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The Original Meaning of "God": Using the Language of the Framing Generation to Create a Coherent Establishment Clause Jurisprudence

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THE ORIGINAL MEANING OF “GOD”: USING THE LANGUAGE OF THE FRAMING GENERATION TO CREATE A COHERENT ESTABLISHMENT CLAUSE JURISPRUDENCE

MICHAEL I. MEYERSON*

The Supreme Court’s attempt to create a standard for evaluating whether the Establishment Clause is violated by religious governmental speech, such as the public display of the Ten Commandments or the Pledge of Allegiance, is a total failure. The Court’s Establishment Clause jurisprudence has been termed “convoluted,” “a muddled mess,” and “a polite lie.” Unwilling to either allow all governmental religious speech or ban it entirely, the Court is in need of a coherent standard for distinguishing the permissible from the unconstitutional. Thus far, no Justice has offered such a standard.

A careful reading of the history of the framing period reveals that those responsible for the initial implementation of the First Amendment were able to create a compromise that permitted the use of governmental religious speech in a way that was inclusive of all citizens, regardless of faith. Committed to creating an “American” vision of religious freedom, one that was distinct from the restrictive practices of the individual states, George Washington, Thomas Jefferson, and James Madison created a new template for public religious vocabulary. Through the use of non-sectarian, theologically equivocal language, they found a way to talk simultaneously to the most orthodox segment of the population and atheists, deists, and other members of religious minorities.

My Article proposes building on the lessons of the framing period to create a workable Establishment Clause jurisprudence. If we accept that non-sectarian phrases such as “endowed by their Creator” need not divide our nation, we can modify the traditional “endorsement test.” A workable test reflecting the Framers’ wisdom would only judge governmental speech as unconstitutional if it endorsed religion in such a way “that it 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.” Simple non-sectarian utterances, such as the Supreme Court’s invocation “God save the United States and this honorable court,” would

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be permitted, while the courthouse display of the Ten Commandments would be prohibited, and judges and lawyers would finally be able to rely on a usable, understandable Establishment Clause jurisprudence.

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I. INTRODUCTION

The Supreme Court has never figured out how to evaluate the constitutionality of the myriad religious references that pervade American public life. The Court seemingly alternates between ad hoc, one-case-at-a-time jurisprudence and prudential avoidance of the constitutional issue altogether. The result has been confusion for government officials, a lack of guidance for lower courts, and unsympathetic disrespect by many of those who study the Court.¹

The fundamental problem for the Court arises from the fact that it has been unwilling to either prohibit all governmental religious speech (such as the national motto, "In God we trust," and the phrase, "one nation under God," in the Pledge of Allegiance) or permit all governmental religious speech (such as placing the Ten Commandments in a school or courthouse). Thus, the Court is left with the difficult task of articulating the line between permissible and unconstitutional religious governmental speech. As Douglas Laycock noted,

It is easy to explain why government can never say anything about religion, and equally easy (though less convincing) to explain why government can say anything it wants about religion so long as it does not coerce or penalize those who disagree. Avoiding either extreme requires the Court to pick and choose, to explain why government can endorse some religious

1. See, e.g., G. Sidney Buchanan, *Prayer in Governmental Institutions: The Who, the What, and the at Which Level*, 74 TEMP. L. REV. 299, 326 (2001) ("[A] healthy dose of gastronomic jurisprudence enters the arena. We know in our guts that the Supreme Court will not require government to remove the references to God from the national motto or the pledge of allegiance. But, we stumble uncertainly in searching for a convincing rationale to support that position."); RonNell Andersen Jones, *Pick Your Poison: Private Speech, Government Speech, and the Special Problem of Religious Displays*, 2010 BYU L. REV. 2045, 2046 ("All told, the Supreme Court's handling of purportedly sectarian displays has been convoluted at best."); Bruce Ledewitz, *Could Government Speech Endorsing a Higher Law Resolve the Establishment Clause Crisis?*, 41 ST. MARY'S L.J. 41, 47 (2009) ("Public religious displays and imagery are routinely upheld by the courts, but without convincing explanation."); Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 1003 (1989) ("When the Court wishes to invalidate a law or practice, it implicitly adopts an exclusionary approach; finding religious content or inspiration, the Court pronounces the law or practice unconstitutional. When the Court wishes to uphold a law or practice, it adopts an inclusive or positive conception of the secular; almost any measure enacted by a state or national legislature will survive that test.").

propositions but not others, with no clear principle to guide the choices.²

One of the major reasons the Court has not had a “clear principle” to guide its Establishment Clause cases is that the Justices have fundamentally misunderstood the history of the words and actions of those who helped create the First Amendment. The Framers are assumed to have wanted either a “‘high and impregnable’ wall between church and state”³ or a nation in which the national government could encourage citizens to attend a particular church as long as no governmental coercion was involved.⁴ The Framers are said to have been interested in furthering either only monotheism⁵ or only Christianity.⁶

The error in these interpretations is that they treat the Framers as simplistic, narrow-minded partisans. In reality, the Framers constructed a sophisticated compromise. They recognized the important distinction between governmental action and governmental speech. The federal government was considered virtually prohibited from regulating or funding religious activities.⁷ But genuine, devout governmental religious speech was to be permitted, within carefully delimited bounds. The Framers found language that expressed reverential concepts without implying that those not of a favored religion were second-class citizens.⁸ They avoided sectarian references, but they were not afraid of

2. Douglas Laycock, *The Supreme Court, 2003 Term—Comment: Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 223–24 (2004).

3. Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947)).

4. “The Framers understood an establishment ‘necessarily [to] involve actual legal coercion.’” *Van Orden v. Perry*, 545 U.S. 677, 693 (2005) (Thomas, J., concurring) (alteration in original) (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 52 (2004) (Thomas, J., concurring in the judgment)).

5. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 893 n.3 (2005) (Scalia, J., dissenting).

6. *Id.* at 880 (majority opinion).

7. In 1811, for example, James Madison vetoed a law that would have granted “five acres of land, including Salem Meeting-house, in the Mississippi Territory, for the use of the Baptist Church.” 22 ANNALS OF CONG. 1097–98, 1104 (1811). The Baptist church had requested the land because, after erecting the church building, it discovered that the structure was on federal property. Unable to obtain clear title to the property, the church petitioned Congress. Madison’s veto message declared that this grant would violate the Establishment Clause by setting a “precedent, for the appropriation of funds of the United States, for the use and support of religious societies.” *Id.* at 1097–98.

8. See *infra* Part V.A.

the public offering of truly religious expression. They strove to create a civil vocabulary that could encompass all people, regardless of their faith.

Their means for accomplishing this difficult feat was the deliberate use of theologically equivocal language. The best-known example is the Declaration of Independence's use of "endowed by their Creator," which can be seen by the devout as pious religious language but can be heard by non-believers in a variety of other ways. By contrast, the Framers avoided sectarian language, as well as governmental directives that the citizenry pray. Following the path of the Framers, we can create a twenty-first century standard for evaluating which religious governmental speech is consistent with the Establishment Clause.

It is important to emphasize that emulating the Framers in this area does not require commitment to the "originalist" school of constitutional interpretation.⁹ One need not believe that, when interpreting the Constitution, "we must be guided by [its] original meaning, . . . [that what] . . . it meant when adopted, it means now."¹⁰ It is possible to agree that both *Bolling v. Sharpe*¹¹ and *United States v. Virginia*¹² were correctly decided, notwithstanding the certainty that the Framers of the Fifth and Fourteenth Amendments did not intend their amendments to provide equality for African-Americans and women.

One can also agree that, "[d]espite more than forty years of criticism by the historical academy, 'bad history' abounds in Religion Clause jurisprudence."¹³ Far too many judicial and scholarly opinions that purport to rely on the founding period are in reality nothing more than "'law office' history," that is, "the selection of data favorable to the

9. Originalism "most often refers to the normative constitutional interpretive theory that instructs judges faced with indeterminate textual guidance to look primarily to the original understanding of a particular clause's ratifying generation." Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 662 (2009); see also Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 377 (2013) ("[O]riginalism argues that the discoverable public meaning of the Constitution at the time of its initial adoption should be regarded as authoritative for purposes of later constitutional interpretation.").

10. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 359 (1995) (Thomas, J., concurring in the judgment) (quoting *South Carolina v. United States*, 199 U.S. 437, 448 (1905)) (internal quotation mark omitted).

11. 347 U.S. 497 (1954) (banning racial segregation in schools under federal jurisdiction).

12. 518 U.S. 515 (1996) (requiring that women be admitted to the Virginia Military Institute).

13. Steven K. Green, "Bad History": *The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. REV. 1717, 1719 (2006) (footnote omitted).

position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered.”¹⁴

We can also accept the observation that, even if the study of history is honestly pursued and well-researched, it cannot be expected to “provide specific answers to modern controversies.”¹⁵ History can, however, “provide the perimeters within which the choice of meaning may be made.”¹⁶ It can “inform; it cannot resolve legal controversies.”¹⁷

In the area of freedom of religion, in particular, the practices of the founding generation can “shine light upon the meaning of the Establishment and Free Exercise Clauses.”¹⁸ Founders such as George Washington, Thomas Jefferson, and James Madison thought deeply about the meaning of liberty of conscience and also about the painful history of governmental involvement with religion. Unlike their antiquated views on issues like race and gender, the Framers had a sophisticated understanding of religious freedom that is surprisingly modern. They knew that religion could be a source of both incredible good or incredible evil, and they were committed to finding ways in which religion could unite, rather than divide, the new nation. We need not follow the Framers in this area because we want to “return to the days” of the founding period.¹⁹ Rather, we should learn from their experience to ensure that the Establishment Clause protects their hard-won vision of an American theory of freedom of religion.

This Article is organized as follows. Part II explores the historical origins of some of the most iconic examples of governmental religious

14. Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 n.13; see also JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT 787 n.3 (2d ed. 2001) (“[T]here is a tendency to refer the reader to pages in the cited volume that appear to bolster the Court’s conclusion, and to ignore other materials in the same volume that cast doubt on the Court’s reading of the past.”); Jack N. Rakove, *Fidelity Through History (Or to It)*, 65 FORDHAM L. REV. 1587, 1591 (1997) (“We can think of the role that appeals to history play in the composition of judicial opinions not as the reasons driving decisions, but as an attractive rhetorical method of reassuring citizens that courts are acting consistently with deeply held values.”).

15. Green, *supra* note 13, at 1719.

16. Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 841–42 (1986).

17. Green, *supra* note 13, at 1719.

18. Mark David Hall, *Jeffersonian Walls and Madisonian Lines: The Supreme Court’s Use of History in Religion Clause Cases*, 85 OR. L. REV. 563, 567 (2006).

19. Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2155 (1996).

expression. Part III discusses the hopelessly confused state of modern Establishment Clause jurisprudence. Part IV examines the historical record and demonstrates the Framers' sophisticated compromise. Part V explores how a modern standard can be derived from the lessons of our founding period.

II. RELIGION IN THE PUBLIC SQUARE

For a nation without established religion, there exists a seemingly endless array of religious governmental pronouncements.²⁰ On both the national and local level, through statutes, proclamations, and informal practices, religion plays a major role in how government communicates with the citizenry. Any attempt to create a workable jurisprudence for evaluating these statements and activities must begin by recognizing the many different ways that America's governments utilize religious utterances.

A. "God save the United States and this honorable Court"

At the time the Constitution was ratified, the state courts of New England generally opened with a sectarian prayer offered by local clergy.²¹ The original Supreme Court Justices "rode the circuits" and heard cases throughout the new nation.²² When sitting in New England, the Justices followed the local custom of beginning court sessions with a prayer. John Jay, the first Chief Justice, wrote of his plans for sitting in the "Northern Circuit": "It appears to me adviseable to respect ancient usages in all Cases where Deviations from them are not of essential Importance. . . . The custom in New England of a clergyman's

20. See, e.g., LEONARD LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT*, at xiv (2d ed. rev. 1994) ("[R]eligion saturates American public life."); Ashley M. Bell, Comment, "God Save This Honorable Court": *How Current Establishment Clause Jurisprudence Can Be Reconciled with the Secularization of Historical Religious Expressions*, 50 AM. U. L. REV. 1273, 1276 (2001) ("Historical religious expressions are deeply embedded in various aspects of public life.").

21. See, e.g., Charles F. Sedgwick, *Fifty Years at the Litchfield County Bar* (1870), in DWIGHT C. KILBOURN, *THE BENCH AND BAR OF LITCHFIELD COUNTY, CONNECTICUT 1709-1909*, at 75 (1909) ("It had been the practice of the Congregational pastor of the village, to open the proceedings in Court with prayer . . .").

22. "The Judiciary Act of 1789 . . . required Justices to ride circuit, which involved traveling from state to state in order to hold circuit court in each district within a circuit twice annually." David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1715 (2007).

attending, should in my opinion be observed and continued.”²³ A Boston newspaper noted that the Circuit Court for the District of Massachusetts

opened on Saturday, May 12, [1792,] with Chief Justice John Jay, Associate Justice William Cushing, and Judge John Lowell in attendance. On Monday, May 14, Jay delivered a charge to the grand jury . . . ‘replete with his usual perspicuity and elegance.’ The prayer was made by the Rev. Dr. [Samuel] PARKER.”²⁴

Similarly, a New Hampshire newspaper reported:

On Monday last the Circuit Court of the United States was opened in this town. . . . After the Jury were empanelled, the Judge delivered a most elegant and appropriate Charge. . . . *Religion & Morality* were pleasingly inculcated and enforced, as being necessary to good government, good order and good laws, for “when the righteous are in authority, the people rejoice.”

. . . .
After the Charge was delivered, the Rev. Mr. [Timothy] ALDEN addressed the Throne of Grace, in an excellent, well adapted prayer.²⁵

Thus, not only was there a well-established practice of many state courts beginning their sessions with sectarian prayer, that practice was initially copied by Supreme Court Justices riding circuit. What is so significant, though, is that the practice of sectarian prayer in federal court was obviously and unambiguously rejected by Chief Justice John Marshall. Virtually nothing is known about when or why Marshall began opening Supreme Court sessions with the cry, “God save the

23. Letter from John Jay, Chief Justice, Supreme Court of the United States, to Richard Law, District Judge, United States District Court for the District of Connecticut (Mar. 10, 1790), in 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 13, 13 (Maeva Marcus ed., 1988) [hereinafter 2 DHSC].

24. Circuit Court for the District of Massachusetts (May 12, 1792), in 2 DHSC, *supra* note 23, at 276, 276 (quoting COLUMBIAN CENTINEL, May 16, 1792, at 74).

25. UNITED STATES ORACLE, May 24, 1800, reprinted in 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 436, 436 (Maeva Marcus ed., 1990). The quote “when the righteous are in authority, the people rejoice” is from *Proverbs* 29:2 (King James). See also COLUMBIAN CENTINEL, June 8, 1793, reprinted in 2 DHSC, *supra* note 23, at 406, 406 (“Judge WILSON delivered to the Grand Jury, a Charge, replete with the purest principles of our equal Government, and highly indicative of his legal reputation. After the Charge, the Rev. Dr. THACHER addressed the throne of Grace, in prayer.”).

United States and this honorable Court." The earliest report is from a book written in 1857, about a hearing the author had attended in 1827:

The judges were all seated, and the marshal, in a kind of nasal tone, cried out, "Yea, yea, yea, yea! the Supreme Court of the United States is now in session. All persons having business before the court will be heard. God save the United States and this honorable court." The court was opened. Chief Justice Marshall was seated in the middle, on his right were Justices Story, Thompson and Duval; on his left, Washington, Johnson and Trimble.²⁶

There is no reported statement of Chief Justice Marshall as to why he initiated the practice of a brief, non-sectarian invocation instead of a sectarian prayer, but that decision certainly seems to argue against using the invocation in support of sectarian governmental prayer and displays.²⁷

B. *The National Motto*

Prior to 1956, the United States lacked a national motto. It had been popularly assumed that "E Pluribus Unum — Out of many, One," which has appeared on the Great Seal of the United States since 1782, was the national motto,²⁸ but its status had never been made official. Meanwhile, on September 21, 1814, Francis Scott Key's song, "The Star Spangled Banner," declared in its fourth verse: "And this be our motto — 'In God is our Trust.'"²⁹ During the Civil War, on December 9,

26. OLIVER HAMPTON SMITH, *EARLY INDIANA TRIALS AND SKETCHES* 137 (Cincinnati, Moore, Wilstach, Keys & Co. 1858).

27. For example, Justice Scalia has argued in favor of governmental displays of the Ten Commandments by stating, "The Supreme Court under John Marshall opened its sessions with the prayer, 'God save the United States and this Honorable Court.'" *McCreary Cnty. v. ACLU*, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting) (quoting 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 469 (rev. ed. 1926)). Similarly, Justice Stewart defended the practice of sectarian public school prayers by noting, "At the opening of each day's Session of this Court we stand, while one of our officials invokes the protection of God. Since the days of John Marshall our Crier has said, 'God save the United States and this Honorable Court.'" *Engel v. Vitale*, 370 U.S. 421, 446 (1962) (Stewart, J., dissenting) (quoting 1 WARREN, *supra*, at 469).

