changing social and political conditions underlying Establishment Clause cases, *American Legion* offers a chance to con-

1. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019).
2. *Id.* at 2074.

template an Establishment Clause issue not directly presented to the Court in that case. The American Humanist Association argued, and the Fourth Circuit held, that the cross violated the Establishment Clause.[3] If the Supreme Court had upheld the Fourth Circuit, the cross would have had to be dismantled and removed from its site. However, such an action probably would have had just the effect that the endorsement test seeks to avoid—the alienation of individuals (e.g., religious believers), who would be made to feel as second-class citizens and outsiders.

This Article will explore the meaning and application of the Establishment Clause in contemporary society through an analysis of the issue of state-conducted dismantling of longstanding religious displays. The Establishment Clause issues surrounding such displays have historically been evaluated from the standpoint of government maintenance of those displays, not from the standpoint of government removal of displays built by private parties. But the removal of displays built during more religious eras raises issues not yet addressed by the Court, with one question being whether affirmative government exclusion of religion might violate the Establishment Clause.

The constitutional issue in *American Legion* arose decades after the cross was constructed when there were no objections to the display.[4] The display was first erected during an era in which Christianity was far more prominent in America but was litigated in a time of rising secularism. And yet, current Establishment Clause doctrines still embrace an unstated assumption that secularists and religious objectors are still minorities subject to the majoritarian dictates of Christian activists.

American Legion implicated an issue the Court bypassed earlier in *Salazar v. Buono*, where it avoided having to directly address the constitutional issue of whether a cross erected on government land as a memorial to WWI veterans violated the Establishment Clause.[5] But while the *Salazar* Court left intact the lower court's ruling that the cross constituted an improper establishment, no court has addressed whether the destruction of that cross might itself have violated the Establishment Clause.

II. THE *AMERICAN LEGION* DECISION

The *American Legion* facts in many ways mirror the facts in *Salazar v. Buono*. In both cases, the government did not build or initi-

3. Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n, 874 F.3d 195, 212 (4th Cir. 2017), *cert. granted sub nom*. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 451 (2018), *cert. granted*, 139 S. Ct. 451 (2018), *rev'd and remanded sub nom*. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019).

4. *Id.*

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

ate the cross memorial and it was not until decades later that any Establishment Clause objections were made against the memorials.

A. Facts of the Case

In 1918 a group of private citizens started raising money to erect a giant cross monument to honor forty-nine area soldiers killed in World War I.[6] In 1922 the American Legion assumed control of the project and completed it in 1925.[7] The monument, in the shape of a Latin cross (the Cross), stands thirty-two feet high in the median of a three-way highway intersection in Bladensburg, Maryland.[8] Due to safety concerns arising from the placement of the Cross in the middle of a busy traffic median, the Maryland-National Capital Park and Planning Commission, a state parks agency, acquired title to the land on which the Cross sat and assumed care and maintenance of the monument in 1961.[9]

Currently, the Cross stands in a traffic island taking up one-third of an acre at the busy intersection of two highways.[10] The American Legion's symbol is affixed near the top of the Cross and a nine-foot wide plaque listing the names of the soldiers memorialized by the Cross is located at the base.[11] The Cross is also part of a memorial park honoring veterans, known as Veterans Memorial Park.[12] Monuments in the park include a War of 1812 memorial, a World War II memorial, a Korean and Vietnam veterans memorial, and a September 11th memorial walkway.[13]

No objections were made to the Cross until 2012, when the American Humanist Association lodged a complaint with the Commission. The American Humanist Association and a group of individuals who were offended by the Cross commenced litigation in 2014.[14] Claiming the Cross violated the Establishment Clause, the plaintiffs asked a federal court to demolish the Cross or at least remove its arms.[15] The district court upheld the Cross against this challenge, but the Fourth Circuit Court of Appeals ruled it breached the wall of separation between church and state, violating the Establishment Clause.[16]

6. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074 (2019).
7. *Id.*
8. *Id.* at 2074–76.
9. *Id.* at 2078.
10. *Id.*
11. *Id.* at 2077.
12. *Id.* at 2077.
13. *Id.*
14. *Id.* at 2074.
15. *Id.*
16. Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n, 874 F.3d 195, 212 (4th Cir. 2017).

The issue in *American Legion* in many ways arose from the question the Supreme Court left unanswered in the 2010 case of *Salazar v. Buono.*[17] Like *American Legion*, *Salazar* involved the issue of a large Latin cross built by private parties to commemorate the loss of American soldiers in World War I.[18] That cross stood for seventy years before anyone objected. On appeal the Court never ruled on the constitutionality of the cross but disposed of the case on procedural grounds.[19]

B. The Supreme Court's Decision

In a 7–2 decision, with five concurrences and an opinion written by Justice Alito, the United States Supreme Court in *American Legion* overturned the Fourth Circuit's holding. The Court held the Cross did not violate the Establishment Clause, relying on the historical traditions test utilized in *Marsh v. Chambers*,[20] *Van Orden v. Perry*,[21] and *Town of Greece v. Galloway*.[22] As a prelude to its decision, the Court made several findings. It found that, although the general symbol of a Latin cross is unquestionably a religious symbol, it had "also taken on a secular meaning."[23] The Court also found that, given the historical circumstances surrounding World War I, the figure of a cross was a logical symbol to memorialize the veterans killed in that war.[24]

No conclusive evidence suggested that religious motivations were the only—or even the primary—reason for initially deciding on the symbol of a cross to be used in the memorial. As the Court stated, while "we do not know precisely why the [designers of the memorial] chose the cross, it is unsurprising that the committee—and many others commemorating World War I—adopted a symbol so widely associated with that wrenching event."[25] Not only was the Court unable to ascertain the original purposes of the Cross—religious or secular—but it found that over time, the purposes of the Cross multiplied and changed.[26] Furthermore, according to the Court, just as the purposes

17. Salazar v. Buono, 559 U.S. 700 (2010).
18. *Id.* at 705–06.
19. *Id.* at 726, 722.
20. Marsh v. Chambers, 463 U.S. 783 (1983).
21. Van Orden v. Perry, 545 U.S. 677 (2005).
22. Town of Greece v. Galloway, 572 U.S. 565 (2014).
23. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074 (2019). As the Court recognized, "there are instances in which [the cross's] message is now almost entirely secular." *Id.* (citing the cross symbol used by the Red Cross and in the Swiss flag, as well as by corporations such as Blue Cross Blue Shield).
24. *Id.* at 2074–76, 2090.
25. *Id.* at 2076.
26. *Id.* at 2082–83.

behind the Cross evolved over time, so too did the messages conveyed by that monument.[27]

A primary focus of the Court's opinion in *American Legion* was its disposal of the *Lemon* test as the appropriate test for the dispute at hand.[28] Recognizing the "shortcomings" of the *Lemon* test, the oldest of the Establishment Clause tests, the Court noted that in previous cases it had either declined to apply the test or it had simply ignored the test.[29] In *American Legion*, the Court explained why *Lemon* "presents particularly daunting problems" and should not be applied.[30] These problems, as the Court dissected them, related to the specific facts at hand, involving a passive display built nearly ninety years earlier to memorialize soldiers killed in war.[31] Acknowledging the hostility to religion and doctrinal chaos fostered by *Lemon*,[32] as well as the failure of *Lemon* to fulfill its ambitious attempt to "find a grand unified theory of the Establishment Clause," the Court in *American Legion* decided on a much narrower and more modest approach of the historical traditions test.[33] It was as if the failure of *Lemon*'s grand test discouraged the Court from any broader or more comprehensive view of the Establishment Clause. However, as much as the Court may have dismissed *Lemon*, it did so narrowly, refusing to apply it only to longstanding passive displays such as the Cross.[34]

In place of the *Lemon* test used by the Fourth Circuit to find the Cross unconstitutional, the Court resorted to the historical traditions test. As narrowly applied in *American Legion*, the historical traditions