28. 1 BENSON J. LOSSING, *HARPERS' POPULAR CYCLOPEDIA OF UNITED STATES HISTORY FROM THE ABORIGINAL PERIOD: CONTAINING BRIEF SKETCHES OF IMPORTANT EVENTS AND CONSPICUOUS ACTORS* 1264 (New York, Harper & Bros. Publ'g 1892).

29. See generally OSCAR GEORGE THEODORE SONNECK, REPORT ON "THE STAR-SPANGLED BANNER" "HAIL COLUMBIA" "AMERICA" "YANKEE DOODLE" 7, 37 (1909). His song was originally published in the *Baltimore American*. *Id.* at 7. It became the official

1863, Secretary of the Treasury Salmon P. Chase ordered the Director of the Mint, James Pollock, to place “In God We Trust,” on coins.³⁰ Congress then authorized the Secretary of the Treasury to place a phrase on coins³¹ but did not specify the particular phrase until 1873.³² The authorization became a requirement in 1908, when Congress mandated that the specific phrase continue to appear on coins.³³ The requirement was extended to all currency in 1955.³⁴

The following year, Congress voted to make the phrase, “In God We Trust” the national motto. Citing both the National Anthem and the inscription on currency, the House Report declared that “it is clear that ‘In God We Trust’ has a strong claim as our national motto.”³⁵ The House Report deemed “In God We Trust” to be “superior” to “E Pluribus Unum,” concluding that “[i]t will be of great spiritual and psychological value to our country to have a clearly designated national motto of inspirational quality in plain, popularly accepted English.”³⁶ On July 30, 1956, President Eisenhower signed the law making “In God we trust” our national motto.³⁷

national anthem in 1931. Act of Mar. 3, 1931, ch. 436, 46 Stat. 1508 (codified at 36 U.S.C. § 301 (2012)).

30. DAVID K. WATSON, HISTORY OF AMERICAN COINAGE 214–15 (New York & London, G.P. Putnam’s Sons 1899). Earlier, Chase had written Pollock: “No nation can be strong except in the strength of God, or safe except in His defense. The trust of our people in God should be declared on our national coins.” *Id.* at 214.

31. Act of Apr. 22, 1864, ch. 66, 13 Stat. 54.

32. The Coinage Act of 1873, ch. 131, § 18, 17 Stat. 424, 427 (“[T]he director of the mint, with the approval of the Secretary of the Treasury, may cause the motto ‘In God we trust’ to be inscribed upon such coins as shall admit of such motto; and any one of the foregoing inscriptions may be on the rim of the gold and silver coins.”).

33. Act of May 18, 1908, ch. 173, § 1, Pub. L. No. 60-120, 35 Stat. 164.

34. Act of July 11, 1955, ch. 303, Pub. L. No. 84-140, 69 Stat. 290. The current requirement is located in two different sections: 31 U.S.C. § 5112(d)(1) (2012) (“United States coins shall have the inscription ‘In God We Trust.’”) and 31 U.S.C. § 5114(b) (2012) (“United States currency has the inscription ‘In God We Trust’ in a place the Secretary decides is appropriate.”). See generally J. Clifford Wallace, *The Framers’ Establishment Clause: How High the Wall?*, 2001 BYU L. REV. 755.

35. H.R. REP. NO. 84-1959, at 1–2 (1956), reprinted in 1956 U.S.C.C.A.N. 3720, 3720–21.

36. *Id.*; see B. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning Over Time*, 59 DUKE L.J. 705, 708–09 (2010) (“[I]t was not until much later, in a frenzy of religious piety mixed with patriotism not unlike that accompanying the motto’s initial appearance in the Civil War era, that ‘In God We Trust’ was finally adopted as the national motto.”).

37. Act of July 30, 1956, Pub. L. No. 84-851, 70 Stat. 732 (codified as amended at 36 U.S.C. § 302 (2012)).

C. The Pledge of Allegiance

The Pledge of Allegiance, without any reference to God, was written in 1892, by a Baptist minister’s son, Francis Bellamy, as part of a planned celebration of the 400th anniversary of Christopher Columbus’s landing in the New World.³⁸ Printed in a very popular publication, *Youth’s Companion*, the Pledge read, “I pledge allegiance to my flag and the Republic for which it stands—one Nation indivisible—with liberty and justice for all.”³⁹ In the 1920s, the National Flag Conference changed the phrase “my flag” to “the flag of the United States of America,” so that immigrant children would be taught that it was the American flag to which they were pledging allegiance.⁴⁰

During the 1930s, many states and local governments mandated the recitation of the Pledge of Allegiance in public schools.⁴¹ In 1940, the U.S. Supreme Court, in *Minersville School District v. Gobitis*,⁴² upheld the expulsion from public school of two Jehovah’s Witnesses, who saw the Pledge as a violation of their religious beliefs.⁴³ The Court termed the compulsory Pledge a permissible “means to evoke that unifying sentiment without which there can ultimately be no liberties, civil or religious” and a “universal gesture of respect for the symbol of our national life.”⁴⁴

Two years later, in 1942, Congress enacted the first federal law recognizing the Pledge of Allegiance and also described the proper way for both civilians and the military to stand while reciting the Pledge.⁴⁵

38. Jeffrey Owen Jones, *The Pledge’s Creator*, SMITHSONIAN, Nov. 2003, at 113, 114.

39. *Id.* at 115 (emphasis omitted).

40. This change happened in two intervals. In 1923, the National Flag Conference changed the language to “the flag of the United States,” and the next year added, “of America.” *Id.* at 115.

41. See, e.g., *Hering v. State Bd. of Educ.*, 189 A. 629, 629 (N.J. 1937) (“[E]very board of education in this state is obliged to procure a United States flag for each school in the district; the flag is to be displayed upon or near the public school building during school hours[.] . . . and the pupils are required to salute the flag and repeat the oath of allegiance every school day.” (citing Act of May 2, 1932, ch. 145, sec. 1, § 230, 1932 N.J. Laws 260)); see also *Leoles v. Landers*, 192 S.E. 218, 221 (Ga. 1937) (describing a city board of education requirement that all public school students “must ‘salute the flag of the United States’”).

42. 310 U.S. 586 (1940).

43. *Id.* at 591, 597–98.

44. *Id.* at 597.

45. Act of June 22, 1942, Pub. L. No. 77-623, § 7, 56 Stat. 377, 380. According to the law, the Pledge would be

rendered by standing with the right hand over the heart; extending the right hand, palm upward, toward the flag at the words ‘to the flag’ and holding this position

Ironically, the next year, the Supreme Court reversed itself and, in *West Virginia State Board of Education v. Barnette*,⁴⁶ overruled *Gobitis* and said that the compulsory nature of the Pledge violated the First Amendment.⁴⁷ Significantly, the Court did not base its decision on religion; the Pledge at the time contained no religious language. Moreover, the Court said the fact that the students' objections to reciting the pledge were based on their religion was not determinative.⁴⁸ Rather, the constitutional flaw was that the government was "invas[ing] the sphere of intellect and spirit" by mandating that a private individual's speech be in conformity with a governmental edict:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.⁴⁹

Thus, *Barnette* is properly seen as a speech case, not a religious case. After that decision, local governments continued to require that public school teachers lead their students in the Pledge but provided that students who objected would be permitted to refrain from reciting the Pledge.⁵⁰

In 1954, Congress altered the text of the Pledge to add the words "under God."⁵¹ A major goal of the sponsor of the bill was to differentiate the United States from its Cold War adversary, the Soviet

until the end, when the hand drops to the side. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress. Persons in uniform shall render the military salute.

Id.

46. 319 U.S. 624 (1943).

47. *Id.* at 642.

48. *Id.* at 634–35.

49. *Id.* at 642.

50. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 8 (2004) ("Consistent with our case law, the School District permits students who object on religious grounds to abstain from the recitation."); *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 443 (7th Cir. 1992) (describing the testimony of the superintendent of schools in Wheeling, Illinois, that no student "is compelled to recite the Pledge, to place his hand over his heart, to stand, or to leave the room while others recite").

51. Act of June 14, 1954, Pub. L. No. 83-396, 68 Stat. 249. For an excellent history of the adding of "under God," to the Pledge, see Epstein, *supra* note 19, at 2118–22.

Union.⁵² Others emphasized the benefits of having America’s children reassert a belief in God.⁵³ The final version of the bill provided the version of the Pledge that has remained unchanged since: “I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.”⁵⁴

The recitation of the Pledge of Allegiance in public schools was challenged in 2004 in *Elk Grove Unified School District v. Newdow*,⁵⁵ on the grounds that the addition of “under God” constituted an impermissible establishment of religion.⁵⁶ The Supreme Court avoided reaching the merits of the question and ruled that the parent bringing the suit lacked standing.⁵⁷ Several Justices, however, filed concurring opinions, each declaring that the public school’s recitation of the Pledge did not offend the Establishment Clause.⁵⁸

52. 100 CONG. REC. 1700 (1954) (statement of Rep. Rabaut) (“[T]he fundamental issue which is the unbridgeable gap between America and Communist Russia is a belief in Almighty God.”).

53. “What better training for our youngsters could there be than to have them, each time they pledge allegiance to Old Glory, reassert their belief, like that of their fathers and their fathers before them, in the all-present, all-knowing, all-seeing, all-powerful Creator.” 100 CONG. REC. 5915 (1954) (statement of Sen. Wiley).

54. 68 Stat. 249 (codified as amended at 4 U.S.C. § 4 (2012)) .

55. 542 U.S. 1 (2004).

56. *Id.* at 5.

57. *Id.* at 17 (“In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff’s claimed standing.”), *abrogated on other grounds by* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

58. Chief Justice Rehnquist wrote, “I do not believe that the phrase ‘under God’ in the Pledge converts its recital into a ‘religious exercise’ Instead, it is a declaration of belief in allegiance and loyalty to the United States flag and the Republic that it represents.” *Id.* at 31 (Rehnquist, C.J., concurring in the judgment). Justice O’Connor wrote that the phrase, although spoken “in the language of religious belief,” is “more properly understood as employing the idiom for essentially secular purposes.” *Id.* at 35 (O’Connor, J., concurring in the judgment). Justice Thomas stated that “[t]hrough the Pledge policy, the State has not created or maintained any religious establishment, and neither has it granted government authority to an existing religion.” *Id.* at 54 (Thomas, J., concurring in the judgment). See also *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 406 (4th Cir. 2005) (“[N]ot one Justice has ever suggested that the Pledge is unconstitutional. In an area of law sometimes marked by befuddlement and lack of agreement, such unanimity is striking.” (emphasis omitted)).

D. Legislative Prayer

The practice of legislative chaplains predates the American Revolution. On September 6, 1774, the day after the colonial representatives assembled as the First Continental Congress, a motion was made to begin each session with a prayer.⁵⁹ Some members argued against the motion, expressing concern that, in such a setting, prayer “would be considered as Enthusiasm & Cant” and cited “the Hazard of submitting such a Task to the Judgement of any Clergy.”⁶⁰ The majority, though, believed in “the propriety of a Reverence & Submission to the Supreme Being & supplicating his Blessing on every Undertaking.”⁶¹

Concern was also expressed about the difficulty in selecting a clergyman who could speak to the religiously diverse Congress; some worried that “we were so divided in religious Sentiments, some Episcopalians, some Quakers, some Aanabaptists, some Presbyterians and some Congregationalists, . . . that We could not join in the same Act of Worship.”⁶² As a gesture of good will, Sam Adams, a Massachusetts Congregationalist,⁶³ proposed that the prayer be led by a representative of the religion that predominated in the southern colonies: “As many of our warmest Friends are Members of the Church of England, [I] thought it prudent, as well on that as on some other Accounts to move that the Service should be performed by a Clergyman of that Denomination.”⁶⁴ The cleric who presided over the First Continental Congress was Reverend Jacob Duché.⁶⁵

59. According to John Adams, Thomas Cushing of Massachusetts made the initial motion that daily sessions open with prayer. Letter from John Adams to Abigail Adams (Sept. 16, 1774), in 1 ADAMS FAMILY CORRESPONDENCE 156, 156 (L.H. Butterfield ed., 1963); MICHAEL I. MEYERSON, ENDOWED BY OUR CREATOR: THE BIRTH OF RELIGIOUS FREEDOM IN AMERICA 44, 48 (2012). Another delegate, Abraham Clark from New Jersey, also claims to have made the motion. See Letter from Abraham Clark to James Caldwell (Aug. 2, 1776), in 4 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 605, 605 (Paul H. Smith ed., 1979).

60. James Duane’s Notes of Debates (Sept. 6, 1774), in 1 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 30, 31 (Paul H. Smith ed., 1976) [hereinafter 1 LDC].

61. *Id.*

62. Letter from John Adams to Abigail Adams, *supra* note 59, at 156.

63. JOHN C. MILLER, SAM ADAMS: PIONEER IN PROPAGANDA 84 (1936).

64. Letter from Samuel Adams to Joseph Warren (Sept. 9, 1774), in 1 LDC, *supra* note 60, at 55, 55 (emphasis omitted).

65. Letter from Abraham Clark to James Caldwell, *supra* note 59, at 605.

In contrast, the Constitutional Convention did not begin its session with prayer. On June 28, 1787, with the Convention deadlocked over whether small and large states should have the same voting power, Benjamin Franklin urged the delegates to follow the example of the Continental Congress.⁶⁶ He proposed, "henceforth prayers, imploring the assistance of Heaven, and its blessing on our deliberations, be held in this assembly every morning before we proceed to business; and that one or more of the clergy of this city be requested to officiate in that service."⁶⁷

Franklin's proposal was defeated.⁶⁸ There were rumors that Alexander Hamilton had opposed the call for prayer because "he did not see the necessity of calling in foreign aid."⁶⁹ James Madison attributed the convention refusal to vote for Franklin's motion to both "[t]he Quaker usage, never discontinued in the State & the place where the Convention held its sittings," as well as "the discord of religious opinions within the Convention."⁷⁰ According to a postscript Franklin later added to the paper containing his proposal, "The convention, except three or four persons, thought prayers unnecessary."⁷¹

After the Constitution was ratified, though, prayer returned to the national legislative chambers. On April 7, 1789, the second day of its existence, the U.S. Senate voted to create a committee to meet with the

66. See Benjamin Franklin, Speech to the Federal Convention (June 28, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 450, 450–451 (Max Farrand ed., rev. ed. 1937) [hereinafter FARRAND]. According to Franklin, "In the beginning of the Contest with G. Britain, when we were sensible of danger we had daily prayer in this room for the divine protection.—Our prayers, Sir, were heard, and they were graciously answered." *Id.*

67. BENJAMIN FRANKLIN, *Dr. Franklin's Motion for Prayers in the Convention*, in BENJAMIN FRANKLIN & WILLIAM TEMPLE FRANKLIN, MEMOIRS OF THE LIFE AND WRITINGS OF BENJAMIN FRANKLIN 389 (London, 1818).

68. See *id.*

69. Letter from William Steele to Jonathan D. Steele, in 3 FARRAND, *supra* note 66, at 467, 472–73 (emphasis omitted). The story probably first appeared in 1825, in a letter from William Steele to his son, Jonathan D. Steele, purporting to be an anecdote told to the father by Jonathan Dayton, a delegate from New Jersey. *Id.* at 467. According to Madison's notes, Hamilton expressed concern that beginning prayers more than a month after deliberations had begun would "lead the public to believe that the embarrassments and dissensions within the convention, had suggested this measure." 1 JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 182 (Gaillard Hunt & James Brown Scott eds., 1920).

70. Letter from James Madison to Thomas S. Grimke (Jan. 6, 1834), in 3 FARRAND, *supra* note 66, at 531, 531. Madison also pointed to "the lapse of time which had preceded" Franklin's motion. *Id.*

71. FRANKLIN, *supra* note 67, at 389 (emphasis omitted).

House of Representatives to decide how the two bodies would appoint chaplains.⁷² In less than a week, the joint committee, one that included James Madison,⁷³ issued a proposal designed to deal with America's religious diversity by ensuring that different denominations be represented and that neither house would be dominated by a single denomination.⁷⁴ This proposal, which was quickly adopted by both houses, required

[t]hat two Chaplains, of different denominations, be appointed to Congress for the present session; the Senate to appoint one, and give notice thereof to the House of Representatives, who shall thereupon appoint the other—which Chaplains shall commence their services in the Houses that appoint them, but shall interchange weekly.⁷⁵

Later in life, Madison wrote that the payment of governmental funds for legislative chaplains was a “deviation” from the principle of “immunity of Religion from civil jurisdiction.”⁷⁶ He said that he objected to providing for religious worship “approved by the majority, and conducted by Ministers of religion paid by the entire nation.”⁷⁷

But Madison knew that Congress was unlikely to abolish legislative chaplaincies. Rather than be seen as precedent for governmental funding of religion, these expenditures, Madison said, should be viewed as simply insignificant violations of constitutional principles: “As the precedent is not likely to be rescinded,” he wrote, “the best that can now be done, may be to apply to the [Constitution] the maxim of the law, *de minimis non curat*.”⁷⁸

72. *Journal of the First Session of the Senate of the United States*, in 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 3, 12 (Linda Grant De Pauw ed., 1972).

73. *Journal of the First Session of the House of Representatives of the United States*, in 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 3, 17 (Linda Grant De Pauw ed., 1977).

74. *Id.* at 25.

75. *Id.* at 25–26.

76. Letter from James Madison to Edward Livingston (July 10, 1822), in 9 THE WRITINGS OF JAMES MADISON 98, 100 (Gaillard Hunt ed., 1910).

77. James Madison, Detached Memoranda, in Elizabeth Fleet, *Madison's "Detached Memoranda,"* 3 WM. & MARY Q. 534, 558 (1946) [hereinafter Madison, Detached Memoranda].

78. Letter from James Madison to Edward Livingston, *supra* note 76, at 100 (emphasis added).

Since that time, legislative chaplains have been utilized at both the national and local level. In 1983, the Supreme Court upheld Nebraska's practice of paying a chaplain to open legislative sessions with prayer, even though "a clergyman of only one denomination — Presbyterian — [had] been selected for 16 years."⁷⁹ The Court reasoned that, "[i]n light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society."⁸⁰

III. THE COURT'S CONFUSION

There is widespread agreement that the Supreme Court has not been able to create and maintain a consistent and coherent system for analyzing Establishment Clause issues, such as those arising from the above-discussed governmental practices. The Court's Establishment Clause jurisprudence has been termed in "chaos,"⁸¹ "confused,"⁸² and "a hopeless muddle."⁸³

While much of this criticism is valid, the surprising truth is that in many narrow areas the Supreme Court's Establishment Clause jurisprudence is quite settled. This does not mean that there is universal

79. *Marsh v. Chambers*, 463 U.S. 783, 792–94 (1983).

80. *Id.* at 792. The Supreme Court extended its rationale in *Marsh* to permit sectarian prayer at local town meetings, even when those meetings "involve participation by ordinary citizens." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1842 (2014) (Kagan, J., dissenting).

81. John M. Bickers, *Of Non-Horses, Quantum Mechanics, and the Establishment Clause*, 57 U. KAN. L. REV. 371, 405 (2009).

82. Douglas G. Smith, *The Establishment Clause: Corollary of Eighteenth-Century Corporate Law?*, 98 NW. U. L. REV. 239, 294 (2003).

83. Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 728 (2006); see also Daniel O. Conkle, *The Establishment Clause and Religious Expression in Governmental Settings: Four Variables in Search of a Standard*, 110 W. VA. L. REV. 315, 315 (2007) (terming the Court's Establishment Clause doctrine "a muddled mess"); William P. Marshall, "We Know It When We See It": *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 495 (1986) (stating that "it has been painfully clear that logical consistency and establishment clause jurisprudence were to have little in common"); Jay A. Sekulow & Francis J. Manion, *The Supreme Court and the Ten Commandments: Compounding the Establishment Clause Confusion*, 14 WM. & MARY BILL RTS. J. 33, 33 (2005) (describing "the fog obscuring" the Court's "Establishment Clause jurisprudence generally"); Mark Strasser, *Establishing the Pledge: On Coercion, Endorsement, and the Marsh Wild Card*, 40 IND. L. REV. 529, 530 (2007) ("The only matters about which one can be confident are that the Justices will be divided, the opinion will be rancorous, and years of litigation will be required to help clarify the Court's evolving jurisprudence in this area."); Roxanne L. Houtman, Note, *ACLU v. McCreary County: Rebuilding the Wall Between Church and State*, 55 SYRACUSE L. REV. 395, 397 (2005) (stating that "the Supreme Court's Establishment Clause [doctrine] . . . has become increasingly ambiguous").

agreement with the way the Court has resolved these issues, merely that the Court has created a recognizable and workable standard that is used in a generally consistent and predictable manner to resolve particular questions.⁸⁴

For example, the use of government funding by religious schools and religious institutions has been the source of frequent litigation.⁸⁵ Nonetheless, the Court finally agreed that, as long as the funding criteria were neutral, government funds could be spent by private citizens on religious activities:

[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.⁸⁶

Similarly, the Court has reached a general equilibrium when dealing with cases involving prayer in public schools.⁸⁷ Government officials are barred from encouraging the delivery of, or participation in, prayer during classes or at “important school events.”⁸⁸

A different, but equally straight-forward, rule is applied by the Court when analyzing the use of public property by private religious groups.⁸⁹ Here, the Establishment Clause is not violated as long as that use is according to criteria that are neutral as to religion, is “not sponsored by the school, and . . . [the] forum [is] available to other organizations.”⁹⁰

84. *Cf. Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 766 (1979) (Blackmun, J., concurring) (describing a case as one for which “it is more important that it be decided . . . than that it be decided correctly”).

85. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Mueller v. Allen*, 463 U.S. 388 (1983); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Walz v. Tax Comm’n of New York*, 397 U.S. 664 (1970); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

86. *Zelman*, 536 U.S. at 652.

87. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

88. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 317.

89. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981); *see also Salazar v. Buono*, 130 S. Ct. 1803, 1811 (2010) (federal statute transferring ownership of cross and the tiny parcel of government land on which it stands to a private party).

90. *Good News Club*, 533 U.S. at 113.

Even the seemingly intractable question of what sorts of exceptions from legal requirements can government permissible carve out for religious groups has been largely resolved by the Court.⁹¹ Accommodations do not violate the Establishment Clause as long as they alleviate "exceptional government-created burdens on private religious exercise[,] . . . take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries[,] and [are] . . . administered neutrally among different faiths."⁹²

Taken as a group, the rules governing these four areas are understandable, usable, and consistent with one another. If they represented the full extent of Establishment Clause questions, there would be little cause to argue that the Court's jurisprudence was incoherent. But when we consider the cases involving governmental religious expression, the true cause of the problem emerges. It is primarily these cases that have led to "an Establishment Clause jurisprudence rife with confusion."⁹³

A. *A Judicial Hodgepodge*

If we define the fundamental first-year law student skill of case synthesis as "bringing together two, three, four, or more decided cases and other legal authorities as support for a single legal idea or proposition,"⁹⁴ it quickly becomes apparent that even the most rudimentary form of case synthesis in the area of governmental religious expression is impossible.⁹⁵ Unfortunately, as one scholar wrote, the most accurate prediction we can make based on all the relevant cases is

91. See *Cutter v. Wilkinson*, 544 U.S. 709 (2005); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985); *Larson v. Valente*, 456 U.S. 228 (1982); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Walz v. Tax Comm'n of New York*, 397 U.S. 664 (1970); *Zorach v. Clauson*, 343 U.S. 306, 313–14 (1952).

92. *Cutter*, 544 U.S. at 720 (citation omitted).

93. *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 343 (5th Cir. 1999).

94. Paul T. Wangerin, *Skills Training in "Legal Analysis": A Systematic Approach*, 40 U. MIAMI L. REV. 409, 442–43 (1986); see also DEBORAH A. SCHMEDEMANN & CHRISTINA L. KUNZ, *SYNTHESIS: LEGAL READING, REASONING, AND WRITING* 41 (2d ed. 2003) (stating that "the lawyer needs to take account of multiple close cases, 'fusing' them into a single rule or pattern on that topic that then can be applied to the client's facts").

95. Students are taught early on that they "must discard a synthesis when it does not adequately take into account all relevant cases existing at that time, because such a synthesis would be a deficient articulation of the current status of the law in that jurisdiction." Jane Kent Gionfriddo, *Thinking Like a Lawyer: The Heuristics of Case Synthesis*, 40 TEX. TECH. L. REV. 1, 9 (2007).

that “the Justices will be divided, the opinion will be rancorous, and years of litigation will be required to help clarify the Court’s evolving jurisprudence in this area.”⁹⁶ The jurisprudential confusion can be seen by looking at the opinions of the winning side, those supporting the judgment of the Court, in the most recent cases involving governmental religious expression.

In 2004, the Court turned aside on procedural grounds a challenge to the recitation of the Pledge of Allegiance in public schools; three Justices wrote expressing their views that the recitation did not violate the Establishment Clause.⁹⁷ The next year, in *Van Orden v. Perry*,⁹⁸ the Supreme Court ruled that a monument by the Texas State Capitol containing the Ten Commandments did not violate the Establishment Clause; that case saw a four-Justice plurality and three separate concurring opinions.⁹⁹ The same day *Van Orden* was decided, the Court, in *McCreary County v. ACLU*,¹⁰⁰ declared it unconstitutional for two Ohio counties to place a plaque of the Ten Commandments in a courthouse; this time there was a majority opinion and one concurrence.¹⁰¹ Finally, in 2010, the Court rejected a challenge to a federal law transferring ownership of a small plot of government land with a Latin cross on it to a private party; this case saw a three-person plurality plus three separate concurrences.¹⁰² After reading these opinions, we still, in the words of one frustrated circuit judge, “remain in Establishment Clause purgatory.”¹⁰³

In none of these opinions did a single member of the Court rely on the so-called “*Lemon* test.” That test, first announced in the 1971 case *Lemon v. Kurtzman*,¹⁰⁴ presented a three-step analysis for a

96. Strasser, *supra* note 83, at 530.

97. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 4–5 (2004), *abrogated on other grounds by* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

98. 545 U.S. 677 (2005) (plurality opinion).

99. *Id.* at 679. Chief Justice Rehnquist wrote the plurality opinion, Justices Scalia and Thomas signed that opinion and wrote their own concurring opinion, and Justice Breyer wrote a concurring opinion but did not sign onto the plurality opinion. *Id.*

100. 545 U.S. 844 (2005).

101. *Id.* at 868–70. Justice Souter wrote the majority opinion; Justice O’Connor signed that opinion and authored a concurrence. *Id.* at 848.

102. *Salazar v. Buono*, 130 S. Ct. 1803 (2010). The plurality was written by Justice Kennedy, and joined by Chief Justice Roberts and Justice Alito. Chief Justice Roberts and Justice Alito wrote concurring opinions, and Justice Scalia wrote a separate concurring opinion, which Justice Thomas joined. *Id.* at 1810.

103. *ACLU of Kentucky v. Mercer Cnty.*, 432 F.3d 624, 636 (6th Cir. 2005).

104. 403 U.S. 602 (1971).

governmental action to survive Establishment Clause scrutiny: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”¹⁰⁵

While the *Lemon* test has been subject to withering attack by many of the Justices, it has never been overruled.¹⁰⁶ In upholding the constitutionality of the Texas Ten Commandments monument, a four-Justice plurality explicitly rejected the use of the *Lemon* test in resolving the case: “Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds.”¹⁰⁷ The fifth Justice voting to uphold the Texas monument, Justice Breyer, also specifically disclaimed reliance on *Lemon*, but without saying the case should be overturned: “While the Court’s prior tests provide useful guideposts—and might well lead to

105. *Lemon*, 403 U.S. at 612–13 (citation omitted) (quoting *Walz v. Tax Comm’n of New York*, 397 U.S. 664, 674 (1970)).

106. The most famous disparagement of the *Lemon* test is Justice Scalia’s comparison of it to “some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried.” *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment). For a useful summary of the Court’s ambivalence towards the *Lemon* test, see *Utah Highway Patrol Association v. American Atheists, Inc.*, 132 S. Ct. 12 (2011) (Thomas, J., dissenting from the denial of certiorari):

Some of our cases have simply ignored the *Lemon* or *Lemon*/endorsement formulations. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Marsh v. Chambers*, 463 U.S. 783 (1983). Other decisions have indicated that the *Lemon*/endorsement test is useful, but not binding. *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (despite *Lemon*’s usefulness, we are “unwillin[g] to be confined to any single test or criterion in this sensitive area”); *Hunt v. McNair*, 413 U.S. 734, 741 (1973) (*Lemon* provides “no more than helpful signposts”). Most recently, in *Van Orden*, 545 U.S. 677, a majority of the Court declined to apply the *Lemon*/endorsement test in upholding a Ten Commandments monument located on the grounds of a state capitol. Yet in another case decided the same day, *McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844, 859–866 (2005), the Court selected the *Lemon*/endorsement test with nary a word of explanation and then declared a display of the Ten Commandments in a courthouse to be unconstitutional.

132 S. Ct. at 14–15 (Thomas, J., dissenting from the denial of certiorari) (parallel citations and footnote omitted).

107. *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality opinion). Chief Justice Rehnquist wrote the plurality and was joined by Justices Scalia, Kennedy, and Thomas. *Id.* at 679.

the same result the Court reaches today, see, e.g., *Lemon*, . . . — no exact formula can dictate a resolution to such fact-intensive cases.”¹⁰⁸

The majority striking down the Kentucky courthouse display of the Ten Commandments specifically rejected a call to “abandon *Lemon*’s purpose test.”¹⁰⁹ Nonetheless, those Justices never explicitly affirmed the three-part test either, since their analysis ended upon their finding an impermissible governmental purpose.¹¹⁰

Parsing the numerous opinions from the cases reveals that there were seven disparate “tests” or “standards” utilized by the various Justices in the justification of the four Court rulings.¹¹¹ A review of each illuminates the tremendous difficulty the Court has faced in trying to articulate a workable standard.

1. Legislative Purpose of Advancing Religion

The only majority opinion from this group, *McCreary County*, determined that the appropriate test for analyzing whether the Ten Commandments display being challenged was unconstitutional was whether the counties acted with the purpose of advancing religion: “When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality”¹¹² That neutrality would be violated if the government were to act with the purpose of favoring “one religion over another, or religion over irreligion.”¹¹³

2. Endorsement Test

The *McCreary County* majority did not specifically rely on the “endorsement test,” even though that test had been utilized by the Court in several earlier cases.¹¹⁴ Justice O’Connor, the originator of the

108. *Id.* at 700 (Breyer, J., concurring in the judgment).

109. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 861 (2005).

110. *ACLU of Kentucky v. Mercer Cnty.*, 432 F.3d 624, 635–36 (6th Cir. 2005).

111. Professor Gey counted even more possible standards: “At one point or another in recent years, one or more of the nine Justices have signed opinions proposing ten different standards for enforcing the Establishment Clause.” Gey, *supra* note 83, at 728. The list in the text is slightly different, focusing solely on the tests that were actually used to reach the judgment of the Court.

112. *McCreary Cnty.*, 545 U.S. at 860.

113. *Id.* at 875.

114. In *Santa Fe Independent School District v. Doe*, the Court stated, “In cases involving state participation in a religious activity, one of the relevant questions is ‘whether an objective observer, acquainted with the text, legislative history, and implementation of the

endorsement test, did rely on that test in her concurrence: “The purpose behind the counties’ display is relevant because it conveys an unmistakable message of endorsement to the reasonable observer.”¹¹⁵ According to Justice O’Connor, the test for determining whether governmental speech violates the Establishment Clause is whether a government practice, from “the perception of a reasonable, informed observer,”¹¹⁶ has “the effect of communicating a message of government endorsement or disapproval of religion.”¹¹⁷

3. Ceremonial Deism

The year before *McCreary County*, Justice O’Connor had argued that a public school’s recitation of the Pledge of Allegiance, including the phrase “one Nation under God,” did not violate the Establishment Clause because it was a form of “ceremonial deism.”¹¹⁸ This was not a repudiation of her endorsement test since, according to Justice O’Connor, government references that are categorizable as ceremonial deism survive that test because they are “being used to acknowledge

statute, would perceive it as a state endorsement of prayer in public schools.” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O’Connor, J., concurring in the judgment)). Similarly, the Court had stated in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989):

Whether the key word is “endorsement,” “favoritism,” or “promotion,” the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from “making adherence to a religion relevant in any way to a person’s standing in the political community.”