27. *Id.* at 2085.
28. The three-part *Lemon* test was first articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and was used by the Fourth Circuit to rule that the Cross violated the Establishment Clause. Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n, 874 F.3d 195, 206–10 (4th Cir. 2017).
29. *Am. Legion*, 139 S. Ct. at 2080.
30. *Id.* at 2081.
31. *Id.* at 2082.
32. *See, e.g.*, Michael McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 118–20 (1992) (outlining the doctrinal chaos fostered by *Lemon*).
33. *Am. Legion*, 139 S. Ct. at 2087. As Justice Gorsuch stated, "*Lemon* was a misadventure . . . Scores of judges have pleaded with us to retire *Lemon*, scholars of all stripes have criticized the doctrine, and a majority of this Court has long done the same. Today, not a single Member of the Court even tries to defend *Lemon* against these criticisms—and they don't because they can't." *Id.* at 2101 (Gorsuch, J., concurring in judgment) (citation omitted).
34. "Today, the Court declines to apply *Lemon* in a case in the religious symbols and religious speech category . . . The Court's decision in this case again makes clear that the *Lemon* test does not apply to Establishment Clause cases in that category." *Id.* at 2093 (Kavanaugh, J., concurring). The narrowness of the decision was reflected in Justice Kagan's concurrence: "Although I agree that rigid application of the *Lemon* test does not solve every Establishment Clause problem . . . I prefer at least for now to [proceed on a] case-by-case [basis], rather than to sign on to any broader statements about history's role in Establishment Clause analysis." *Id.* at 2094 (Kagan, J., concurring in part).

test holds that sufficiently longstanding passive religious symbols that have over time taken on one or more secular meanings do not violate the Establishment Clause. Articulated in *Marsh v. Chambers*, which upheld the practice of a chaplain leading a prayer at the beginning of a state legislative session, the historical traditions test looks to whether the particular government–religion interaction had a sufficiently long historical record.[35] The Court's long analysis of why *Lemon* did not apply supported the Court's use of the historical traditions test to uphold the Cross.[36] For instance, the Court noted that the Cross had stood for so long that it had acquired various secular meanings; it had stood so long that viewers had acquired secular images and perceptions of the Cross.[37] Moreover, there was no evidence that the government was using the Cross for religious purposes or functions, nor that it was discriminating against other religions by not dismantling the Cross.

The problem with the historical traditions test insofar as its ability to resolve other Establishment Clause issues is that it looks only to the distant past. Consequently, a host of unanswered questions persist in the aftermath of *American Legion*. As the Court stated, "the passage of time gives rise to a strong presumption of constitutionality."[38] The Cross had stood for eighty-nine years. But how long must a government-religion interaction persist before it acquires a presumption of constitutionality?[39] What if other longstanding religious symbols or expressions do not acquire the various secular meanings or perceptions that the Cross acquired over its eighty-nine years? What if evidence exists that the longstanding symbol had more religious reasons attached to its construction than did the Cross?

III. PASSIVE DISPLAYS AND THE ESTABLISHMENT CLAUSE

The display at issue in *American Legion* was built in 1925 by private citizens on property acquired by the government in 1961.[40] The government acquired the property because of its location at a busy intersection of highways and the public need for traffic safety and con-

35. Marsh v. Chambers, 463 U.S. 783, 787–88 (1983). The test was later applied in *Town of Greece v. Galloway*, 572 U.S. 565 (2014).

36. *Am. Legion*, 139 S. Ct. at 2080–85.

37. *Id.* at 2082.

38. *Id.* at 2085.

39. As Justice Gorsuch inquired in his concurrence, "How old must a monument, symbol, or practice be to qualify for this new presumption?" *Id.* at 2102 (Gorsuch, J., concurring in judgment).

40. *Id.* at 2074, 2078.

trol.[41] An Establishment Clause challenge to the display came in 2014.[42]

According to the monument's objectors in *American Legion*, the only way the government could have avoided an Establishment Clause violation was to dismantle or disfigure the monument as soon as it received an objection to the display.[43] However, such a dramatic destruction of a Latin cross would most likely have caused great offense and outrage, which is the result the endorsement test seeks to prevent, albeit for a different group of people.[44]

The endorsement test has been a primary test for evaluating Establishment Clause challenges to religious expression or displays of religious symbols.[45] As applied, the endorsement test has focused on aiding dissenting individuals who feel alienated by expressions of perceived linkages of church and state.[46]

While the Court did not specifically mention the endorsement test in *American Legion*, it did implicitly refer to it through its discussion of *Lemon*.[47] Since the endorsement test is an offshoot of *Lemon*, much of the Court's analysis of *Lemon* also applies to the Court's decision not to use the endorsement test in *American Legion*.

Although *American Legion* did not use the endorsement test, the Court also did not overrule it for any other fact setting. Because the Court's decision was so narrow, the endorsement test, although not applied in *American Legion*, could still govern other Establishment Clause cases involving even slightly different factual scenarios. Moreover, the endorsement test is still worthy of discussion because of its logical relevance to issues on the flip side of the issue presented in *American Legion*: the constitutionality of government dismantling of religious symbols in particular and governmental exclusion of religion in general. The relevance of the endorsement test arises with these issues because of its basic concern: the alienation or marginalization of groups offended by the religious (or anti-religious) actions of the government.

41. *Id.* at 2078.

42. Am. Humanist Ass'n v. Md.-Nat'l Capital Park, 147 F. Supp. 3d 373, 380 (D. Md. 2015), *rev'd sub nom*. Am. Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n, 874 F.3d 195 (4th Cir. 2017), *rev'd and remanded sub nom*. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019).

43. *Am. Legion*, 139 S. Ct. at 2078.

44. *See infra* notes 58–60 and accompanying text.

45. *See infra* notes 50–52 and accompanying text.

46. *Id.*

47. *See supra* notes 30–33.

A. Problems with the Endorsement Test

The Court introduced the endorsement test in *Lynch v. Donnelly*.[48] It has since become the Court's preeminent means for analyzing the constitutionality of religious symbols and expression on public property.[49] Under the test, the government unconstitutionally endorses religion whenever it conveys the message that the state favors a religion or particular religious belief.[50] Thus, individual feelings of offense or alienation become a constitutional trump card against any religious expression or symbol on public property. This was precisely the issue that arose in *American Legion*, where the few named plaintiffs filed a complaint based on their feelings of offense and alienation as they drove the busy highways surrounding the display.[51]

Aside from its subjectivity, another problem with the endorsement test is that it involves underlying assumptions that no longer comport with social reality. In the current state of contemporary society, secularists are not the small minority and Christian activists are not the dominant majority.[52] Therefore, any perceived linkages between state and church can most likely be addressed through democratic action.

In the true spirit of the endorsement test, which strives to remedy social alienation due to religious actions by the government, religious believers have now become the alienated. If, as the endorsement test declares, the Establishment Clause focuses on alienated religious minorities, then perhaps in contemporary society it is the religious believer who should be the beneficiary of the Clause—because for the government to dismantle a longstanding religious symbol built by private parties is to alienate followers of that religion and show hostility to that religion.

In its application, the endorsement test inherently sides with the dissenters, as demonstrated in *Buono v. Norton*, where the Court ordered that a cross be removed from a federal preserve.[53] The cross was

48. Lynch v. Donnelly, 465 U.S. 668 (1984).
49. *See* Alberto B. Lopez, *Equal Access and the Public Forum: Pinette's Imbalance of Free Speech and Establishment*, 55 BAYLOR L. REV. 167, 195 (2003). Since *County of Allegheny*, which confirmed the endorsement test as the Court's preferred method of analysis, the Court has continued its reliance on the endorsement test for Establishment Clause cases. Cty. of Allegheny v. ACLU, 492 U.S. 573, 593 (1989). The Court recently applied the test in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316 (2000).
50. *Cty. of Allegheny*, 492 U.S. at 593. The banning of the crèche, in Kennedy's opinion reflected "an unjustified hostility toward religion" and a "callous indifference toward religious faith that our cases and traditions do not require." *Id*. at 655, 664.
51. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074 (2019).
52. *See infra* note 76.
53. Buono v. Norton, 212 F. Supp. 2d 1202 (C.D. Cal., 2002). For the U.S. Supreme Court decision, which ruled on procedural grounds rather than First Amendment grounds, see *Salazar v. Buono*, 559 U.S. 700 (2010).

a memorial to veterans who died in World War I.[54] The Veterans of Foreign Wars erected it in 1934, sixty years before the land on which the cross stood was made part of the federal preserve.[55] Approximately 130,000 acres comprised the preserve, and the less-than-eight-foot-tall cross stood on undeveloped land, well off of one of the narrow secondary roads winding through the preserve.[56] Almost all the viewers of this cross were automobile travelers who had made a conscious decision to drive through that particular secondary road.[57] But contrary to free speech cases, the Court did not require offended viewers to take any steps to avoid the harm, such as taking another road or not looking up at the cross as they passed by. The Court also seemed indifferent to the context of the cross, concluding that the size of the cross and the number of people who view it are not important for deciding whether a reasonable observer would perceive the cross as a governmental endorsement of religion.[58] In making this ruling, the Court disregarded the plaque displayed at the base of the cross which specified the purpose for which the cross had been erected.