492 U.S. at 593–94 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring)), *abrogated by* *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *see also* *Wallace*, 472 U.S. at 56 (“In applying the purpose test, it is appropriate to ask ‘whether government’s actual purpose is to endorse or disapprove of religion.’” (quoting *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring))).

115. *McCreary Cnty.*, 545 U.S. at 883–84 (O’Connor, J., concurring). Justice O’Connor first proposed the “endorsement test” in *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O’Connor, J., concurring) (“The proper inquiry . . . , I submit, is whether the government intends to convey a message of endorsement or disapproval of religion.”).

116. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 773 (1995) (O’Connor, J., concurring in part and concurring in the judgment).

117. *Lynch*, 465 U.S. at 692 (O’Connor, J., concurring).

118. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37 (2004) (O’Connor, J., concurring in the judgment). For the derivation of the phrase “ceremonial deism,” *see infra* notes 173–80 and accompanying text. A majority of the Court declined to review the merits of the case, finding that the father of the school child lacked standing. *Newdow*, 542 U.S. at 17–18 (majority opinion), *abrogated on other grounds by* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014).

religion or to solemnize an event rather than to endorse religion in any way.”¹¹⁹

Nonetheless, because of the detailed framework that Justice O’Connor provided for determining which governmental speech qualified as ceremonial deism, it is useful to consider this a distinct category. To decide if a government practice constitutes ceremonial deism, Justice O’Connor said that there were four factors to evaluate:

- (a) “History and Ubiquity”—A practice is only to be considered as ceremonial deism if it “has been in place for a significant portion of the Nation’s history, and when it is observed by enough persons that it can fairly be called ubiquitous.”¹²⁰
- (b) “Absence of worship or prayer”—Ceremonial deism will not be found when the government is leading its citizenry in prayer, which Justice O’Connor defined as any “statement that has as its purpose placing the speaker or listener in a penitent state of mind, or that is intended to create a spiritual communion or invoke divine aid.”¹²¹
- (c) “Absence of reference to particular religion”—Ceremonial deism must be non-sectarian and may not “explicitly favor[] one particular religious belief system over another.”¹²²
- (d) “Minimal religious content”—Ceremonial deism may only contain a very limited, very brief religious reference, what Justice O’Connor termed a “highly circumscribed reference to God.”¹²³

4. Acknowledgment of the Nation’s Religious Heritage

In finding that the placement of a monument containing the Ten Commandments on the grounds of the Texas state capitol did not violate the Establishment Clause, a four-Justice plurality opinion, authored by Chief Justice Rehnquist, declared that the Constitution did not disable “the government from in some ways recognizing our religious heritage.”¹²⁴ The Rehnquist opinion stated that its

119. *Newdow*, 542 U.S. at 43 (O’Connor, J., concurring in the judgment).

120. *Id.* at 37.

121. *Id.* at 39–41.

122. *Id.* at 42.

123. *Id.* at 42–43.

124. *Van Orden v. Perry*, 545 U.S. 677, 684 (2005) (plurality opinion). Chief Justice Rehnquist’s opinion was joined by Justices Scalia, Kennedy, and Thomas. This is essentially

constitutional analysis was “driven both by the nature of the monument and by our Nation’s history”¹²⁵ but did not specify which aspects of that “nature” and “history” were dispositive.¹²⁶ The opinion did note that Texas had “treated its Capitol grounds monuments as representing the several strands in the State’s political and legal history.”¹²⁷ The monument, thus, was seen as having a “dual significance,” not only of obvious religious meaning but of secular meaning as well.¹²⁸

The opinion seems to imply that it was highly relevant that Texas did not have a purely religious purpose for maintaining the monument. In distinguishing the Texas monument from *Stone v. Graham*,¹²⁹ the Kentucky case striking down a statute requiring the posting of the Ten Commandments in public schoolrooms, the plurality noted that, “[in] the classroom context, [it] found that the Kentucky statute had an improper and plainly religious purpose.”¹³⁰ The opinion added that the

the same rationale used by Chief Justice Rehnquist when he argued that the public school recitation of the Pledge of Allegiance did not violate the Establishment Clause: “[O]ur national culture allows public recognition of our Nation’s religious history and character.” *Newdow*, 542 U.S. at 30 (Rehnquist, C.J., concurring in the judgment). Interestingly, Justice O’Connor joined Chief Justice Rehnquist’s *Newdow* opinion. *Id.* at 33 (O’Connor, J., concurring in the judgment).

125. *Van Orden*, 545 U.S. at 686 (plurality opinion).

126. The *Van Orden* plurality analysis is similar, but not identical, to the analysis the Court had utilized in *Marsh v. Chambers*, 463 U.S. 783 (1982), when it upheld the practice of legislative prayer. In *Marsh*, the Supreme Court seemed to say that the simple fact that legislative prayer had been utilized since the time of the framing was sufficient to establish its constitutionality:

In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an “establishment” of religion or a step toward establishment; it is simply a tolerable acknowledgement of beliefs widely held among the people of this country.

463 U.S. 783, 792 (1982). The *Van Orden* plurality did not explicitly state it was using the same standard as *Marsh* but did rely on *Marsh* for the proposition that

[r]ecognition of the role of God in our Nation’s heritage has also been reflected in our decisions. . . . This recognition has led us to hold that the Establishment Clause permits a state legislature to open its daily sessions with a prayer by a chaplain paid by the State. *Marsh v. Chambers*, 463 U.S., at 792. Such a practice, we thought, was “deeply embedded in the history and tradition of this country.” *Id.*, at 786.

Van Orden, 545 U.S. at 688 (plurality opinion) (footnote omitted).

127. *Van Orden*, 545 U.S. at 691 (plurality opinion).

128. *Id.* at 692.

129. 449 U.S. 39 (1980).

130. *Van Orden*, 545 U.S. at 690 (plurality opinion).

Stone decision did not imply that its holding would “extend to displays of the Ten Commandments that lack a ‘plainly religious,’ ‘pre-eminent purpose.’”¹³¹ It would be a mistake, though, to treat this plurality as actually agreeing with the majority in *McCreary County* that a “purpose” of favoring either one religion over another religion, or religion in general over irreligion, would violate the Establishment Clause. All four Justices who signed onto the Rehnquist opinion also signed onto Justice Scalia’s dissent in *McCreary County*, which rejected the “purpose” analysis on the ground that “even an exclusive purpose to foster or assist religious practice is not necessarily invalidating.”¹³²

5. Sectarian Endorsement

In his concurrence to the Texas monument case, Justice Scalia seemed to be proposing an Endorsement Clause test that would permit government to endorse religion in general but not necessarily a particular religious doctrine. The test he proposed was: “[T]here is nothing unconstitutional in a State’s favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.”¹³³ Even though his short *Van Orden* concurrence did not explicitly state that governmental sectarian endorsement would be unconstitutional, Justice Scalia made that distinction in his dissent in *Lee v. Weisman*,¹³⁴ in which he stated that

our constitutional tradition . . . ruled out of order government-sponsored endorsement of religion . . . where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ).¹³⁵

131. *Id.* at 691 n.11 (quoting *Stone*, 449 U.S. at 41).

132. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 902–03 (2005) (Scalia, J. dissenting) (emphasis omitted).

133. *Van Orden*, 545 U.S. at 692 (Scalia, J. concurring). For a discussion of why Justice Scalia’s assertion that venerating the Ten Commandments is not the same as venerating religion in general, see *infra* notes 167–70 and accompanying text.

134. 505 U.S. 577 (1992). This case struck down a non-denominational prayer delivered at a public high school graduation. *Id.* at 585–86.

135. *Id.* at 641 (Scalia, J., dissenting).

6. Coercion

Justice Thomas, in both his *Van Orden* and *Newdow* concurrences, argued that the only government activity that was prohibited by the Establishment Clause was “actual legal coercion.”¹³⁶ Under this approach, a mere governmental “endorsement,” either of religion in general or of a particular denomination’s beliefs, would not violate the Constitution. According to Thomas, the Establishment Clause is not implicated absent the “coercion of religious orthodoxy and of financial support by force of law and threat of penalty,”¹³⁷ such as “mandatory observance or mandatory payment of taxes supporting ministers.”¹³⁸ Thus, all governmental religious expression, as long as it did not directly “compel” anyone “to do anything,” would be permissible.¹³⁹

7. Avoiding Divisiveness

Justice Breyer was the only Justice to vote in favor of the Court’s judgment in both *Van Orden* and *McCreary County*.¹⁴⁰ Thus, he was the only Justice to find a constitutional distinction between the Ten Commandments displayed on a monument in front of a state capital and inside the courthouse. Although Justice Breyer disclaimed the hope of finding a “single mechanical formula”¹⁴¹ and declared that there was “no

136. *Van Orden*, 545 U.S. at 693 (Thomas, J., concurring) (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 52 (2004) (Thomas, J., concurring in the judgment)) (internal quotation mark omitted). According to Justice Thomas, even this Establishment Clause limitation should only be directed at the federal government. *Id.* He argued that the Establishment Clause was solely designed as a structural protection for federalism—i.e., preventing federal interference with state establishments—and thus could not be incorporated to apply to the states. *Newdow*, 542 U.S. at 49 (Thomas, J., concurring in the judgment). As a matter of historical fact, this latter claim is demonstrably incorrect. See MEYERSON, *supra* note 59, at 172–76.

137. *Van Orden*, 545 U.S. at 693 (Thomas, J., concurring) (emphasis omitted) (quoting *Lee*, 505 U.S. at 640 (Scalia, J., dissenting)) (internal quotation mark omitted).

138. *Id.* (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 729 (2005) (Thomas, J., concurring)) (internal quotation mark omitted).

139. *Id.* at 694.

140. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 848 (2005); *Van Orden*, 545 U.S. at 698 (Breyer, J., concurring in the judgment). He also voted with the Court majority in *Newdow*, albeit without offering an opinion on the constitutionality of the Pledge of Allegiance. *Newdow*, 542 U.S. at 3. He was however, in the dissent in *Salazar v. Buono*, 130 U.S. 1803, 1842 (2010) (Breyer, J., dissenting).

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

test-related substitute for the exercise of legal judgment,”¹⁴² the ultimate concern he expressed was the need to avoid political divisiveness.¹⁴³

The features of the Texas monument display that led him to conclude that they did not threaten to cause such divisiveness were that they were part of a display that included numerous secular messages and they had been on public grounds for forty years with no previous legal complaint.¹⁴⁴ By contrast, he said, the history of the Kentucky courthouse displays “indicates a governmental effort substantially to promote religion.”¹⁴⁵

But most significantly to Justice Breyer, it seems, the recency of the courthouse displays presented a much greater threat; unlike the Texas monument, “a more contemporary state effort to focus attention upon a religious text is certainly likely to prove divisive in a way that this longstanding, pre-existing monument has not.”¹⁴⁶ Removing the older monument, he warned, was not simply unnecessary for avoiding divisiveness but would evince such “hostility” to religion as to “create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.”¹⁴⁷

B. *Seven Flawed Standards*

There is obviously no way to synthesize these seven standards into a single usable test. It is also beyond question that no single rule could unite this disparate Court. What is perhaps more surprising, though, is that each of their standards is fundamentally flawed.

Justice Thomas’s claim that the Establishment Clause only prohibits legal coercion is the easiest to dismiss, as such a radical change to our legal culture has been wisely rejected by every other member of the Court.¹⁴⁸ Justice Thomas’s standard would eviscerate the “principle of

142. *Id.* at 700, 703–04.

143. *See id.*

144. *Id.* at 702–03.

145. *Id.* at 703.

146. *Id.*

147. *Id.* at 704.

148. *See* Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 998 (2010) (“Of the nine Justices currently on the Court, the best guess is that eight of them support this ban on denominational religious speech—the only dissenter seems to be Justice Thomas.”).

denominational neutrality.”¹⁴⁹ It would permit the “permanent erection of a large Latin cross on the roof of city hall” and allow a state government, and indeed the federal government, to “proselytize on behalf of a particular religion.”¹⁵⁰

Even the Justices who have been most willing to allow religious governmental speech have recognized that the Establishment Clause was “designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. Given the ‘incorporation’ of the Establishment Clause . . . , States are prohibited as well from establishing a religion or discriminating between sects.”¹⁵¹ As Justice Scalia asserted, were a government to “take sides in a theological dispute” with an “endorsement of a particular version of the Decalogue as authoritative,” that would violate the Establishment Clause as an “impermissible endorsement of a particular religious view.”¹⁵²

Accepting that at least some form of governmental endorsement is unconstitutional, the Justices have been divided over whether the Establishment Clause prohibits only sectarian endorsements or extends to prohibit endorsements of religion over non-religion. Based on the way these arguments are framed today, neither side can withstand careful scrutiny.

One weakness with the argument of those who would permit the government to endorse religion over non-religion is that it would violate several fundamental precepts of religious freedom. First, it contradicts the principle that the “government has no legitimate role in shaping the

149. *Larson v. Valente*, 456 U.S. 228, 246 (1982); *see also* *Sch. Dist. v. Schempp*, 374 U.S. 203, 214–15 (1963) (quoting an unpublished opinion of Judge Alphonso Taft in *Minor v. Board of Education of Cincinnati* (Super. Ct. of Cincinnati 1870) (Taft, J., dissenting), in *THE BIBLE IN THE PUBLIC SCHOOLS* 351, 415 (Cincinnati, Robert Clarke & Co. 1870) (“The government is neutral, and, while protecting all, it prefers none, and it disparages none.” (emphasis omitted))).

150. *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

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

152. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 894 n.4 (2005) (Scalia, J., dissenting). Interestingly, Justice Thomas joined this dissent. *See also* *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) (“I will further concede that our constitutional tradition . . . [has] ruled out of order government-sponsored endorsement of religion . . . where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ).”). Justice Thomas also signed onto Justice Scalia’s *Lee* dissent. *Id.* at 631.

religious opinions of the American people.”¹⁵³ The government is not charged with being the nation’s religious teacher. As James Madison wrote, this principle requires that, “[in] matters of Religion, no man’s right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.”¹⁵⁴

A second flaw, to again quote Madison, is that permitting the government to pronounce that it prefers those who believe in religion “degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.”¹⁵⁵ As Justice O’Connor explained, it violates the principles behind the Establishment Clause for the government to send “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.”¹⁵⁶

Finally, the position that government can endorse religion in general but not a particular religion is doomed to collapse over the fact that governmental endorsement of religion will inevitably conform to the views and practices of the majority religion. Take, for example, a concept as seemingly all-inclusive as National Prayer Day. According to federal law, the President must “issue each year a proclamation designating the first Thursday in May as a National Day of Prayer on which the people of the United States may turn to God in prayer and meditation *at churches*, in groups, and as individuals.”¹⁵⁷ Even when attempting to talk to all religions, Congress could not avoid singling out “churches” in preference to mosques, synagogues, and other places where non-Christians pray. Preferences for religion in general will always tend toward preferences to “the standard of the predominant sect.”¹⁵⁸

Those contending that the Establishment Clause bars all endorsement of religion, including religion in general over non-religion, as well as those who assert that the “central Establishment Clause value of official religious neutrality” is violated when government acts with

153. Laycock, *supra* note 2, at 230.

154. Memorial and Remonstrance Against Religious Assessments, *in* 2 THE WRITINGS OF JAMES MADISON 183, 185 (Gaillard Hunt ed., 1901).

155. *Id.* at 188.

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

157. 36 U.S.C. § 119 (2012) (emphasis added).

158. Madison, Detached Memoranda, *supra* note 77, at 561.

the purpose of favoring "religion over irreligion,"¹⁵⁹ face an insurmountable burden. Neither principle has ever been consistently applied, even by their most ardent supporters.¹⁶⁰ As Justice Kennedy argued when the endorsement test was first used by the Court,

Either the endorsement test must invalidate scores of traditional practices recognizing the place religion holds in our culture, or it must be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past, while condemning similar practices with no greater endorsement effect simply by reason of their lack of historical antecedent.¹⁶¹

The Court has upheld legislative prayer,¹⁶² property tax exemptions for church property,¹⁶³ and the Pledge of Allegiance to a nation "under God,"¹⁶⁴ among many other governmental activities that unmistakably fail the endorsement test's requirement of total neutrality between religion and non-religion.¹⁶⁵ As one commentator noted, "Any explanation of why these practices survive constitutional scrutiny under this test, while school prayer and other practices invalidated by the Court do not, is hopelessly inadequate."¹⁶⁶

In reality, the best explanation for the inconsistent application of the endorsement test may well be the Justices' "fear of the backlash that could result from the full enforcement of the neutrality principle."¹⁶⁷ The consequence from such enforcement "would be too unpopular, do

159. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860, 875 (2005).

160. "One of the criticisms sometimes made of the Endorsement Test is that it cannot account for all of the practices that the Court has upheld." Strasser, *supra* note 83, at 566.

161. *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 674 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

162. *Marsh v. Chambers*, 463 U.S. 783 (1983).

163. *Walz v. Tax Comm'n of New York*, 397 U.S. 664 (1970).

164. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 5 (2004), *abrogated on other grounds* by *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). While the Court rejected the challenge to the Pledge on procedural grounds, no Justice even intimated that the Pledge would violate the Establishment Clause.

165. *See McCreary Cnty. v. ACLU*, 545 U.S. 844, 891 (2005) (Scalia, J., dissenting) (detailing "the variety of circumstances in which this Court . . . has approved government action 'undertaken with the specific intention of improving the position of religion'" (quoting *Edwards v. Aguillard*, 482 U.S. 578, 616 (1987) (Scalia, J., dissenting))).

166. Epstein, *supra* note 19, at 2173–74.

167. Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U. L. REV. 1097, 1123 (2006); *see also McCreary Cnty.*, 545 U.S. at 890 (Scalia, J., dissenting) ("[T]he Court has not had the courage (or the foolhardiness) to apply the neutrality principle consistently.").

too much damage to the Court's credibility, and do too little good for religious minorities and nonbelievers."¹⁶⁸ Justice Scalia terms the Court's "instinct for self-preservation" as the factor that keeps the Justices from going "too far down the road of an enforced neutrality that contradicts both historical fact and current practice."¹⁶⁹ Thus, the endorsement test is simply "ignored" when its application would "prohibit things the Court seems to wish to protect."¹⁷⁰

One way some Justices have tried to explain how obviously religious governmental expression has passed the endorsement test is by terming such permitted expression ceremonial deism. The phrase "ceremonial deism" was apparently invented in 1962 by Walter Rostow, Dean of Yale Law School.¹⁷¹ He used the phrase to denote a "class of public activity, which . . . [could] be accepted as so conventional and uncontroversial as to be constitutional."¹⁷²

"Ceremonial deism" is, in reality, quite a peculiar phrase.¹⁷³ The word "deism" is generally associated with the religious beliefs of Thomas Paine and several of the other Framers.¹⁷⁴ "Deism in America was a product of French intellectual thought in the eighteenth century and had among its fundamental principles the existence of a Supreme Deity, worthy of adoration, and the necessity of religious liberty. It also eschewed theological and ecclesiastical extremes."¹⁷⁵ Modifying the

168. Douglas Laycock, *Church and State in the United States: Competing Conceptions and Historic Changes*, 13 *IND. J. GLOBAL LEGAL STUD.* 503, 529 (2006).

169. *McCreary Cnty.*, 545 U.S. at 892–93 (Scalia, J., dissenting).

170. John M. Bickers, *Standing on Holy Ground: How Rethinking Justiciability Might Bring Peace to the Establishment Clause*, 60 *CLEV. ST. L. REV.* 415, 432 (2012).

171. Arthur E. Sutherland, Book Review, 40 *IND. L.J.* 83, 86 & n.7 (1964) (reviewing WILBER G. KATZ, *RELIGION AND AMERICAN CONSTITUTIONS* (1964)).

172. *Id.* at 86.

173.

Note that "ceremonial deism" is a term of art and distinct from the theological definition of Deism as "the belief, claiming foundation solely upon the evidence of reason, in the existence of God as the creator of the universe who after setting it in motion abandoned it, assumed no control over life, exerted no influence on natural phenomena, and gave no supernatural revelation."

Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 *UCLA L. REV.* 1545, 1549 n.14 (2010) (quoting *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 348 (William Morris ed., 1978)).

174. Thomas Paine, *Of the Religion of Deism Compared with the Christian Religion, and the Superiority of the Former over the Latter* (1804), reprinted in 'IN GOD WE TRUST': *THE RELIGIOUS BELIEFS AND IDEAS OF THE AMERICAN FOUNDING FATHERS* 430 (Norman Cousins ed., 1958).

175. Epstein, *supra* note 19, at 2091 (footnotes omitted).

word “deism” with the word “ceremonial” does more than merely limit the location of religious phraseology to “ceremonial, as opposed to theological, settings.”¹⁷⁶ It also shrinks the meaning of “deism” to non-sectarian religious expression.¹⁷⁷

While no majority opinion of the Supreme Court has either explicitly adopted or rejected the concept of ceremonial deism,¹⁷⁸ a few Justices have stated that it would help resolve difficult Establishment Clause cases. According to Justice O’Connor, the concept of ceremonial deism includes the Pledge of Allegiance, as well as “the national motto (‘In God We Trust’), religious references in traditional patriotic songs such as The Star-Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions (‘God save the United States and this honorable Court’).”¹⁷⁹

One of the major objections to the category of ceremonial deism is that it is a result-oriented label, easily “subject to manipulation.”¹⁸⁰ Ceremonial deism has been termed an “amorphous concept” which has been frequently utilized “as a springboard from which to hold that other challenged practices,” such as the cross in a city’s insignia or a state’s celebration of Good Friday, do not violate the Establishment Clause.¹⁸¹

The most fundamental objection to the concept of ceremonial deism, though, is that it is built on the erroneous, if not dishonest, foundation that religious words have no religious significance. When Justice Brennan first expressed support for the concept, he said the examples of

176. *Id.*

177. Cass Sunstein has defined ceremonial deism as the “non-coercive public displays that refer to God in the way that is time honored and fits with our traditions.” Cass R. Sunstein, *Celebrating God, Constitutionally*, 83 U. DET. MERCY L. REV. 567, 567 (2006); *see also* Corbin, *supra* note 173, at 1546 (“Ceremonial deism is defined as a longstanding religious practice—sometimes extending back to the nation’s founding—with de minimis and nonsectarian religious content.”).

178. Strasser, *supra* note 83, at 559; *see also* Hill, *supra* note 36, at 717 (“[T]he Supreme Court has shown no great appetite for addressing the constitutionality of ceremonial deism.”).

179. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37 (2004) (O’Connor, J., concurring in the judgment).

180. Laycock, *supra* note 2, at 240; *see also* Michael M. Maddigan, Comment, *The Establishment Clause, Civil Religion, and the Public Church*, 81 CALIF. L. REV. 293, 345 (1993) (“Ceremonial deism, then, is a nebulous and ill-defined concept that has become nothing more than a shorthand for what some Justices believe are ‘constitutionally acceptable religious practices.’”).

181. Epstein, *supra* note 19, at 2086 & n.13 (describing *Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991) (cross in city insignia), and *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991) (upholding Good Friday holiday)).

ceremonial deism were “protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.”¹⁸² Similarly, Justice O’Connor said that “[a]ny religious freight the words may have been meant to carry originally has long since been lost.”¹⁸³

This assertion is incorrect: “[I]t is simply untrue for many people that ‘under God’ has lost its religious meaning.”¹⁸⁴ While it is doubtlessly accurate to say that many people do not feel these phrases have religious significance, to many others the religious language continues to express deep religious meaning. Assertions to the contrary “demean the expressions and insult the intelligence.”¹⁸⁵

A similar critique can be made of the *Van Orden* plurality’s standard asserting that the Establishment Clause is not violated if the government is simply “recognizing our religious heritage.”¹⁸⁶ The problem with this approach is that it, by *ipse dixit*, denies the religious nature of religious words.

182. *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting).

183. *Newdow*, 542 U.S. at 39–41 (O’Connor, J., concurring in the judgment); *see also* Bell, *supra* note 20, at 1274–75 (“When considering phrases such as ‘God Save the United States and this Honorable Court’ and ‘In God We Trust,’ the Court has engaged in ‘secularization,’ justifying religious practices and expressions based on their context or tradition.” (footnote omitted)); Andrew Rotstein, Note, *Good Faith? Religious-Secular Parallelism and the Establishment Clause*, 93 COLUM. L. REV. 1763, 1772 (1993) (stating that certain religious phrases “have largely or totally lost their religious significance because of their passive character or their longstanding repetition in a civic context”).

184. Thomas C. Berg, *The Pledge of Allegiance and the Limited State*, 8 TEX. REV. L. & POL. 41, 48 (2003); *see also* Daniel O. Conkle, *Religious Expression and Symbolism in the American Constitutional Tradition: Governmental Neutrality, but Not Indifference*, 13 IND. J. GLOBAL LEGAL STUD. 417, 433 (2006) (“By all indications, the governmental expression in question does promote and endorse religion, and it does so deliberately.”).

185. Steven D. Smith, *How Is America “Divided by God”?*, 27 MISS. C. L. REV. 141, 155 (2007). Many have also felt that the denial of religious meaning can be seen as insulting people of faith who see great religious significance in religious language. *See, e.g.*, *Myers v. Loudoun Cnty. Pub. Sch.*, 418 F.3d 395, 407 (4th Cir. 2005) (saying that “it is demeaning to persons of any faith to assert that the words ‘under God’ contain no religious significance”); Robert A. Schapiro, *The Consequences of Human Rights Foundationalism*, 54 EMORY L.J. 171, 179 (2005) (stating that treating references to God as meaningless “would be insulting to those who take references to God quite seriously”).

186. *Van Orden v. Perry*, 545 U.S. 677, 684 (2005) (plurality opinion). In arguing that the Pledge of Allegiance did not violate the Establishment Clause, several Justices, “repeatedly used the words ‘describe,’ ‘acknowledge,’ and their synonyms.” Hill, *supra* note 36, at 729.

According to Douglas Laycock, this sort of approach is essentially “a polite lie.”¹⁸⁷ The assertion that religious speech has become “secularized” permits courts to uphold governmental religious speech “but still maintain lip service to the constitutional principle of religious neutrality.”¹⁸⁸ When a legislative chaplain is leading legislators in a devout prayer, it is disingenuous to contend that this pious activity has only been designed to “recognize[] the rich religious heritage of our country”¹⁸⁹ or is “simply a tolerable acknowledgment of beliefs widely held among the people of this country.”¹⁹⁰ A sustainable legal rule cannot be premised on a transparent “legal fiction,” one in which courts insist that governmental religious speech and actions are “nonreligious as a matter of law, no matter how religious they might be as a matter of fact.”¹⁹¹

Justice Breyer’s approach of avoiding religious divisiveness has the virtue of forthrightness as well as a philosophical linkage to the thoughts and practices of George Washington.¹⁹² Nonetheless, as Justice Breyer himself admitted, his methodology is too amorphous to be described as a legal standard. He relied not upon “any particular test” but instead “upon consideration of the basic purposes of the First Amendment’s Religion Clauses themselves.”¹⁹³ In his analysis, there is “no test-related substitute for the exercise of legal judgment.”¹⁹⁴

An obvious difficulty with this approach is that there is no way to predict ahead of time how a court will exercise its legal judgment in determining what religious governmental actions will be deemed unacceptably divisive. Moreover, the fluid nature of relying on the “purposes” of the First Amendment will inevitably lead to the perception, if not reality, that Justices are “ruling now this way, now

187. Laycock, *supra* note 2, at 225.

188. Christopher C. Lund, *The Future of the Establishment Clause in Context: A Response to Ledewitz*, 87 CHI.-KENT L. REV. 767, 768 (2012).

189. Turner v. City Council of Fredericksburg, 534 F.3d 352, 356 (4th Cir. 2008) (O’Connor, J., retired, sitting by designation), *cert. denied*, 129 S. Ct. 909 (2009). It was similarly disingenuous when the Court contended that a governmental display of a nativity scene merely “depict[ed] the historical origins” of Christmas. Lynch v. Donnelly, 465 U.S. 668, 680 (1984).

190. Marsh v. Chambers, 463 U.S. 783, 792 (1983).

191. Lund, *supra* note 188, at 769.

192. See *infra* notes 286–92 and accompanying text.

193. Van Orden v. Perry, 545 U.S. 677, 703–04 (2005) (Breyer, J., concurring in the judgment).

194. *Id.* at 700.

that—thumbs up or thumbs down—as their personal preferences dictate.”¹⁹⁵

One of the major obstacles that has prevented the Court from reaching a workable standard for judging the constitutionality of religious government speech is the Justices’ collective misreading of the actions and understandings of the Framers who helped draft and implement the First Amendment. The Court has asserted continually that history plays an especially critical role in the creation of Establishment Clause jurisprudence.¹⁹⁶ As Justice Wiley Rutledge declared, “No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history.”¹⁹⁷ It is thus particularly disheartening that the history relied upon is so often “bad history.”¹⁹⁸

Justices have been accurately categorized as engaging in “law office histor[y],” in which they “selectively recount[] facts, emphasizing data that support the recorder’s own prepossessions and minimizing significant facts that complicate or conflict with that bias.”¹⁹⁹ They create “a stark, crabbed, oversimplified picture of the past, developed largely to plead a case.”²⁰⁰ If the Justices had a more complete and more accurate understanding of how the Framers understood and utilized governmental religious expression, they might have an easier time creating a predictable, usable standard.

195. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 891 (Scalia, J., dissenting).

196. “From the Supreme Court’s first Religion Clause case, . . . Justices have appealed to the history surrounding the writing of the First Amendment, the Founders generally, and specific Founders to shine light upon the meaning of the Establishment and Free Exercise Clauses.” Hall, *supra* note 18, at 567.

197. *Everson v. Bd. of Educ.*, 330 U.S. 1, 33 (1947) (Rutledge, J., dissenting); *see also* *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (stating that “the meaning of the Clause is to be determined by reference to historical practices and understandings”); *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) (“The true meaning of the Establishment Clause can only be seen in its history.”).

198. Green, *supra* note 13, at 1719.

199. Daniel L. Dreisbach, *A Lively and Fair Experiment: Religion and the American Constitutional Tradition*, 49 EMORY L.J. 223, 234 (2000) (book review) (internal quotation marks omitted).

200. Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, in *ESSAYS ON THE AMERICAN CONSTITUTION* 77, 80 (Gottfried Dietze ed., 1964).

IV. HOW THE FRAMERS SPOKE ABOUT RELIGION

We should not expect the framing generation to have considered the relationship between religion and government in a simplistic way. They were capable of sophisticated, multifaceted thinking, and the balance they struck reflects a complexity that modern commentators have often underestimated. The inability to recognize the nuanced compromise reached by the Framers has contributed to the Court's failure to reach any sort of consensus on the proper test for evaluating the Establishment Clause.

A. *Never a Christian Nation*

Justices who view the Constitution as limiting governmental religious speech erroneously assume that, except for Jefferson and Madison, the Framers viewed the First Amendment solely as protection for Christians.²⁰¹ In *McCreary County*, for example, Justice Souter, writing for the majority, stated that "history shows that the religion of concern to the Framers was not that of the monotheistic faiths generally, but Christianity in particular."²⁰² To support this conclusion, Justice Souter quotes from Justice Story's book *Commentaries on the Constitution*: "Justice Story probably reflected the thinking of the framing generation when he wrote in his Commentaries that the purpose of the Clause was 'not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects.'"²⁰³

In reality, Justice Story was wrong about the framing generation, and his mistake was made for the same reasons as Justice Daniel Brewer's

201. See, e.g., *Harris v. City of Zion*, 927 F.2d 1401, 1410 (7th Cir. 1991) ("Perhaps originally the Religion Clauses merely sought to protect the diversity of faiths and practices within Christianity itself.").

202. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 880 (2005); see also *Freedom from Religion Found., Inc. v. Obama*, 705 F. Supp. 2d 1039, 1062 (W.D. Wis. 2010) ("If one were to read the establishment clause as permitting any practice in existence around the time of the framers, this would likely mean that the government would be free to discriminate against all non-Christians."), *vacated on other grounds*, 641 F.3d 803 (7th Cir. 2011).