B. The Endorsement Test as a Secular Trump Card

The endorsement test rests in part on Justice O'Connor's premise that the Establishment Clause prohibits the government from sending messages that divide the community into outsiders and insiders.[59] In *Lynch*, Justice O'Connor wrote, "endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[60] Such a reading also gives a "heckler's veto" to anyone who objects to religious speech or symbolism in the public square—a censoring power that the Free Speech Clause otherwise prohibits.[61] As Richard Duncan observes, the "endorsement test has been used by the Court as a vehicle

54. *Buono*, 212 F. Supp. 2d at 1205.
55. *Id.*
56. *Id.*
57. *See id.* ("The cross is mounted on the top of a prominent rock outcropping on the north side of Cima Road, a narrow blacktop secondary road that passes through the Preserve.").
58. *Id.* at 1216.
59. *See Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) (stating that government actions endorsing religion "make religion relevant, in reality or public perception, to status in the political community").
60. *Id.* at 688. To Justice O'Connor, the endorsement test functioned to prevent government from "making a citizen's religious affiliation a criterion for full membership in the political community." *Id.* at 690.
61. *See* Richard Duncan, *Just Another Brick in the Wall: The Establishment Clause as a Heckler's Veto*, 18 TEX. REV. L. & POL. 255, 264–65 (2014) (stating "the evil in heckler's veto situations is that it empowers hecklers to silence any speaker of whom they do not approve").

for allowing offended observers . . . to impose heckler's vetoes on harmless religious expression in the public culture."[62] But if the endorsement test gives a heckler's veto to the maintenance of a longstanding display, should it not also give such a veto to the forced removal of that display?

Indeed, the Court in *American Legion* recognized the kind of offense that religious believers would feel at the forced removal of a longstanding religious monument.[63] As Justice Alito wrote, "when time's passage imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance, removing it may no longer appear neutral, especially to the local community for which it has taken on particular meaning."[64] Elsewhere in the opinion, Justice Alito acknowledged that as religious symbols or monuments become a familiar part of the landscape, "requiring their removal would not be viewed by many as a neutral act."[65] Thus, if the concerns of the endorsement test are to be equally applied, those who feel alienated or offended by forced removal of religious symbols should have grounds to assert an Establishment Clause violation.

IV. THE MEANING OF THE ESTABLISHMENT CLAUSE

A. Institutional Nonpreferentialism

The Establishment Clause keeps government from discriminating against the *existence*—not just the *exercise*—of religion. And the existence means a non-governmentally determined social sphere free of government doctrinal interference or favoritism. The Clause protects the opportunity for a vibrantly pluralistic religious presence in society.

According to historian Thomas Curry, the classical concept of an exclusive state church dominated the American image of an establishment of religion throughout the colonial and constitutional periods.[66] A state preference of one religious denomination over others was what was primarily thought to be an establishment of religion, as the Framers did not want to duplicate the English experience with the established Anglican church.[67] In the American view, the most repressive

62. *Id.* at 277.
63. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2084–85 (2019).
64. *Id.* (adding that 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").
65. *Id.* at 2086.
66. THOMAS J. CURRY, The First Freedoms 146, 192 (1986).
67. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970) (stating "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity"). Separation of church and state was a concept focused on

aspect of establishment involved government intrusion into religious doctrines and liturgies.[68]

The Establishment Clause should require courts to focus on what government is doing to become a religious actor or influence other religious actors. The Clause does not focus on what perceptions individuals might have. An establishment of religion occurs only when the government has involved itself in a permanent or ongoing way in the institutional integrity of an existing or created religious denomination.[69]

B. Protecting the Existence of Religion

Just as government cannot set up its own religion, government should not be able to exclude or marginalize religion in the public square. Although the Supreme Court has never specifically ruled that disapproval or exclusion of religion violates the Establishment Clause, some cases suggest that such a ruling might be appropriate.[70] One commentator notes that many observers "regard the exclusion of religious perspectives from schools and public services to evince a hostility toward religion and to be tantamount to an establishment of secularism," thus making religious followers "feel like political outsiders."[71]

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ensuring the institutional independence and integrity of religious groups, preventing government from dictating articles of faith or interfering in the internal operations of religious bodies. As Elisha Williams wrote, every church should have the "[r]ight to judge in what [m]anner God is to be worshiped by them, and what [f]orm of [d]iscipline ought to be observed by them, and the [r]ight also of electing their own [o]fficers" free of interference from government officials. ELISHA WILLIAMS, THE ESSENTIAL RIGHTS AND LIBERTIES OF PROTESTANTS, 46 (Boston, S. Kneeland & T. Green, 1744) (emphasis omitted).

68. JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 51 (4th ed. 2016). The English ecclesiastical law, for instance, had formally required use of the King James version of the Bible and of the liturgies and prayers of the *Book of Common Prayer*. It had also demanded adherence to the Thirty-Nine Articles of Faith. Akhil Reed Amar argues that the Establishment Clause prohibited the federal government from having any power to act in this area. AKHIL REED AMAR, THE BILL OF RIGHTS, 246 (1998). As Amar explains, the possibility of national control over such a powerful social institution as religion, which shaped the behavior and cultivated the habits of the citizenry, struck fear in the hearts of Anti-Federalists. *Id.* at 45.

69. *See generally* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1988).

70. *See* Jay Wexler, *Government Disapproval of Religion*, 2013 BYU L. REV. 119, 121–22 (2013).

71. Richard Esenberg, *You Cannot Lose If You Choose Not to Play: Toward a More Modest Establishment Clause*, 12 ROGER WILLIAMS U. L. REV. 1, 50 (2006) (also stating that "several lower courts, faced with an argument that the exclusion of expressions of faith from public life constitutes an establishment of secularism, have also emphasized the need for some active advocacy, as opposed to the mere assumption, of irreligion"). "The problem is that government has systematically, whether by constitutional fiat, fear of litigation, or a secularist bent, ruled out

Under the endorsement test, state disapproval of religion, just as state endorsement of a religion, should be unconstitutional.[72] The removal of a longstanding religious symbol may well be viewed as government's attack on the presence of religion in the life of the community. Indeed, if the endorsement test is really about ensuring that no member of the community feel like a second-class citizen because of his or her religious beliefs, then it should apply to both religious believers and nonbelievers. It should not have a one-sided application to only nonbelievers. As Noah Feldman notes, "[i]ncreasingly, the symbolism of removing religion from the schools, courthouses, or the public square is experienced by values evangelicals as excluding them, no matter how much the legal secularists tell them that is not the intent."[73] Feldman further observes that the "constitutional decisions marginalizing or banning religion from public places have managed to alienate millions of people who are also sincerely committed to an inclusive American project."[74] Given the nonpreferentialism commands of the Establishment Clause, government cannot exclude or discriminate against religion under the guise of promoting secularism. The Establishment Clause should prohibit such institutional or structural discrimination. Consequently, longstanding privately-built religious symbols cannot be dismantled as a means of protecting secular society *from* religion.

In his *American Legion* concurrence, Justice Kavanaugh suggested that while the Court's ruling "*allows* the State to maintain the cross on public land . . . [the ruling] does not *require* the State to maintain the cross on public land."[75] However, this suggestion may not be entirely accurate. Clearly the government has control over how it maintains its property and to what uses it devotes public funds, but that discretion might be limited in certain circumstances. Take, for instance, the hypothetical of a religious house of worship located on a busy street or highway. Outside that house, and close to the street or highway, is located a large religious symbol that all travelers can see. Some of those travelers, offended by the symbol, complain to their local government. In response, the local government decides to take through eminent domain a slice of property abutting the highway for use as a planned public walkway. This slice is wide enough to include the symbol. Consequently, the government obtains the property, demolishes the symbol, and then either constructs or does not construct

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religion as an approach to whatever information is being imparted or service being provided, effectively denying its relevance." *Id.* at 52.

72. *See* Mark Strasser, *The Endorsement Test Is Alive and Well*, 39 PEPP. L. REV. 1273, 1276–77 (2013).

73. NOAH FELDMAN, DIVIDED BY GOD 15 (2005).

74. *Id.*

75. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring) (emphasis omitted).

the walkway. Once the government has obtained the once-private land upon which a religious symbol stands, the Establishment Clause may impose duties requiring symbol maintenance not foreseen by Justice Kavanaugh.

V. RELIGION IN MODERN SECULAR SOCIETY

The danger addressed by the Establishment Clause is that, in a democracy, the majority would use the force of government to establish a state-funded, state-mandated religion. In this way, the majority would use its political power to dictate religious truth and observance.

When the cross at issue in *American Legion* was constructed, Christianity was a dominant social and political force in America. A person's social standing depended at least in part on their membership in a Christian sect or their adherence to Christian doctrine. Some ninety years later, when the existence of that cross was being litigated, America was a greatly changed nation and society. Membership in Christian sects continues to decline, while the number of people having no religious affiliation continues to rise.[76] In the 1950s, three

76. While the percentage of adults who describe themselves as religiously affiliated has shrunk, the percentage of those who are religiously unaffiliated has jumped. PEW RESEARCH CENTER, U.S. PUBLIC BECOMING LESS RELIGIOUS (2015). White Christians now account for less than half of the public, and America's youngest religious groups are all non-Christian. ROBERT P. JONES & DANIEL COX, PUBLIC RELIGION RESEARCH INSTITUTE, AMERICA'S CHANGING RELIGIOUS IDENTITY 7 (2017) (stating that no religious group is larger than those who are unaffiliated from religion, which make up 24% of the public, and that young adults are more than three times as likely as seniors to identify as religiously unaffiliated). A recent survey shows that people having no religious affiliation are tied with Catholic and evangelicals as the three largest religious (or nonreligious) groups in the United States. Jack Jenkins, *'Nones' Now as Big as Evangelicals, Catholics in the U.S.*, RELIGION NEWS NETWORK (Mar. 21, 2019), https://religionnews.com/2019/03/21/nones-now-as-big-as-evangelicals-catholics-in-the-us/ [https://perma.unl.edu/E8VL-5UZK]. Other studies show that Christian membership continues to decline in the U.S., while those having no religion continues to increase. Allison De Jong, *Protestants Decline, More Have No Religion in a Sharply Shifting Religious Landscape*, ABC NEWS (May 10, 2018), https://abcnews.go.com/Politics/protestants/decline/religion-sharply-shifting-religious-landscape-poll/story?id=54995663 [https://perma.unl.edu/37XF-8LWT]. In a recent poll, twenty-nine percent of Americans were found to be nonreligious, with another thirty-two percent only somewhat religious, thus constituting a clear majority of the public. PEW RESEARCH CENTER, THE RELIGIOUS TYPOLOGY: A NEW WAY TO CATEGORIZE AMERICANS BY RELIGION 5 (2019). A 2019 *Wall Street Journal* poll found that just twenty-nine percent of Americans attend religious services once a week, down from forty-one percent in 2000. Gerald Seib, *Cradles, Pews, and the Societal Shifts Coming to Politics*, Wall St. J., June 25, 2019, at A4. According to the same poll, the numbers of those aged 18 to 34 who never attend religious services has more than doubled since 2000, now thirty-six percent. *Id.* For a discussion on how the nonreligious are becoming more secular, see Michael Lipka, *Religious 'Nones' Are Not Only Growing, They're Becoming More Secular*, FACTTANK: NEWS IN THE NUMBERS (Nov. 11, 2015), https://www.pewresearch.org/fact-tank/2015/11/11/reli

percent of Americans had no religious affiliation, which has grown to nearly eight times that figure in recent years.[77] Moreover, both legally and politically, Christian believers and practitioners often find themselves the object of attack and scorn.[78] As constitutional law scholar Gerard Bradley writes, "For the first time in American history, it has become respectable to publicly oppose religious liberty and its supreme value in our polity."[79]

The decline in the percentage of the population that is religiously affiliated translates into a similar decline in the social and cultural sensitivity toward religious beliefs. While the general society might once have possessed an instinctive respect for, or at least understanding of, strongly held religious beliefs, if for no other reason than a vast majority of Americans had some affiliation with organized religion, such may not be the case now, especially with large numbers of Americans having no experience with organized religion.[80]

For example, in *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Comm'n*, the Court found the Colorado Civil Rights Commission had shown religious animosity in its rulings that Jack Phillips, a Christian baker, violated state civil rights laws by refusing a make a cake for a gay couple's wedding.[81] In part through the "inappropriate

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gious-nones-are-not-only-growing-theyre-becoming-more-secular/ [https://perma.unl.edu/9JKH-DTCU]. This "generational replacement" effect means that as "older Americans with relatively strong religious commitments die off, younger less affiliated Americans gradually will take their place . . . [and the] Nones will make up an increasingly large percentage of the population." *See* Mark L. Movsesian, *Masterpiece Cakeshop and the Future of Religious Freedom*, 42 HARV. J.L. & PUB. POL'Y 711, 723 (2019).

77. *Id.* at 722–23.

78. *See infra* notes 85–94. Reflecting the shifting social attitudes against religion, the Democratic National Committee on August 24, 2019 passed a resolution specifically praising the religiously unaffiliated, stating that "religiously unaffiliated Americans overwhelmingly share the Democratic Party's values" and that the deeply religious have used their beliefs, "with misplaced claims of religious liberty," to oppress other groups. Peter Hasson, *DNC Resolution Celebrates Religiously Unaffiliated*, THE DAILY SIGNAL (Aug. 30, 2019), https://www.dailysignal.com/2019/08/30/dnc-resolution-celebrates-religiously-unaffiliated/ [https://perma.unl.edu/8EAN-67DC].

79. Gerard V. Bradley, *Sexual Identity Politics and Religious Freedom in a Secular Age*, PUBLIC DISCOURSE (Apr. 28, 2019), https://www.thePublicDiscourse.com/2019/04/50836/ [https://perma.unl.edu/H3J2-UQ7Y]. *See also* Patrick M. Garry, *The Cultural Hostility to Religion*, 47 MOD. AGE 121 (2005) (discussing a pattern of judicial, institutional and cultural hostility toward religion in modern American society).

80. *See* Movsesian, *supra* note 76 at 729.

81. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1729–31 (2018). For a scholarly discussion that the Commission was tainted by prejudice against Christians, see Douglas Laycock & Thomas Berg, *Masterpiece Cakeshop: Not as Narrow as May First Appear*, SCOTUSBLOG (June 5, 2018, 3:48 PM), https://www.scotusblog.com/2018/06/Symposium-Masterpiece-Cakeshop-Not-as-Narrow-as-May-First-Appear/ [https://perma.unl.edu/X3M4-VH2E].

and dismissive comments showing lack of due consideration for Phillips' free exercise rights," the Commission showed "a clear and impermissible hostility toward [Phillips'] sincere religious beliefs."[82] The Court cited the statements of one commissioner, who "went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust."[83] Another statement referred to the "despicable" nature of Phillips's religious beliefs regarding same-sex weddings.[84]

To the Court, the Commission had been blatantly biased against Phillips's religious liberty claims.[85] Moreover, throughout the agency and appellate process, neither the agency nor courts considered Phillips's religious claims to be worthy of judicial consideration; the only question addressed by the Colorado courts was whether the secular antidiscrimination norms were violated.[86] As Steven Smith points out, because Phillips's actions caused no measurable damages to the same-sex complainants, the prosecution against Phillips was really about punishing his religious beliefs.[87]

In a case involving Oregon bakers who were fined for refusing to bake a cake for a same-sex wedding, the Commissioner of the Oregon Bureau of Labor and Industries, as part of his 2015 ruling imposing a fine, also ordered the former owners of Sweet Cakes by Melissa to "cease and desist" from communicating about any future intent to exercise their religious beliefs in ways that might discriminate on the basis of sexual orientation.[88]

Similarly, a Catholic order of nuns whose mission involves caring for the elderly poor, had to sue the government because the Affordable Care Act (ACA) put them in an unresolvable position: either sacrifice their religious beliefs or give up their religious mission.[89] The Little Sisters of the Poor took their opposition to the Act's mandate that they offer contraceptive and abortion-inducing drugs in their healthcare plans for their employees all the way to the Supreme Court.[90] This

82. *Masterpiece Cakeshop*, 138 S. Ct. at 1729.
83. *Id.* at 1729–30.
84. Movsesian, *supra* note 76, at 720.
85. *Masterpiece Cakeshop*, 138 S. Ct. at 1732.
86. *Id.*
87. Steven D. Smith, *What Masterpiece Cakeshop is Really About*, PUBLIC DISCOURSE (Oct. 24, 2017), http://www.thepublicdiscourse.com/2017/10/20148/ [https://perma.unl.edu/6LQ9-ZEZK]. As a further show of bias, the Commission had refused on numerous occasions to take any action against bakers who, because of conscience, refused to make cakes with anti-gay marriage messages, thus demonstrating that it was not being fair or neutral to Phillips's conscientious actions. *Masterpiece Cakeshop*, 138 S. Ct. at 1730–31.
88. Klein v. Or. Bureau of Labor & Indus., 410 P.3d 1051, 1086–87 (Or. Ct. App. 2017), *vacated* 139 S. Ct. 2713 (2019).
89. Little Sisters of the Poor Home for the Aged v. Burwell, 136 S. Ct. 1557 (2016).
90. *Id.*

was not a case of the federal government wanting those employees to have access to contraception, but instead the federal government trying to force the Little Sisters of the Poor to violate their own religious beliefs and distribute those contraceptives through their own health plan.