203. *McCreary Cnty.*, 545 U.S. at 880. Although the quote is from 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1871, at 728 (Boston, Hilliard, Gray, & Co. 1833), Justice Souter, for some reason, cites to a secondary source, ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 13 (1988), a book that Mark Tushnet accurately describes as "a work of crank constitutional law," Mark Tushnet, Book Review, 45 LA. L. REV. 175, 175 (1984) (reviewing ROBERT CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982)).

erroneous assertion sixty years later that the United States “is a Christian nation.”²⁰⁴ Both Justices Story and Brewer relied almost exclusively on the practices of the colonies and states, rather than those of the federal government following the enactment of the Constitution. For example, Justice Brewer, other than quoting the First Amendment and the constitutional provision giving the President ten days, “Sundays excepted,” to decide whether to sign or veto legislation,²⁰⁵ only cited colonial charters, the Declaration of Independence, and the common law systems of Pennsylvania and New York.²⁰⁶ Similarly, Justice Story only cites one source for support, the House of Representatives’ debate on the First Amendment, in which neither the word “Christianity” is mentioned nor is there a discussion of other religions.²⁰⁷

Justices Story and Brewer were wrong. A comprehensive review of the practices of the framing generation shows that they neither believed that America was a “Christian Nation” nor that the First Amendment only protected Christianity. That review also shows the fundamental error in Justice Scalia’s assumption that the Framers’ use of religion in their public speech endorsed “inescapably the God of monotheism.”²⁰⁸

The key to understanding the Framing Generation is the realization that they believed that the Constitution had created a new entity, a national government not dependent on the state governments, one that was capable of having a distinct identity. The Framers had a vision of religious liberty for the national government that was entirely different from the concept that prevailed in the several states.

This distinction can be seen in two famous letters written by Presidents Washington and Jefferson. In the first, Washington’s 1790 letter to the Hebrew Congregation in Newport Rhode Island, he explained his vision for American universal religious freedom. He began by acknowledging the change in perception of the source of religious freedom: “It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the

204. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892).

205. U.S. CONST. art. I, § 7, cl. 2.

206. *Church of the Holy Trinity*, 143 U.S. at 466–72.

207. STORY, *supra* note 203, § 1868, at 726. In a footnote, Story cites “2 Lloyd’s Deb. 195, 196,” which corresponds to 1 ANNALS OF CONG. 730–31. *Id.*

208. *McCreary Cnty.*, 545 U.S. at 894 n.3 (Scalia, J., dissenting) (emphasis omitted).

exercise of their inherent natural rights.”²⁰⁹ He then pronounced his description of the American guarantee of religious equality: “For happily *the Government of the United States*, which gives to bigotry no sanction, to persecution no assistance requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support.”²¹⁰

Note that Washington placed his focus on “the Government of the United States.” Under the Constitution, a distinct national perspective of freedom of religion was created; it was the “Government of the United States” that no longer sanctioned religious bigotry, regardless of the discrimination that might still occur in the several states.

Similarly, a careful reading of the 1802 letter in which Jefferson provided the metaphor of “a wall of separation between Church & State” reveals that that wall was only legally required for the federal government.²¹¹ Jefferson’s letter had been written in response to a letter from a committee of Baptists from Danbury, Connecticut.²¹² They had written Jefferson to complain about their home state’s religious establishment.²¹³ They wrote that Connecticut did not accept the Baptists’ view of religious liberty, which was that “the legitimate Power of civil Government extends no further than to punish the man who works ill to his neighbour.”²¹⁴ In Connecticut, they said, “Religion is consider[e]d as the first object of Legislation; & therefore what religious privileges we enjoy (as a minor part of the State) we enjoy as favors granted, and not as inalienable rights.”²¹⁵

The committee did not ask Jefferson to intervene directly in state affairs. In fact, they acknowledged both “that the President of the [U]nited States, is not the national Legislator, & also sensible that the

209. Letter from George Washington to the Hebrew Congregation in Newport, Rhode Island (Aug. 18, 1790), in 6 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 284, 285 (Mark A. Mastromarino ed., 1996).

210. *Id.* (emphasis added).

211. See Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802), in 36 THE PAPERS OF THOMAS JEFFERSON 258, 258 (Barbara B. Oberg ed., 2009); see also Daniel L. Dreisbach, “Sowing Useful Truths and Principles”: *The Danbury Baptists, Thomas Jefferson, and the “Wall of Separation,”* 39 J. CHURCH & ST. 455 (1997).

212. Dreisbach, *supra* note 211, at 457.

213. Letter from Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson to Thomas Jefferson, *reprinted in* Dreisbach, *supra* note 211, at 460.

214. *Id.* at 460 (emphasis omitted).

215. *Id.*

national government cannot destroy the Laws of each State.”²¹⁶ Nonetheless, they expressed the hope that “the sentiments of our beloved President . . . will shine & prevail through all these States and all the world till Hierarchy and tyranny be destroyed from the Earth.”²¹⁷

Jefferson’s well-known response echoed the Connecticut Baptists’ view that the national government’s understanding of the proper relationship between religion and government could serve as an exemplar for the individual States.²¹⁸ Jefferson, after expressing agreement that “religion is a matter which lies solely between Man & his God . . . [and] the legitimate powers of government reach actions only, & not opinions,” declared his view that the national government was restricted by the First Amendment, citing the “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 & State.”²¹⁹ Jefferson then stated that he hoped the example of the national government would be followed in each state: “[A]dhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights . . .”²²⁰

There are several factors that led to the creation of a national view of the “rights of conscience” that was distinct from the individual states and far more respectful of those who did not share the majority’s religious faith. One of the most important was that, while the individual states began as narrowly focused, religiously homogeneous communities, the United States was born a pluralistic nation made up of multiple religious groups.

A statistical analysis conducted by Roger Finke and Rodney Stark for their book *The Churching of America, 1776–2005* reveals how much

216. *Id.*

217. *Id.*

218. In a later letter, Jefferson similarly explained that although many New England states still had established churches, the United States Constitution “protects the rights of conscience against the enterprises of the civil authority. It has not left the religion of its citizens under the power of its public functionaries . . .” Letter from Thomas Jefferson to the Society of the Methodist Episcopal Church at New London, Connecticut (Feb. 4, 1809), in 16 THE WRITINGS OF THOMAS JEFFERSON 331, 331–32 (Andrew A. Lipscomb ed., 1903).

219. Letter from Thomas Jefferson to the Danbury Baptist Association, *supra* note 211, at 258 (emphasis omitted) (quoting U.S. CONST. amend. I).

220. *Id.*

more diverse the new nation as a whole was than the individual states.²²¹ In the United States, larger denominations were far less prominent and smaller denominations were far more numerous. For example, the Congregationalists, the largest denomination in Massachusetts in 1776, made up more than 71% of all the state's religious congregations.²²² Southern states, while not as lopsided, were still dominated by a single group, with Episcopalian congregations, at 34.6%, the greatest number in Virginia, and Presbyterians, at 28.5%, the largest in North Carolina.²²³ No state matched the diversity of the entire United States, in which the largest denomination, Congregationalists, comprised barely more than 20% of all congregations.²²⁴

Another way to measure religious diversity is to calculate the number of significant-sized denominations. Eight different denominations—Congregationalists, Presbyterians, Episcopalians, Baptists, Quakers, the German Reformed, Lutherans, and the Dutch Reformed—accounted for at least 3% of all the nation's congregations.²²⁵ Most individual states contained only four to six denominations that comprised at least 3% of their congregations, with New York being the only state with eight denominations of that proportion.²²⁶

Small denominations, those containing less than 3% of the congregations in a particular area, were also a much more significant political factor on the national level. In the United States, the combination of small denominations—including Methodists, Catholics, Moravians, Separatists and Independents, Dunkers, Mennonites, Huguenots, Sandemanians, and Jews—contained more than one-third of the number of congregations of the largest national denomination, Congregationalists.²²⁷ Except in Pennsylvania (which had a similar ratio to the national level), the predominant state denomination dwarfed the combined small local denominations by between 4–1 and 38–1.²²⁸ It is not surprising, therefore, to find more deference paid to the interests

221. ROGER FINKE & RODNEY STARK, *THE CHURCHING OF AMERICA, 1776–2005: WINNERS AND LOSERS IN OUR RELIGIOUS ECONOMY* 281–94 (2005).

222. *Id.* at 286 tbl.A1.

223. *Id.* at 288 tbl.A1.

224. *Id.* at 284 tbl.A1.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

and sensitivities of religious minorities at the national level than at the state level, and far more pressure placed on the local level to assist the most powerful denominations.

In part, this was a phenomenon foreshadowed by the observation in James Madison's *Federalist 10* essay, in which he warned that in individual states, with their relatively small populations, it was easier for "a majority [to] be found of the same party" and to "concert and execute their plans of oppression."²²⁹ The national government, with a much larger population, would "[e]xtend the sphere, and . . . take in a greater variety of parties and interests."²³⁰ This, Madison predicted, would "make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens."²³¹

Many of the Framers understood that to govern and unite a religiously diverse population would require a different approach than that practiced in the individual states. For example, Oliver Ellsworth, a Connecticut delegate to the Constitutional Convention, wrote an essay under the name "A Landowner" explaining why national religious tests would be impractical:

A test in favor of any one denomination of Christians would be to the last degree absurd in the United States. If it were in favor of either Congregationalists, Presbyterians, Episcopalians, Baptists, or Quakers, it would incapacitate more than three-fourths of the American citizens for any public office; and thus degrade them from the rank of freemen.²³²

Daniel Shute, first minister of the Second Congregational Church of Hingham, Massachusetts, also used the size and diversity of the United States to argue against religious oaths:

In this great and extensive empire, there is and will be a great variety of sentiments in religion among its inhabitants. Upon the plan of a religious test, the question I think must be, who shall be excluded from national trusts? Whatever answer bigotry may

229. THE FEDERALIST NO. 10, at 52 (James Madison) (Ian Shapiro ed., 2009).

230. *Id.*

231. *Id.*

232. Oliver Ellsworth, *A Landholder VII* (Dec. 17, 1787), in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 497, 499 (Merrill Jensen ed., 1978).

suggest, the dictates of candour and equity, I conceive, will be none.²³³

In addition to the demographic realities of "this great and extensive empire," a second major factor in the creation of a new national view of freedom of religion was the personal convictions of the earliest national leaders. While the contributions of Thomas Jefferson and James Madison are well known, it may have been the words and actions of George Washington that did the most to create the American vision of the proper relationship between government and religion.

B. George Washington and the Tax to Support Christian Teachers

Arguably the most critical moment in the development of Washington's insistence on the creation of a national vision of the rights of conscience occurred a few years prior to the drafting of the First Amendment, during the battle in Virginia over Patrick Henry's bill to authorize taxation to support "teachers of the Christian religion."²³⁴ Under Henry's proposal, taxpayers could designate the "society of Christians" to which they wished to have their money allocated.²³⁵ The revenue from those who did not designate a "Christian society" was to be distributed, "under the direction of the General Assembly, for the encouragement of seminaries of learning."²³⁶

The fight to defeat the bill was led by James Madison. He largely orchestrated a ten-month political campaign, from December 1785–

233. *Convention Debates, 31 January, A.M.* (Jan. 31, 1788), in 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1373, 1376, 1379 n.5 (John P. Kaminski & Gaspare J. Saladino eds., 2000) (emphasis omitted).

234. Patrick Henry, *A Bill Establishing a Provision for Teachers of the Christian Religion* (1784), reprinted in *Everson v. Bd. of Educ.*, 330 U.S. 1 supplemental app. at 72 (1947) (title case omitted).

235. *Id.* at 73. In a cramped attempt at religious sensitivity, the bill gave Quakers and Mennonites, who did not use paid religious teachers, more freedom as to how the money should be spent than the other Christian denominations. The bill required other denominations to appropriate the money for the "provision for a Minister or Teacher of the Gospel of their denomination, or the providing place of divine worship, and to none other use whatsoever," while Quakers and Mennonites were permitted to place the money "in their general fund, to be disposed of in a manner which they shall think best calculated to promote their particular mode of worship." *Id.* at 74.

236. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 853 n.1 (Thomas, J., concurring) (quoting Henry, *supra* note 234, at 74).

October 1786, to generate state wide opposition to the proposal.²³⁷ He wrote a petition, his “Memorial and Remonstrance,” to help garner signatures to present to the legislature.²³⁸ This petition declared that “[r]eligion is wholly exempt from [the] . . . cognizance” of “Civil Society” in general and the legislature in particular.²³⁹ Madison also stated, “It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him.”²⁴⁰

Madison had written his petition anonymously, and when George Mason sent a copy to George Washington, Mason did not tell him who had written it but said merely that it had been “confided to me by a particular Friend, whose Name I am not at Liberty to mention.”²⁴¹ Mason urged Washington to sign the petition. Although Washington declined, his letter explaining why reveals a significant aspect of Washington’s thoughts on the relationship between religion and government.

Washington began by saying that he did not object in principle to a tax to support religious teaching, as long as minority religions were provided appropriate exemptions:

Altho’ no mans sentiments are more opposed to any kind of restraint upon religious principles than mine are; yet I must confess, that I am not amongst the number of those who are so much alarmed at the thoughts of making people pay towards the support of that which they profess, if of the denominations of Christians; or declare themselves Jews, Mahomitans or otherwise, & thereby obtain proper relief.²⁴²

Nonetheless, Washington continued, he did not believe the assessment bill was good for Virginia, and he actually hoped that the bill would be defeated: “As the matter now stands, I wish an assessment had

237. See James Madison, Memorial and Remonstrance Against Religious Assessments (June 20, 1785), in 8 THE PAPERS OF JAMES MADISON 295 (Robert A. Rutland & William M.E. Rachal eds., 1973).

238. See *id.* at 298.

239. *Id.* at 299.

240. *Id.*

241. Letter from George Mason to George Washington (Oct. 2, 1785), in 3 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 290, 290 (W.W. Abbot & Dorothy Twohig eds., 1994) [hereinafter 3 PGW: CONFEDERATION SERIES].

242. Letter from George Washington to George Mason (Oct. 3, 1785), in 3 PGW: CONFEDERATION SERIES, *supra* note 241, at 292, 292–93 (emphasis omitted). At the time of Washington’s letter, he had not yet read Madison’s petition, and he told Mason that he intended to read “with attention.” *Id.* at 292 (emphasis omitted).

never been agitated—& as it has gone so far, that the Bill could die an easy death; because I think it will be productive of more quiet to the State, than by enacting it into a Law”²⁴³ In light of the strong opposition of a “respectable minority,” Washington warned, passage of the bill would “rankle, & perhaps convulse the State.”²⁴⁴

Washington’s letter reveals a deep awareness of the dangers of political strife that can be caused by an insensitive intermingling of government and religion.²⁴⁵ As historian Paul Boller noted, “The agitation over the Virginia assessment plan seems to have convinced him, once and for all, of the impracticality of all proposals of this kind for state support of religion.”²⁴⁶ A few years later, as President, Washington would write that “[r]eligious controversies are always productive of more acrimony and irreconcilable hatreds than those which spring from any other cause.”²⁴⁷

While serving as Commander-in-Chief during the Revolutionary War, Washington had occasionally used explicit Christian references in his writing to the troops. In 1776, he urged the soldiers to “attend carefully upon religious exercises” and stated that he hoped that every officer “will endeavour so to live, and act, as becomes a Christian Soldier defending the dearest Rights and Liberties of his country.”²⁴⁸ In 1778, he told his troops that while they were “zealously performing the

243. *Id.* at 293.

244. *Id.*

245. Madison included a similar concern in his *Memorial and Remonstrance*. One of the reasons he listed to oppose the tax was that it would “destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion has produced among its several sects.” Madison, *supra* note 237, at 302. Making an argument very similar to Washington’s, Madison stated that

[t]he very appearance of the Bill has transformed “that Christian forbearance, love and charity,” which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased. What mischiefs may not be dreaded, should this enemy to the public quiet be armed with the force of a law?

Id. at 303 (quoting VA. CONST. of 1776, § 16).

246. PAUL F. BOLLER, JR., *GEORGE WASHINGTON AND RELIGION* 122 (1963).

247. Letter from George Washington to Edward Newenham (June 22, 1792), in 10 *THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES* 493, 493 (Robert F. Haggard & Mark A. Mastromarino eds., 2002).