Aside from the fact that the federal government seemed intent on forcing the Little Sisters of the Poor to either violate their Catholic beliefs or give up their social mission, Congress did not actually enact the contraceptive mandate.[91] It was the Department of Health and Human Services (HHS) that defined the "preventative care" language in the Act to cover contraceptives.[92] Not only did HHS know that its ruling would force religious believers like Little Sisters of the Poor to violate their religious beliefs, but it also knew that the regulations would burden religious free exercise more generally.[93] Because the contraceptive mandate was not in the statute, the government was under no legal obligation to include contraceptive coverage under the ACA's mandates, and the federal government knew how the mandate conflicted with religious beliefs, it is obvious that the federal government deliberately provoked the fight that took the Little Sisters of the Poor to court.[94]

The federal government's animosity to religion was also evident in *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, where the government's attempt to regulate the ministerial officials of a religious organization was struck down by a rare unanimous ruling by the Supreme Court.[95] California Senator Dianne Feinstein displayed a similar animus when she suggested at the judicial nomination hearing of Amy Coney Barrett that Professor Barrett's deeply held Catholic beliefs were problematic and might be disqualifying.[96]

Religious hospitals, social service providers and universities have been besieged by a regulatory environment that can be overtly hostile

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91. The ACA required all health plans to include coverage for certain preventive care services for women. *See* Pub. L. 111-148 Sec. 2713, 124 Stat. 131 (Mar. 23, 2010). However, the Act never defined contraceptive products or services within the definition of "preventive care services." The so-called contraceptive mandate was promulgated by the Department of Health and Human Services, as part of the regulations promulgated to implement the ACA.

92. *Id.*

93. Ilya Shapiro & Josh Blackman, *Obamacare Again? A Second Chance for the Little Sisters*, THE WEEKLY STANDARD, Mar. 28, 2016, at 20–21.

94. *See supra* note 91.

95. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 132 S. Ct. 694 (2012) (holding that the internal governance of a religious institution is absolutely protected by the First Amendment).

96. *See* Aaron Blake, *Did Dianne Feinstein Accuse a Judicial Nominee of Being Too Christian?* WASH. POST (Sept. 7, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/09/07/did-a-democratic-senator-just-accuse-a-judicial-nominee-of-being-too-christian/ [https://perma.unl.edu/YC3J-WWUU].

to religious doctrine regarding such issues as abortion, same-sex marriage, and transgender surgeries.[97] For instance, Catholic social service agencies, long admired for their efficient and compassionate care, have now found themselves in the cross hairs of a government hostility.[98] This marks a dramatic turnaround from nearly two decades earlier, when religious social service groups experienced a much more supportive environment under President Bush's Faith-Based Initiatives.[99]

Pursuant to a growing political trend, administrative agencies at both the federal and state levels are committed to enforcing an equality based on secular norms, and in turn, see religious norms as hostile to this new perception of equality.[100] In the guise of promoting equality, albeit an equality inherently biased against religion, the administrative state has turned its sights on breaking down "the social boundaries" that religious believers erect "to maintain their distinctiveness and preserve their values."[101]

VI. THE WEAKNESSES OF CURRENT ESTABLISHMENT CLAUSE APPROACHES

American Legion only addressed longstanding passive displays. The Court said nothing about what other Establishment Clause approaches would or could be used in other fact settings. Neutrality is one such approach the Court did not discuss.

A. The Rise of the Neutrality Approach

Given social and cultural changes—particularly the growing animosity toward religion—the shortcomings of current Establishment Clause doctrines have become especially evident. In particular, the neutrality approach, while seemingly fair on its face to religion, has revealed its inherent biases.

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97. Angela C. Carmella, *Catholic Institutions in Court: The Religion Clauses and Political-Legal Compromise*, 120 W. VA. L. REV. 1, 66 (2017).

98. *Id*. at 75–76.

99. *See* Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 5–15 (2005).

100. *See* Movsesian, *supra* note 76, at 714 (arguing this governmental activism seriously infringes on the beliefs and practices of the traditionally religious population).

101. *Id*. at 740–41 (arguing "The Traditionally Religious face an expanding set of rules and policies that promote new understandings of equality, particularly with respect to sexuality and gender, along with an every-expanding bureaucracy dedicated to enforcing them. . . . The Traditionally Religious face increasing pressure to accept the new understandings and comply with the new rules, or face a 'looming threat of a wide range of legal sanctions.'").

Neutrality is based upon the principle of equal treatment for religion and non-religion.[102] In *Good News Club v. Milford Central School*,[103] for instance, a commitment to viewpoint neutrality led the Court to overturn a school board policy excluding religious groups from after-hours use of school facilities. The *Good News* opinion, along with earlier decisions in *Lamb's Chapel v. Center Moriches Union Free School District*[104] and *Rosenberger v. Rector and Visitors of the University of Virginia*,[105] stand for the proposition that the Establishment Clause cannot be used to justify viewpoint discrimination against religious organizations seeking the same kinds of public benefits that secular groups receive.[106]

In a more direct application of the Establishment Clause, the Court in *Zobrest v. Catalina Foothills School District*[107] upheld a provision allowing a publicly funded sign language interpreter to be provided for a deaf student at a religious school, reasoning that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion do not violate the Establishment Clause.[108] In *Zelman v. Simmons-Harris*,[109] the Court used the neutrality doctrine to uphold Cleveland's school voucher program. It ruled the vouchers promoted private choice by giving money directly to students for their use at either religious or non-religious schools.[110] This scheme was found neutral because it left the decision of whether to apply funds toward a religious education to private choice and not government action (i.e., individuals, and not government, decide through enrollment decisions whether funds would go to

102. *See* Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 2 (2000).

103. Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

104. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

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

106. Likewise, a neutrality approach has also been used to strike down the no-aid approach, which prohibited the flow of any governmental benefit to any religious organization, since a strict no-aid reading of the Establishment Clause would require the exclusion of religious institutions from generally available government aid programs, and would thus constitute a penalty on the free exercise of religion. *See* Thomas R. McCoy, *Quo Vadis: Is the Establishment Clause Undergoing Metamorphosis?*, 41 BRANDEIS L.J. 547, 549 (2003) (stating that the no-aid approach contributed to the perceived irreconcilable tension between the Establishment and Free Exercise Clauses).

107. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

108. *Id*. at 8.

109. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

110. *Id.* at 662–63. In *Zelman*, the Court's finding that the Ohio program was one of true private choice was based upon the determination that the program is neutral toward religion, gives aid directly to a broad class of citizens without consideration of religion, and permits public and both religious and secular private schools to participate. *See id.* at 648–54.

religious schools).[111] The *Zelman* decision capped a trend of case law upholding government aid programs available to students of both public and private schools,[112] but rejecting programs that favor students attending non-public schools over students attending public schools as an impermissible establishment of religion.[113]

Compared with previous case law, neutrality initially appeared to be an advantageous doctrine for religion. Illustrative of previous judicial hostility to religion is *Aguilar v. Felton*,[114] where the Court ruled against parochial school participation in a special education program in the New York City school system. The program, first enacted in 1965 as a cornerstone of Lyndon Johnson's Great Society, provided remedial English and mathematics assistance to economically and educationally disadvantaged students.[115] By statute, school districts were required to provide comparable services to both public and private school students.[116] In the nineteen year history of the program, not a single instance of unconstitutional involvement by agents of one school system in the other was documented.[117] Nonetheless, the Supreme Court still invalidated the program on grounds of excessive entanglement,[118] implying that the proponents of the program, not its opponents, had the burden of proving that there would never be a problem in the administration of the program.[119]

Even though neutrality is a better approach for religion than that used in *Aguilar*, it still has drawbacks. Based on the principle that government must be neutral between religion and non-religion, neutrality prohibits government from providing any benefits to religion unless they are made equally available to nonreligious groups or indi-

111. *Id.* at 622–23.
112. *See, e.g.*, Mueller v. Allen, 463 U.S. 388, 397 (1983) (approving of an aid program benefitting public and private school students).
113. *See* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782–83, 794 (1973).
114. Aguilar v. Felton, 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).
115. *Id.* at 406.
116. Chapter 1 of the Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, 95 Stat. 463.
117. *Aguilar*, 473 U.S. at 424 (O'Connor, J., dissenting).
118. *Id.* at 414.
119. The Supreme Court abandoned the reasoning of *Aguilar* when it overruled that decision in *Agostini v. Felton*, 521 U.S. 203 (1997). In *Agostini*, the Court stressed the importance of formal neutrality in concluding that the Establishment Clause did not preclude publicly funded teachers from teaching secular, remedial courses on the premises of religious schools under a federally funded program that supported teaching at nonreligious schools as well. Although the Court also relied on other considerations, it suggested that Establishment Clause invalidation would be unlikely when aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. *Id.* at 230–32.

viduals. Thus, neutrality prevents the state from accommodating particular religious practices or from flexibly dealing with the unique problems and needs of religion. For instance, government cannot grant to religious organizations exemptions from the burdens of generally applicable laws, because if the exemption at all favors religion—even religion in general—it will probably violate the Establishment Clause.[120] As one scholar has noted, "the immediate impact of formal neutrality may seem beneficial for religion, but its long-term effect . . . may be to . . . secularize religion."[121]

B. Neutrality as a Denial of Religion's Role

Despite the fact that religious liberty is the first freedom mentioned in the Bill of Rights, the neutrality doctrine implies that religion is neither distinct nor distinctly important. Critics of the doctrine argue that it is "inadequately sensitive to religious freedom by flatly prohibiting all religious exemptions from general regulations no matter how greatly they burden religious exercise and how insubstantial the competing state interest may be."[122] By leveling religion to the same plane as the secular, neutrality ignores constitutional text and history, as well as the special role and value that the framers envisioned for it in American society. Moreover, contained within the neutrality approach is the assumption that the First Amendment protects secularism as much as religion. Instead, the First Amendment singled out religion for special treatment based on a whole set of historical factors and theological beliefs prevalent in the eighteenth century.[123]

120. *See, e.g.*, Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (invalidating Texas sales tax exemption that was granted to religious literature but not to other literature).

121. Conkle, *supra* note 102, at 25.

122. JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 21 (1995).

123. Steven D. Smith, *The Last Chapter?*, 41 PEPP. L. REV. 903, 903 (2014) [hereinafter *The Last Chapter*]. Religion, as the oldest institution in American social life, has often provided the social capital necessary to overcome the atomizing force of individualism. *See* STEPHEN CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION, 35–43 (1993). Communities fostered by religion create a valuable buffer between the state and the individual. *See* Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984). They allow and advance the flourishing of moral principles, and they promote cultural diversity. *See* Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 116 (1989). A healthy democracy cannot survive without a social value system that supports the communal interests and bonds of that society. Religion counteracts the destructive urges of individual narcissism that elevate self-centeredness to the point that it drowns out any sense of public responsibility. For an outline of the harms brought to American culture through an elevation of individual narcissism and of an obsession with self identity see CHRISTOPHER LASCH, THE CULTURE OF NARCISSISM (1979). Consequently, with the increasing separation of religious influences from the public sphere over the past several decades, society has witnessed dramatically higher

In addition to its cultural role, religion also serves a vital political role. It is not only an important source of viewpoints in the process of democratic self-government, but it has been a powerful political motivator behind some of the nation's greatest crusades.[124] Religious organizations, for instance, energized both the abolitionist movement of the nineteenth century and the civil rights movement of the twentieth century. This view of religion and its importance to public morality and civic virtue was expressed by Dwight D. Eisenhower, who stated that "[o]ur government makes no sense unless it is founded in a deeply felt religious faith, and I don't care what it is."[125] And this opinion was squarely within the tradition of the framers.

Religious institutions also perform vital social welfare services.[126] This ability was highlighted in *Zelman*, the Cleveland school voucher case. Prompting the voucher program was a recognition of the "crisis of magnitude" that existed in the Cleveland public school system, with only ten percent of ninth graders passing a proficiency test and more than two-thirds of high school students failing to graduate.[127] The program passed with the strong support of inner-city minorities, as a way of escaping the chronically failing urban schools.[128] In *Zelman*, Justice Thomas observed that "failing urban public schools disproportionately affect minority children most in need of educational opportunity."[129] He warned that the "failure to provide education to poor urban children perpetuates a vicious cycle of poverty, dependence, criminality, and alienation that continues for the remainder of their lives."[130] He then cited data from Cleveland showing that religious schools are more educationally effective than public schools.[131]

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levels of violence, divorce, illegitimacy, and other manifestations of cultural dysfunction. DOUGLAS W. KMIEC & STEPHEN PRESSER, THE AMERICAN CONSTITUTIONAL ORDER: HISTORY, CASES AND PHILOSOPHY, 196 (1998). Americans often name the loss of religion as a leading cause of difficult social problems such as drugs and crime. Laurie Messerly, *Reviving Religious Liberty in America*, 8 NEXUS 151, 164 (2003).

124. Political movements owing to religious inspirations include the Social Gospel movement, nearly all the peace movements, the demand for freer immigration of refugees, abolition and civil rights.

125. SIDNEY E. MEAD, THE NATION WITH THE SOUL OF A CHURCH 25 (1975).

126. *See* JOSEPH P. VITERITTI, CHOOSING EQUALITY 80–81 (1999) (arguing that religion is able to serve some social welfare goals or functions better than secular institutions).

127. Zelman v. Simmons-Harris, 536 U.S. 639, 644 (2002).

128. Joseph P. Viteritti, *Reading* Zelman*: The Triumph of Pluralism, and its Effects on Liberty, Equality, and Choice*, 76 S. CAL. L. REV. 1105, 1173 (2003) [hereinafter *Reading* Zelman] (arguing that almost a half-century after *Brown v. Board of Education* was handed down, most blacks are still not getting a decent education, and so vouchers are a necessary next step beyond *Brown*).

129. *Zelman*, 536 U.S. at 681–82.

130. *Id.* at 683.

131. *Id.* at 681.

Whereas ninety-five percent of the eighth graders in Catholic schools passed a state reading test, only fifty-seven percent of their public school peers did. Similarly, whereas seventy-five percent of the Catholic school students passed a math proficiency test, their public school peers had only a twenty-two percent passage rate.[132] Furthermore, in *Zelman*, evidence showed that the average cost of sending a child to a religious school is considerably lower than the cost of public school.[133] In the Cleveland program, for example, religious schools received a maximum of $2,250 per student in public funding, whereas public schools were allocated $7,746 per student.[134]

In addition to education, prison operation and offender rehabilitation has been an area in which religious organizations have proved especially effective. Take, for instance, the case of Prison Fellowship Ministries (PFM), a nondenominational religious group founded in 1976 by former Nixon aide Charles Colson, who embraced evangelical Christianity while serving time in a federal prison in Alabama for his part in the Watergate cover-up.[135] PFM volunteers and staffers operate in prisons and teach faith-based courses that show inmates how religious conviction can help them stay off drugs, care for their children and hold down a steady job.[136] A civil liberties group, Americans United for Separation of Church and State, filed suit to stop a PFM operation in Iowa, but "one barrier to the lawsuit was finding a prisoner who wanted to complain."[137] Another problem for the suit was that PFM "does a far better job rehabilitating prisoners than the government does."[138] Studies also show that PFM inmates, once released, are half as likely to end up back in the criminal justice system as other inmates.[139]

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132. *Id*. A study conducted by the National Center for Education Statistics found that minority students who attend Catholic schools do better than their public school peers, and that disadvantaged minority students who attend Catholic high schools are more likely to graduate, go on to college and earn a degree. VITERITTI, *supra* note 126, at 83. Other studies have also found Catholic schools to better serve minority populations than urban public schools. *See id.* at 84.

133. *Reading* Zelman, *supra* note 128, at 1163.

134. *Id*. at 1164.

135. In 1997, at the request of the Texas State Legislature, PFM was given control over a wing at the state prison in Richmond. After assuming control, PFM implemented a regimen of prayer meetings, classes, and rehabilitation programs.

136. *Id.*

137. Daniel Brook, *When God Goes to Prison*, 2003 LEGAL AFF. at 22, 24 (June 2003).

138. *Id.* at 24–25. To avoid constitutional problems, taxpayer money pays for only those aspects of prison life that exists at state-run prisons. All the religious programs, which are completely voluntary, are paid for by private donations.

139. *Id.* at 27. *See also* VITERITTI, *supra* note 126, at 80–81 (arguing religion is able to serve some social welfare functions better than secular institutions).