248. General Orders (July 9, 1776), in 5 *THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES* 245, 246 (W.W. Abbot & Dorothy Twohig eds., 1993) (footnote omitted).

duties of good Citizens and soldiers,” they should also “add the more distinguished Character of Christian.”²⁴⁹

Washington’s most famous Christian reference came at the end of one of his final acts as commander in chief. On June 8, 1783, he wrote a letter, generally referred to as the “Circular Letter,” to the thirteen state governors to convince them of the need for the individual states to cede more power to a central government.²⁵⁰ He ended his thirty-six page letter with a plea that everyone demean themselves “with that Charity, humility and pacific temper of mind, which were the Characteristicks of the Divine Author of our blessed Religion.”²⁵¹

According to historian Paul Boller, this description of the “humility” of “the Divine Author of our blessed Religion” is “unmistakably a reference to Jesus Christ.”²⁵² The final paragraph of Washington’s long missive was deeply pious, a clearly Christian ending to his call to the governors for a stronger national government.

This was, however, the last official utterance in which Washington employed Christian terminology. As President, whenever he used religious discourse in his public communication, he carefully, and without exception, chose inclusive, nonsecular language.

One can see the radical change in Washington’s writing by comparing his Presidential Thanksgiving proclamations with one from the Continental Congress twelve years earlier. Under the Articles of Confederation, Congress truly represented the states. The Confederation Congress, like the Continental Congress that preceded it, largely accepted the consensus view among the states that government should endorse and support the Protestant faith.²⁵³ Between June 12, 1775, and October 11, 1782, Congress appointed a dozen days for either fasting, prayer, or thanksgiving,²⁵⁴ and most were decidedly sectarian. The November 1, 1777, Thanksgiving Day proclamation, drafted by Sam

249. General Orders (May 2, 1778), in 15 THE PAPERS OF GEORGE WASHINGTON: REVOLUTIONARY WAR SERIES 13, 13 (Edward G. Lengel ed., 2006).

250. George Washington, Circular to the States (June 8, 1783), in 26 THE WRITINGS OF GEORGE WASHINGTON: FROM THE ORIGINAL MANUSCRIPT SOURCES 1745–1799, at 483, 485 (John C. Fitzpatrick ed., 1938). See generally 5 DOUGLASS SOUTHALL FREEMAN, GEORGE WASHINGTON: A BIOGRAPHY 446 (1952).

251. Washington, *supra* note 250, at 496.

252. BOLLER, *supra* note 246, at 71.

253. See DEREK H. DAVIS, RELIGION AND THE CONTINENTAL CONGRESS 1774–1789: CONTRIBUTIONS TO ORIGINAL INTENT 84–88 (2000).

254. See *id.* The fast days were usually in the spring, while the days for thanksgiving were in the autumn. *Id.* at 84.

Adams, began by dictating to each individual citizen that it was “the indispensable duty of all men to adore the superintending providence of Almighty God.”²⁵⁵ All of “the good people” of the United States were urged to “join the penitent confession of their manifold sins, whereby they had forfeited every favour, and their humble and earnest supplication that it may please God, through the merits of Jesus Christ, mercifully to forgive and blot them out of remembrance.”²⁵⁶ In addition to military success and good harvests, the citizenry was urged to ask God “to prosper the means of religion for the promotion and enlargement of that kingdom which consisteth ‘in righteousness, peace and joy in the Holy Ghost.’”²⁵⁷

By contrast, when Washington issued his Thanksgiving Day proclamation on October 3, 1789, he carefully chose non-sectarian, religiously inclusive, language.²⁵⁸ Unlike the 1777 proclamation, Washington did not command each individual to pray; rather, he said it was “the duty of all Nations to acknowledge the providence of Almighty God.”²⁵⁹ Instead of following Sam Adams’ example of referring to “Jesus Christ” and “the Holy Ghost,” Washington chose the far more inclusive phraseology such as “Almighty God.”²⁶⁰

Some, like Justice Scalia, assume that Washington’s use of the word “God” refers to “inescapably the God of monotheism.”²⁶¹ A return to the battle over the religious tax in Virginia reveals the error in that assumption.

255. Samuel Adams, Thanksgiving Day Proclamation (Nov. 1, 1777), in 9 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 854, 854–55 (1907).

256. *Id.* at 855.

257. *Id.* (quoting *Romans* 14:17 (King James)).

258. According to one historian, “This first national thanksgiving proclamation under the Constitution had been written by William Jackson, one of Washington’s secretaries, and approved by Washington with only one minor revision.” BOLLER, *supra* note 246, at 62–63.

259. George Washington, Thanksgiving Proclamation (October 3, 1789), in 4 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 131, 131 (Dorothy Twohig ed., 1993) [hereinafter 4 PGW].

260. *Id.* Later in the Proclamation, Washington used a different religious phrase, recommending that people be devoted “to the service of that great and glorious Being, who is the beneficent Author of all the good that was, that is, or that will be.” *Id.* at 131–32.

261. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 894 n.3 (2005) (Scalia, J., dissenting) (emphasis omitted).

C. Defining "God"

After Patrick Henry's proposal to fund Christian teachers died in Committee, Madison realized that the arguments against the religious tax had altered the mood in the legislature. On October 31, 1785, he presented to the legislature a bill Jefferson had drafted six years earlier, the "Bill for Establishing Religious Freedom."²⁶²

A heated battle arose over the section of the preamble to the bill, in which Jefferson had written that, "[whereas] Almighty God hath created the mind free, . . . all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy Author of our religion."²⁶³ According to Jefferson's autobiography, an amendment was proposed to add the phrase "'Jesus Christ,' so that it should read 'a departure from the plan of Jesus Christ, the holy author of our religion.'"²⁶⁴

Even though this amendment would not have altered the substance of the bill, Madison saw it as a threat to the principle of universal freedom of religion. If the legislature had spoken of "Jesus Christ, the holy author of our religion," Madison feared that this would "imply a restriction of the liberty defined in the Bill, to those professing his religion only."²⁶⁵

The amendment was defeated, and Jefferson's reaction is significant in illustrating how he viewed the relationship between religious language and universal freedom. Although his preamble had contained phrases such as "Almighty God," "Holy Author of our religion," and "Lord both of body and mind," he did not interpret those phrases as excluding anyone.²⁶⁶ The omission of explicitly Christian language from the law, he wrote, proved that the legislature, "meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and infidel of every

262. Daniel L. Dreisbach, *Thomas Jefferson and Bills Number 82–86 of the Revision of the Laws of Virginia, 1776–1786: New Light on the Jeffersonian Model of Church-State Relations*, 69 N.C. L. REV. 159, 159–160, 166–68, 183 (1990); see also H.J. ECKENRODE, *SEPARATION OF CHURCH AND STATE IN VIRGINIA: A STUDY IN THE DEVELOPMENT OF THE REVOLUTION* 113 (1910).

263. ECKENRODE, *supra* note 262, at 114–15.

264. THOMAS JEFFERSON, *AUTOBIOGRAPHY*, in 1 *THE WRITINGS OF THOMAS JEFFERSON* 1, 62 (Paul Leicester Ford ed., New York, The Knickerbocker Press 1892).

265. Madison, *Detached Memoranda*, *supra* note 77, at 556.

266. See ECKENRODE, *supra* note 262, at 114–15.

denomination.”²⁶⁷ Thus, language such as “Almighty God” and “holy author of our religion” did not disregard, but encompassed, the belief systems of both the polytheistic Hindu²⁶⁸ and the “unbeliever” infidel.²⁶⁹

The Framers were not unique in seeing that the word “God” could have meaning far beyond monotheism, even when, in the words of Justice Scalia, the word was written “in the singular, and with a capital G.”²⁷⁰ For example, anthropologist and mythologist Joseph Campbell stated that “God is a metaphor for a mystery that absolutely transcends all categories of human thought. . . . It’s as simple as that.”²⁷¹ Philosopher John Dewey described the “active relation between ideal and actual to which [he] would give the name ‘God.’”²⁷² Author Paul Tillich meanwhile introduced the concept of a “God above the God of theism.”²⁷³ It is, indeed, accurate to say that today, as at the time of the framing, “the symbol ‘God’ has many meanings, some of which have nothing to do with a supernatural creator of the universe.”²⁷⁴

The leading Framers took advantage of the multiple meanings of “God” to create language that was deliberately theologically equivocal. They were not denying the obvious religious meaning, but adding to it: “religious terms need not lose their religious content when nonreligious meaning is added.”²⁷⁵ Their goal was to produce language that could be embraced by those with orthodox religious views but still permit all others to feel included.

While this would be the way that Presidents Washington, Jefferson, and Madison addressed the population, there was one work produced by the Continental Congress that also embodied this tactic: The

267. JEFFERSON, *supra* note 264, at 62.

268. While the actual characterization of the Hindu religion as polytheistic is somewhat controversial, that is undoubtedly how the English government saw it. See MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE 311 (2008).

269. According to a leading dictionary of Jefferson’s time, the word “infidel” meant “[a]n unbeliever; a miscreant; a pagan; one who rejects Christianity.” 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 537 (7th ed. abr., London, 1783).

270. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 894 n.3 (2005) (Scalia, J., dissenting).

271. Garry Abrams, *Conversation with Joseph Campbell/On Mythology*, L.A. TIMES, May 27, 1987, at G1 (alteration in original) (quoting THE HERO’S JOURNEY: A BIOGRAPHICAL PORTRAIT (Holoform Research Inc. 1987)).

272. JOHN DEWEY, A COMMON FAITH 51 (1934) (emphasis omitted).

273. “The God above the God of theism is present, although hidden, in every divine-human encounter.” PAUL TILlich, THE COURAGE TO BE 187 (2d ed. 2000).

274. Bruce Ledewitz, *Toward a Meaning-Full Establishment Clause Neutrality*, 87 CHI.-KENT L. REV. 725, 751 (2012).

275. *Id.* at 752.

Declaration of Independence. Despite its unmistakably religious language, the document was carefully designed to be inclusive.

Thomas Jefferson wrote the first draft of the Declaration of Independence and began with a religious reference that largely remained in the final version:

When in the course of human events it becomes necessary for a people to advance from that subordination in which they have hitherto remained, & to assume among the powers of the earth the equal & independent station to *which the laws of nature & of nature's god* entitle them²⁷⁶

The phrase “laws of nature and of nature’s god” is associated with eighteenth century deism, a “rather vague Enlightenment-era belief . . . in a Creator whose divine handiwork was evident in the wonders of nature” but not “a personal God who interceded directly in the daily affairs of mankind.”²⁷⁷

Jefferson’s original draft did not contain the iconic phrase “endowed by their Creator.” Instead, he had written: “We hold these Truths to be self evident; that all Men are created equal and independent; that from *that equal Creation* they derive Rights inherent and inalienable”²⁷⁸ Jefferson’s draft was edited by the so-called Committee of Five, which consisted of Jefferson, John Adams, Benjamin Franklin, Roger Sherman, and Robert Livingston.²⁷⁹ The committee changed the

276. 1 Thomas Jefferson, *Original Rough Draft of the Declaration of Independence*, in 1 THE PAPERS OF THOMAS JEFFERSON 423, 423 (Julian P. Boyd ed., 1950) (emphasis added).

277. WALTER ISAACSON, AMERICAN SKETCHES: GREAT LEADERS, CREATIVE THINKERS, AND HEROES OF A HURRICANE 29 (2009); see also STEVEN WALDMAN, FOUNDING FAITH: PROVIDENCE, POLITICS, AND THE BIRTH OF RELIGIOUS FREEDOM IN AMERICA 88–89 (2008) (“This was the language of the Enlightenment theology that grew up in the eighteenth century as a result not only of philosophical innovations—John Locke, David Hume, and others—but also, more important, of scientific innovations.”). Whether Jefferson himself was a “deist” is a matter of some dispute. Compare William D. Gould, *The Religious Opinions of Thomas Jefferson*, 20 MISS. VALLEY HIST. REV. 191, 199 (1933) (“Jefferson was not a deist. . . . [H]e was a decided Unitarian.”), with 3 DUMAS MALONE, JEFFERSON AND HIS TIME: JEFFERSON AND THE ORDEAL OF LIBERTY 481 (1962) (“Actually, he was a deist, not an atheist.”).

278. Thomas Jefferson, *First Draft of the Declaration of Independence*, reprinted in 5 JOURNALS OF THE CONTINENTAL CONGRESS 491, 492 (1906) (emphasis added). The word “inalienable” in Jefferson’s draft was changed to “unalienable” in the final draft, but it is believed that this was of no great significance. See Stephen E. Lucas, *Justifying America: The Declaration of Independence as a Rhetorical Document*, in AMERICAN RHETORIC: CONTEXT AND CRITICISM 67, 124 n.50 (Thomas W. Benson ed., 1989). Some suspect that it might well have been a printer’s error that was never authorized by Congress. *Id.*

279. Lucas, *supra* note 278, at 71–72.

language on human rights into a form which is much closer to its final version: "We hold these truths to be self-evident; that all men are created equal, that they are endowed by their Creator with certain inherent & inalienable rights" ²⁸⁰

The word "Creator" has been claimed by some partisans to support a particular religious belief: "Clearly, the signers of the Declaration of Independence believed that God must be acknowledged and 'that all men were created equal' and 'endowed by their Creator with certain unalienable Rights' . . ." ²⁸¹ That view ignores the nuance of the Framers' language. In truth, this language "is highly ambiguous in its theological groundings." ²⁸² The word *Creator* simultaneously fit into a wide range of religious beliefs. Deists, who viewed the concept of "God as a first cause," ²⁸³ frequently referred to "God" as "the Creator." ²⁸⁴ Yet the term was also utilized by the orthodox religions of the time: Congregational Minister and Yale president Timothy Dwight delivered a sermon stating that the Bible contained "as full a proof, that Christ is the Creator, [and] . . . that the Creator is God." ²⁸⁵

280. Jefferson, *supra* note 278, at 492 (struck language omitted).

281. Roy S. Moore, *Religion in the Public Square*, 29 CUMB. L. REV. 347, 349 (1999) (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).

282. Daniel J. Morrissey, *The Separation of Church and State: An American-Catholic Perspective*, 47 CATH. U. L. REV. 1, 43 (1997).

283. ERIC FONER, TOM PAINE AND REVOLUTIONARY AMERICA 118 (updated ed. 2005).

284. ALF J. MAPP, JR., THE FAITHS OF OUR FATHERS: WHAT AMERICA'S FOUNDERS REALLY BELIEVED 7 (paperback ed. 2005).

285. TIMOTHY DWIGHT, *Sermon XXXIX: Divinity of Christ. — Objections Answered.*, in 2 THEOLOGY; EXPLAINED AND DEFENDED IN A SERIES OF SERMONS 5, 9 (New York, G. & C. Carvill 5th ed. 1828). In its final edit, the Continental Congress added two further religious references to the Declaration of Independence:

We, therefore, the Representatives of the United States of America, in General Congress, Assembled, *appealing to the Supreme Judge of the world* for the Rectitude of our Intentions, do, . . . Declare, That these United Colonies are, and of Right ought to be Free and Independent States And for the support of this Declaration, with a firm *reliance on the protection of divine Providence*, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776) (emphasis added). The phrases added by Congress—"appealing to the Supreme Judge of the world" and "protection of divine Providence"—are widely interpreted as being more traditionally religious than the earlier two religious references. Historian Pauline Maier describes Congress as adding "two references to God, which were conspicuously missing in Jefferson's draft." PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 148–49 (1997). Nonetheless, even after the congressional editing, the religious language in the final version of the Declaration of Independence remains inclusive. According to historian Steven Waldman,

As President, Washington followed the practice embodied in the Declaration of Independence of offering public expressions of religion that were devout but capable of being accepted by a wide, if not endless, variety of belief systems. His Inaugural Address, for example, like his subsequent Thanksgiving Address, was replete with explicitly religious but carefully inclusive language.

Although Washington avoided using the word “God,” the Address began with a direct religious “supplication”: “[I]t would be peculiarly improper to omit in this first official Act, my fervent supplications to that Almighty Being who rules over the Universe, who presides in the Councils of Nations, and whose providential aids can supply every human defect.”²⁸⁶ After this pious opening, he reminded his audience of the role that he believed that divine intervention had played in their victory over the British:

No People can be bound to acknowledge and adore the invisible hand, which conducts the Affairs of men more than the People of the United States. Every step, by which they have advanced to the character of an independent nation, seems to have been distinguished by some token of providential agency.²⁸⁷

At the close of the Address, Washington returned to his religious theme:

I shall take my present leave; but not without resorting once more to the benign Parent of the human race, in humble supplication that . . . this divine blessing may be equally conspicuous in the enlarged views—the temperate consultations, and the wise measures on which the success of this Government must depend.²⁸⁸

To appreciate the care with which the Inaugural Address was crafted, one can compare the final product with the first draft that had

“the term *Divine Providence* was one the Deists could accept, because it left the door open for God to work either directly and personally or through the laws of nature.” WALDMAN, *supra* note 277, at 89. The phrases are not specifically Protestant or Christian; perhaps, as one commentator has asserted, they “unambiguously derive from Judaism.” MICHAEL NOVAK, *ON TWO WINGS: HUMBLE FAITH AND COMMON SENSE AT THE AMERICAN FOUNDING* 17 (2002).