C. Neutrality's Erosion of Religious Liberty

By giving special recognition to religion, the government does not just help a useful social institution to survive; it also recognizes one of the most fundamental laws of sovereignty. The framers saw that religious duties are more important than secular duties.[140] As the Declaration of Independence stated, the duties owed to God transcend those owed to any temporal authority.[141] To the religious believer, the duty to God is supreme, and religious claims are prior to and of greater dignity than the claims of the state. The state cannot simply ignore these claims without treating them as de facto false. Thus, even though the state cannot determine the truth of religious beliefs, it should respect them and afford them every possible benefit of the doubt. As the philosopher Blaise Pascal once argued, the risk of not respecting religious beliefs is a risk not worth taking.[142]

Neutrality not only ignores the special role of religion, but also paves the way for a denial of religious freedom. In *Christian Legal Society v. Martinez*, for instance, the Court upheld the decision of Hastings Law School to deny official recognition of the Christian Legal Society, on the grounds that the group accepted as members only those students who accepted the group's stated principles, one of which forbade sex outside of heterosexual marriage.[143] Thus, because the group violated the school's "neutral" nondiscrimination policy, it was denied the same recognition and benefits of other student groups. But this so-called neutral denial, the first ever in the school's history, effectively violated the group's rights of freedom of speech, association, and religious exercise.[144]

Perhaps the embrace of neutrality reflects a larger social detachment from a commitment to religious freedom. But if religious freedom loses its special status in constitutional law, the erosion of social and political support for religion will surely place that freedom in further jeopardy. Indeed, the whole point of granting special constitutional protections to religion was to protect it even when the political and cultural forces might turn against it.

Professor Movsesian describes this neutrality as an "equality of sameness that treats social distinctions, especially religious distinc-

140. *See* Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 154–66 (1991).

141. The primacy of conscience is reflected throughout the constitutional documents. *See* Michael W. McConnell, *Why is Religious Liberty the First Freedom?*, 21 CARDOZO L. REV. 1243, 1251 (2000).

142. *See generally* BLAISE PASCAL, PASCAL'S PENSÉES, Section 3 (John Cruickshank trans., Grant & Cutter ed. 1983).

143. Christian Legal Soc'y Chapter v. Martinez, 558 U.S. 1076 (2009).

144. *The Last Chapter*, *supra* note 123.

tions, as arbitrary and unimportant."[145] Under this view, equality becomes intolerant, reflecting "a broader unwillingness to accept any distinctions among groups and individuals."[146]

D. The Wrong Baseline

By its very nature, the notion of neutrality is comparative. Neutrality denotes comparison. To determine whether a law or policy is neutral, one must have some basis for comparison. One must have a baseline against which to make comparisons. As so often applied, neutrality in the areas of law and religion uses a secular baseline. Because the First Amendment was ratified in an era of religious society, the baseline was religion and the religious nature of society. But as society has become more secular, the baseline used by courts has likewise shifted. Now, the secular represents the neutral comparison point. Religion, on the other hand, is something different, something out of the ordinary, something that threatens the neutrality of society.[147]

The neutrality approach has succeeded in portraying governmental secularity as being neutral to religion.[148] However, a secular "neutrality" that effectively pushes religion out of the public square and denies that it is different from any other set of opinions or practices is hardly "neutral" to religion. Instead, it is pro-secular, and if one decides that secularity equals neutrality, then one can conclude that dismantling long-standing religious symbols is simply a neutral action.

If secularism is the baseline of neutrality, then neutrality is essentially secularism, or a policy designed to achieve and maintain secularism. But secularism, vis-a-vis religion, is not neutrality. This can be seen in the use of the endorsement test that grants a heckler's veto to those who object to religious expression in the public square. The endorsement test is said to be neutral, because it uses secularism as its baseline, but in its application it is not neutral to religion. In fact, because of the endorsement test, religious expression is treated more harshly than any other kind of speech, since religious expression on public property, under the endorsement test, is effectively subject to a heckler's veto.[149]

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145. Movsesian, *supra* note 76, at 714.

146. *Id.* at 731 (stating that under this view "equality means a rejection of the idea of difference per se").

147. *See, e.g.*, James Davison Hunter, *Law, Religion, and the Common Good*, 39 PEPP. L. REV. 1065, 1069 (2013) (stating that the secular represents value-neutrality, objectivity, or "at least an inclusive realm of autonomous rationality as the basis of a truly universal ethics").

148. Steven D. Smith, *The Plight of the Secular Paradigm*, 88 NOTRE DAME L. REV. 1409, 1443 (2013).

149. *See supra* note 61.

If the courts take a neutrality approach, then anything religious cannot survive because neutrality has been equated with secularism. Using secularism as the neutrality baseline in Establishment Clause cases has effectively raised secularism to a constitutional command. As Steven Smith writes, the "constitutionalization of the neutrality-as-secularism position meant that in the future, the secularist conception would dominate not only school prayer cases, and indeed not only Religion Clause cases, but would come to govern . . . constitutional discourse generally."[150] Thus, not only does neutrality mean secular, but to act in a secular manner the government must act in a way so as to be not religious. But if this is the case, then a great deal of American history, throughout which government has recognized and accommodated religion, is undermined. Using the neutrality approach, the Court's Establishment Clause jurisprudence has "established political secularism as the nation's constitutional orthodoxy."[151]

E. The Endorsement Test's Favoring of Anti-Religion

As discussed above, another frequent approach used by the Court to resolve Establishment Clause cases is the endorsement test. Although the endorsement test does not have the built-in bias against religion that the neutrality approach has, it has been applied in ways that actually discriminate more against religion. The endorsement test is not just biased against religion—it has been applied to affirmatively favor the anti-religious. And it has carved out a constitutional right that gives dissenters a veto power over any religious expression in the public square. According to the endorsement test, the secular can never offend or alienate, but the religious frequently does.

For example, the Supreme Court has used the Establishment Clause to strike down many local accommodations of religious exercise, including all kinds of public displays of religious symbols.[152] Effectively creating a "dissenter's right" out of the Establishment Clause, the Court has given a constitutional trump card to individuals

150. Steven D. Smith, *Constitutional Divide: The Transformative Significance of the School Prayer Decisions*, 38 PEPP. L. REV. 945, 992 (2011).

151. *Id.* at 1017.

152. According to Professor Conkle, the Supreme Court has used the Establishment Clause "to enforce a wavering, but relatively strict, separation of church and state at all levels of American government." Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1117 (1988). As Justice Kennedy stated in *County of Allegheny*, the Court has displayed "an unjustified hostility toward religion" and a "callous indifference toward religious faith." Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 655, 664 (1989). According to the Court in *Lynch v. Donnelly*, when courts enforce a strict separation of church and state, they assault the freedom of religious exercise as guaranteed in the First Amendment. Lynch v. Donnelly, 465 U.S. 668, 668 (1984).

who claim, for instance, that their rights have been violated by a crèche displayed on public grounds[153] and by a plaque of the Ten Commandments hanging in a courthouse.[154] This dissenter's right has been judicially nationalized to block the religious expressions of the larger community, regardless of the religious traditions or sensibilities of the local communities in which the religious displays or expressions take place.

In *County of Allegheny v. American Civil Liberties Union*, Justice Stevens fortified the dissenter's right interpretation by stating that there should be a strong presumption in Establishment Clause jurisprudence against the display of religious symbols on public property, since there is "always a risk that such symbols will offend nonmembers of the faith being advertised as well as adherents who consider the particular advertisement disrespectful."[155] On the other hand, Justice Scalia took the opposite position. Focusing on the history of the Establishment Clause and the intent of the ratifiers and framers of that clause, Justice Scalia cited the longstanding American tradition of prayer at official ceremonies as demonstrating with unmistakable clarity that the Establishment Clause does not forbid the government to accommodate religion,[156] and does not require the subversion of the public expression of religious beliefs to a secularist opposition to those beliefs.[157] But according to Justice Stevens, in his application of the endorsement test, and in a continued focus on the perspective of the non-adherent: "A paramount purpose of the Establishment Clause is to protect such a person from being made to feel

153. *Cty. of Allegheny*, 492 U.S. 573.

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

155. 492 U.S. at 650–51 (Stevens, J., concurring in part and dissenting in part).

156. Lee v. Weisman, 505 U.S. 577, 645 (1992) (Scalia, J., dissenting). This tradition, of course, is contradicted by *Lemon's* making "advancement of religion" as a test for an Establishment Clause violation.

157. *Id.* at 645–46 (Justice Scalia stating, "The issue before us today is not the abstract philosophical question whether the alternative of frustrating this desire of a religious majority is to be preferred over the alternative of imposing 'psychological coercion,' or a feeling of exclusion upon nonbelievers. Rather, the question is whether a mandatory choice in favor of the former has been imposed by the United States Constitution. As the age-old practices of our people show, the answer to that question is not at all in doubt." (emphasis omitted)). Given his interpretation of history, for instance, Justice Scalia argues that the interest in promoting joint communal prayer among religions outweighs the interests of nonbelievers. *Id.* at 646 (stating that the founders of our republic "knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration—no, an affection—for one another than voluntary joining in prayer together, to the God whom they all worship and seek . . . [t]o deprive our society of that important unifying mechanism, in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law.").

like an outsider in matters of faith, and a stranger in the political community."[158] In an increasingly secular society, the endorsement test as espoused by Justice Stevens is not really a test, but is a foregone conclusion, because there will always be observers who will feel offended or alienated by the display.

In a case that reflects a dissenter's rights view of the Establishment Clause, *Skoros v. City of New York*, the United States Court of Appeals for the Second Circuit upheld a New York City public school policy on holiday season displays that forbade Christmas crèches, but allowed the Chanukah menorah and the star and crescent of Islam.[159] The government defended this policy on the ground that the Jewish and Islamic symbols had secular meanings for most students (i.e., Christians, since two-thirds of the students were from Christian families) but that the Christian nativity scene had only religious significance.[160] Thus, according to the court, the Establishment Clause primarily extends to restrain majority religions, while serving as a protection for minority religions that consequently possess privileges of religious expression that the majority religions do not enjoy.

The use of a dissenter's rights application of the Establishment Clause also occurred in *Santa Fe Independent School District v. Doe*.[161] At issue in *Santa Fe* was a Texas school district's practice of having a student, who was annually elected to the office of student council chaplain, deliver a prayer over the public address system before each varsity football game.[162] This practice was held by the Court to be a violation of the Establishment Clause.[163] The Court found that the prayer practice was coercive, insofar as objecting witnesses, who were in the minority, were put into the position of either attending a personally offensive religious ritual or foregoing a traditional gathering of the school community.[164]

VII. CONCLUSION: WHEN THE SUPPOSED REMEDY BECOMES THE DEPRIVATION

Religious displays or expressions on public property face a quandary. There are no statutes of limitations regarding objections to those displays. Moreover, when an objection is made, not only can no reme-

158. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 799–800 (1995) (Stevens, J., dissenting).

159. Skoros v. City of New York, 437 F.3d 1, 6–7 (2d Cir. 2006).

160. *Id.* at 6–8.

161. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

162. *Id.* at 294.

163. *Id.* at 320. The Court found that the practice created "the perception of encouraging the delivery of prayer at a series of important school events." *Id.*

164. *Id*. at 311.

dial action be taken short of total removal, but even the attempt at some remedial action can work against the display.

As Justice Souter wrote in *McCreary County v. American Civil Liberties Union of Kentucky*, the government's attempt to modify the Ten Commandments display and disavow adherence to any religious beliefs in response to objectors was futile because the reasonable observer "could not forget" the original display.[165] Likewise in *Buono v. Kempthorne (Buono IV)*, attempts by Congress to save a war memorial in the shape of a cross by conveying the property to private ownership were counterproductive, according to the court, because a reasonable observer would be aware of all the actions taken by Congress to save the memorial and hence perceive Congress's actions as an endorsement of religion.[166]

As applied, the endorsement test renders any remedial efforts nearly impossible. No matter what subsequent steps are taken to disassociate the governmental unit from the particular private religious speech or symbol, the courts can always point to whatever endorsement may have occurred prior to that disassociation. In *Mercier v. City of La Crosse*,[167] plaintiffs sued to force the removal from a public park of a monument bearing the Ten Commandments. The monument had been placed in the park forty years earlier by the Fraternal Order of the Eagles.[168] In an attempt to avoid the lawsuit, the city sold back to the Eagles the twenty-foot by twenty-foot plot of land on which the monument stood.[169] Subsequently, the Eagles installed a tall iron fence around the perimeter of the parcel, with signs at each corner of the fence stating that the monument was the private property of the La Crosse Eagles.[170] Six months later, the city erected a second iron fence around the monument.[171] This fence was gated, and hanging on it was a sign that read: "This property is not owned or maintained by the City of La Crosse, nor does the City endorse the religious expressions thereon."[172] Yet despite all these actions, the court held that the city had failed to cure the Establishment Clause violation and that a reasonable observer could still conclude that the city was sponsoring the monument.[173]

165. McCreary Cty. v. ACLU, 545 U.S. 844, 870 (2005).

166. *Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069, 1073, 1076 (9th Cir. 2007), *rev'd* Salazar v. Buono, 559 U.S. 700 (2010).

167. Mercier v. City of La Crosse, 276 F. Supp. 2d 961 (W.D. Wis., 2003), *rev'd* Mercier v. Fraternal Order of Eagles, 395 F.3d 693 (7th Cir. 2005).

168. *Id.* at 963.

169. *Id.*

170. *Id.*

171. *Id.* at 965.

172. *Id.* at 965–66.

173. *Id.* at 975.

The *Mercier* court acknowledged that the disclaimer sign might prevent a newcomer to La Crosse from perceiving any city endorsement of the religious message.[174] The problem, however, laid with the city's long-time residents. According to the court, those residents would know about the city's relationship with the monument, its desire to keep the monument on city property, and its efforts to resist removal of the monument.[175]

When it comes to a government-ordered dismantling of a long-standing religious symbol used to commemorate a non-religious event, such as the wartime sacrifices of military veterans, the question arises as to which is the greater violation of the Establishment Clause—the maintenance of a privately-built religious symbol on government property, or the intentional government destruction of a symbol of a particular religion's beliefs. When government categorically takes action that sends a message of disapproval of private religion, the Establishment Clause is violated. When government publicly targets religious expression made decades earlier by private individuals, the free exercise of religion is targeted.

With all the unanswered questions left from *American Legion*, not to mention the narrowness of the holding, there could still be many instances in which even a passive religious display might be seen in violation of the Establishment Clause. Therefore, to preserve free exercise, if a symbol is found to violate the Establishment Clause because it might not meet all the specific guidelines of *American Legion*, it should be offered to a private group before any dismantling occurs. To do otherwise would be to risk a Free Exercise infringement, which the Establishment Clause should never be used to do. Because the First Amendment religion clauses are all about religious liberty, the

174. *Id.* at 978–79.
175. *Id.*

Establishment Clause should not be applied in ways that diminish the scope of that liberty.[176]

176. Since the First Amendment is all about liberty, the Free Exercise Clause is the primary of the two religion clauses. As scholars have noted, religious liberty was "the only concern of the authors of the religion clause." Stephen L. Carter, *Reflections on the Separation of Church and State*, 44 ARIZ. L. REV. 293, 309 (2002). Consequently, the Free Exercise Clause, which directly protects religious liberty, is the primary clause within the First Amendment. As Professor Dent argues, "[o]ne can justify a greater sensitivity to establishment claims than to free exercise claims only if the religion clauses are viewed as promoting secularism." George W. Dent, Jr., *Of God and Caesar: The Free Exercise Rights of Public School Students*, 43 CASE W. RES. L. REV. 707, 719 (1993). Given the primacy of the Free Exercise Clause in the First Amendment hierarchy, the Establishment Clause occupies a subordinate position. Consequently, the Establishment Clause can never negate the Free Exercise Clause. Often, however, the Establishment Clause has been at the focal point of First Amendment jurisprudence. But this is just the opposite of what should be the case. Nearly every member of the Court over the course of the development of the Court's establishment clause jurisprudence has subscribed to some form of the principle that even without any material aid to religion, government endorsement of religion will at some point constitute a violation of the Establishment Clause. *See* Thomas R. McCoy, *supra* note 106, at 553. Indeed, free exercise seems "to have been left on the sidelines of the rights revolution. Mary Ann Glendon, *Law, Communities and the Religious Freedom Language of the Constitution*, 60 GEO. WASH. L. REV. 672, 678 (1992). It has taken somewhat of a beating from judges who have given an expansive interpretation to the notion of 'establishment,' while at the same time ignoring the restrictions being inflicted "on the associational aspects of free exercise." *Id.* (highlighting the claim being made that, for the sake of avoiding the establishment of religion, Americans must surrender some of their rights regarding the free exercise of religion). It has become common for the Court "to trump free exercise claims with findings of religious establishment." *Reading* Zelman, *supra* note 128, at 1145. As applied by the Court, "the Establishment Clause did not expand the legitimate claims of religious people; it worked to diminish them." *Id.* at 1146. Thus, the constitutionally "privileged status of religion [has] been turned into a disability." Richard John Neuhaus, *A New Order of Religious Freedom*, 60 GEO. WASH. L. REV. 620, 629 (1992). "When the American people can no longer publicly express their obligations to the Creator, it is feared that they will no longer acknowledge their obligations to one another—nor to the Constitution in which the obligations of freedom are enshrined." *Id.* at 632.