286. George Washington, First Inaugural Address (April 30, 1789), in 2 *THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES* 152, 173–74 (Dorothy Twohig ed., 1987).

287. *Id.*

288. *Id.* at 176–77 (emphasis omitted).

been prepared by Washington's secretary David Humphreys.²⁸⁹ Humphreys had wanted Washington to use explicitly Christian language referencing "[t]he blessed Religion revealed in the word of God."²⁹⁰

Although the final Address contains much religious imagery, it includes nothing that is uniquely Christian. Additionally, Humphreys's draft of Washington's remarks "included a short space for a prayer that was to be introduced after the first paragraph."²⁹¹ On the day of the inauguration, prayers were indeed given, but they were not led by the President. Instead, they were conducted by Senate chaplain Samuel Provoost during "divine services," held at Saint Paul's Church, after the Inaugural Address.²⁹²

Washington's Farewell Address was written with the same sort of inclusive religious language as the Inaugural Address. The final version of the Farewell Address was primarily drafted by Alexander Hamilton, with Washington providing some crucial editorial changes.²⁹³ A

289. Washington asked James Madison to review Humphreys's seventy-three page draft. Letter from George Washington to James Madison (Feb. 16, 1789), in 11 THE PAPERS OF JAMES MADISON 446, 446 (Robert A. Rutland & Charles F. Hobson eds., 1977). Madison expressed his disdain for the work, which he later described as "so strange a production," *Correspondence with James Madison*, in 2 THE LIFE & WRITINGS OF JARED SPARKS 208, 212–13 (Herbert B. Adams ed., Boston, Houghton, Mifflin & Co. 1893), and proceeded to draft a completely new speech, Washington, *supra* note 286, at 153–54.

290. Washington, *supra* note 286, at 166. Jared Sparks, the original editor of *The Writings of George Washington*, had destroyed the version of Humphreys's draft that Washington had hand copied. Sparks cut the seventy-three pages into small pieces and gave them to people who wanted something with Washington's handwriting. *See id.* at 152–53. The twentieth century editors of *The Papers of George Washington* were able to reassemble small portions of the original, one of which read: "The blessed Religion revealed in the word of God will remain an eternal and awful monument to prove that the best Institutions may be abused by human depravity; and that they may even, in some instances be made subservient to the vilest of purposes." *Id.* at 166.

291. *Correspondence with James Madison*, *supra* note 289, at 211.

292. Washington, *supra* note 286, at 154–55.

293. When Washington had considered stepping down in 1792, at the close of his first term, he asked Madison to write a draft of a "valedictory." FELIX GILBERT, TO THE FAREWELL ADDRESS: IDEAS OF EARLY AMERICAN FOREIGN POLICY 124–25 (1961). Four years later, having become alienated from both Madison and Jefferson due to bitter political differences over issues such as the National Bank and Jay's Treaty, Washington asked Hamilton for help revising Madison's draft. On May 15, 1796, Washington sent Hamilton a copy of Madison's draft, as well as a note describing some of the points he wanted to add. Letter from George Washington to Alexander Hamilton (May 15, 1796), in 20 PAPERS OF ALEXANDER HAMILTON 174, 175 (Harold C. Syrett ed., 1974) [hereinafter 20 PAH]. Hamilton rewrote the Address and, on July 30, sent his new draft to Washington. Letter from Alexander Hamilton to George Washington (July 30, 1796), in 20 PAH, *supra* at 264, 264–65. Hamilton kept much of Madison's introductory language and conclusion but added an

comparison between Hamilton's language and that finally used by Washington demonstrates Washington's insistence on using inclusive public religious language. With minimal stylistic modifications from Hamilton's version, Washington wrote, "[L]et us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle."²⁹⁴

In Hamilton's draft, however, the statement foreshadowing the end of "national morality" without religion, was followed by a rhetorical question: "Does it not require the aid of a generally received and divinely authoritative Religion?"²⁹⁵ Washington deleted this entirely, thereby removing Hamilton's attempt to add the explicitly Christian allusion to "received . . . religion."²⁹⁶

Throughout his presidency, Washington was determined that religious differences would not disrupt the new nation. As writers Michael and Jana Novak noted, his goal was to find a way of communicating that "unites—rather than divides—a religiously pluralistic people."²⁹⁷

D. The Religious Language of Jefferson and Madison

Despite the widespread view that Thomas Jefferson called for a "total separation" between religion and government,²⁹⁸ throughout his presidency he consciously employed religious language in a comparable manner to Washington. He ended his first inaugural address, on March 4, 1801, with a non-denominational religious plea similar in tone to that spoken by Washington: "[M]ay that Infinite Power which rules the

extensive middle section discussing many of the contemporary political issues, such as the desirability of maintaining neutrality during the conflict between England and France. *See id.* at 265–88.

294. WASHINGTON'S FAREWELL ADDRESS TO THE PEOPLE OF THE UNITED STATES, S. DOC. NO. 106-21, at 20 (2000).

295. Letter from Alexander Hamilton to George Washington, *supra* note 293, at 280.

296. *Id.* at 280 & n.22.

297. MICHAEL NOVAK & JANA NOVAK, WASHINGTON'S GOD: RELIGION, LIBERTY, AND THE FATHER OF OUR COUNTRY 14 (2006).

298. Robert L. Cord & Howard Ball, *The Separation of Church and State: A Debate*, 1987 UTAH L. REV. 895, 913 (quoting FAWN M. BRODIE, THOMAS JEFFERSON: AN INTIMATE HISTORY 129 (1974)).

destinies of the universe, lead our councils to what is best, and give them a favorable issue for your peace and prosperity."²⁹⁹

Throughout his presidency, Jefferson would utilize similar religious language in his speeches. In his second message to Congress, Jefferson declared that "our just attentions are first drawn to those pleasing circumstances which mark the goodness of that Being from whose favor they flow, and the large measure of thankfulness we owe for his bounty."³⁰⁰ In his 1805 message to Congress, he noted there had been an outbreak of yellow fever but that "Providence in his goodness gave it an early termination on this occasion, and lessened the number of victims which have usually fallen before it."³⁰¹

The major difference between the public religious language of Washington and Jefferson was that Jefferson refused to issue a Thanksgiving proclamation. While Jefferson would employ non-sectarian religious language himself, he opposed government officials even recommending that citizens engage in religious activity. Such a recommendation by a president, he believed, carried an implicit threat. At minimum, he said, it would lead to "some degree of proscription, perhaps in public opinion."³⁰² Because "[f]asting & prayer are religious exercises" and "[e]very religious society has a right to determine for itself the times for these exercises, and the objects proper for them," the right to call for days of thanksgiving, fasting, and prayer "can never be safer than in their own hands, where the constitution has deposited it."³⁰³

When James Madison became President, he too utilized inclusive, non-sectarian religious language. For example, he concluded his First Inaugural Address in 1809 with a devout entreaty to

the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations, whose blessings have

299. Thomas Jefferson, Inaugural Address (Mar. 4, 1801), in 8 THE WRITINGS OF THOMAS JEFFERSON 1, 5 (H.A. Washington ed., New York, Riker, Thorne & Co. 1854) [hereinafter 8 WTJ].

300. Thomas Jefferson, Second Annual Message (Dec. 15, 1802), in 8 WTJ, *supra* note 299, at 15, 15.

301. Thomas Jefferson, Fifth Annual Message (Dec. 3, 1805), in 8 WTJ, *supra* note 299, at 46, 46.

302. Letter from Thomas Jefferson to Rev. Mr. Millar (Jan. 23, 1808), in 4 MEMOIRS, CORRESPONDENCE AND PRIVATE PAPERS OF THOMAS JEFFERSON 106, 106 (Thomas Jefferson Randolph ed., London, Henry Colburn & Richard Bentley 1829).

303. *Id.* at 106–07.

been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future.³⁰⁴

Earlier in the Address, Madison had announced as one of his guiding principles his commitment “to avoid the slightest interference with the rights of conscience, or the functions of religion so wisely exempted from civil jurisdiction.”³⁰⁵ Like Jefferson, Madison did not see the use of religious language in official speeches as violating the principle of separation of Church and State. To both Jefferson and Madison, fidelity to that principle did not require the purging of all religious language from public dialogue.

Unlike Jefferson, Madison issued several recommendations that the public engage in days of thanksgivings and fasts, though later in life Madison expressed his strong objections to such presidential recommendations. As President, Madison felt compelled to issue his proclamations by the necessity of building public support for the War of 1812. This was an unpopular war; the vote for the official declaration of war, 79–49 in the House of Representatives and 19–13 “in the Senate — was the closest vote on any declaration of war in American history.”³⁰⁶ Less than a month after the war began, Madison, “in response to a specific request by both houses of Congress, . . . issued the first of his four religious proclamations.”³⁰⁷ His July 9 proclamation was a call for “a day of public Humiliation and Prayer.”³⁰⁸ Among the activities Madison recommended were “rendering to the Sovereign of the Universe, and the Benefactor of mankind, the public homage due to his holy attributes” and “acknowledging the transgressions which might justly provoke the manifestations of His divine displeasure.”³⁰⁹

304. James Madison, First Inaugural Address (Mar. 4, 1809) [hereinafter Madison, First Inaugural], in 1 THE PAPERS OF JAMES MADISON: PRESIDENTIAL SERIES 15, 17–18 (Robert A. Rutland & Thomas A. Mason eds., 1984). Interestingly, he did not use any religious imagery in his Second Inaugural. See James Madison, Second Inaugural Address (Mar. 4, 1813), in 6 THE PAPERS OF JAMES MADISON: PRESIDENTIAL SERIES 85 (Angela Kreider ed., 2008) [hereinafter 6 PJM].

305. Madison, First Inaugural, *supra* note 304, at 17.

306. DONALD R. HICKEY, THE WAR OF 1812: A SHORT HISTORY 16 (1995).

307. MEYERSON, *supra* note 59, at 222.

308. James Madison, Presidential Proclamation (July 9, 1812), in 4 THE PAPERS OF JAMES MADISON: PRESIDENTIAL SERIES 581, 581 (J.C.A. Stagg ed., 1999).

309. *Id.* at 581.

After he left office, Madison explained to a friend that when he issued a religious proclamation he was "always careful to make the Proclamations absolutely indiscriminate, and merely recommendatory; or rather mere designations of a day, on which all who thought proper might unite in consecrating it to religious purposes, according to their own faith & forms."³¹⁰ Accordingly, in his first proclamation, Madison stated his hope that his "recommendation" would "enable the several religious denominations and societies *so disposed*, to offer, at one and the same time, their common vows and adorations to Almighty God."³¹¹

Madison was more explicit in his second proclamation one year later. He began by "recommending to all, who shall be piously disposed to unite . . . in addressing, at one and the same time, their vows and adorations, to the great Parent and Sovereign of the Universe," who, Madison said, had blessed the United States with the "sacred rights of conscience."³¹² Even with such a commitment to "freewill offerings," Madison never accepted that such proclamations, including his own, were appropriate. In his so-called "Detached Memoranda," a collection of private papers written sometime after he left office in 1817,³¹³ Madison explained his opposition to religious proclamations, which, he said, "imply a religious agency, making no part of the trust delegated to political rulers."³¹⁴ According to Madison, calling these proclamations "advisory" did not ameliorate the problem since "[a]n advisory Govt is a contradiction in terms."³¹⁵ Madison warned that

310. Letter from James Madison to Edward Livingston (July 10, 1822), *supra* note 76, at 101 (emphasis omitted).

311. Madison, *supra* note 308, at 581 (emphasis added).

312. James Madison, A Proclamation (July 23, 1813), *in* 6 PJM, *supra* note 304, at 458, 458–59. His last two religious proclamations had similar, though less eloquent, disclaimers. His 1814 proclamation recommended that a day be set aside "on which all may have an opportunity of voluntarily offering at the same time in their respective religious assemblies their humble adoration to the Great Sovereign of the Universe." James Madison, Presidential Proclamation (Nov. 16, 1814), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 543, 543 (James D. Richardson ed., 1897). His final proclamation recommended that the people "of every religious denomination may in their solemn assemblies unite their hearts and their voices in a freewill offering to their Heavenly Benefactor of their homage of thanksgiving and of their songs of praise." James Madison, A Proclamation (Mar. 4, 1815), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra*, at 545, 546.

313. Madison, Detached Memoranda, *supra* note 77.

314. *Id.* at 560.

315. *Id.* (emphasis omitted).

these proclamations “nourish the erron[e]ous idea of a national religion.”³¹⁶

E. The Failed Sectarian President

Of the four presidents from the founding generation, only John Adams used sectarian religious language in his public addresses. In his inaugural address, Adams described himself as having “a veneration for the religion of a people who profess and call themselves Christians, and a fixed resolution to consider a decent respect for Christianity among the best recommendations for the public service.”³¹⁷ Thus, not only did Adams announce his own personal “veneration” for Christianity, he pledged to use a religious litmus test for governmental hiring in violation of the spirit, if not the letter, of the constitutional ban on religious tests.³¹⁸

When Adams issued his two proclamations calling for days of “humiliation, fasting, and prayer,” he also employed sectarian, non-inclusive language, drafted by the chaplains of Congress, the Reverends Bishop White and Ashbel Green.³¹⁹ The first of these proclamations, issued March 23, 1798, was substantially “more overtly Christian than Washington’s.”³²⁰ Unlike Washington, who stated that it was “the duty of all Nations” to acknowledge God,³²¹ Adams decreed that acknowledging God was each individual’s duty, declaring that it was “an indispensable duty, which the people owe to him.”³²² Also differing from Washington, Adams employed explicitly Christian language in his recommendation that all citizens “offer their devout addresses to the Father of Mercies . . . , beseeching him at the same time, of his infinite

316. Madison spelled the word “erronious.” *Id.* (emphasis omitted).

317. John Adams, Inaugural Address (Mar. 4, 1797), in 1 THE ADDRESSES AND MESSAGES OF THE PRESIDENTS OF THE UNITED STATES: INAUGURAL, ANNUAL, AND SPECIAL, FROM 1789–1846, at 103, 106 (Edwin Williams ed., New York, Edward Walker 1846).

318. U.S. CONST. art. VI, § 3 (stating that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States”).

319. ASHBEL GREEN, THE LIFE OF ASHBEL GREEN, V.D.M. 270–71 (Joseph H. Hones ed., New York, Robert Carter & Bros. 1849).

320. 2 JAMES HITCHCOCK, THE SUPREME COURT AND RELIGION IN AMERICAN LIFE 30 (2004).

321. Washington, *supra* note 259, at 131.

322. John Adams, Official Proclamation for a National Fast (Mar. 23, 1798), in 9 THE WORKS OF JOHN ADAMS 169, 169 (Charles Francis Adams ed., Boston, Little Brown & Co. 1854).

grace, through the Redeemer of the world, freely to remit all our offences, and to incline us, by his Holy Spirit."³²³

According to Ashbel Green, even this language was not enough to prevent the complaint that "the religious community of our country had made, namely, that the proclamation . . . lacked a decidedly Christian spirit."³²⁴ Accordingly, Green said, when Adams requested a second proclamation a year later, "I resolved to write one of an evangelical character."³²⁵ The 1799 proclamation begins with a reference to the lessons of the "Volume of Inspiration" and calls for the citizens of the nation to

call to mind our numerous offenses against the Most High God, confess them before Him with the sincerest penitence, implore His pardoning mercy, through the Great Mediator and Redeemer, for our past transgressions, and that through the grace of His Holy Spirit we may be disposed and enabled to yield a more suitable obedience to His righteous requisitions in time to come.³²⁶

This time, the "religious community" was enthusiastic in praise. John Mitchell Mason, a Presbyterian minister, applauded Adams for displaying support, "in one of his proclamations, to a number of the most precious truths of Revelation."³²⁷ Adams's political opponents, however, saw these overt religious declarations as fundamentally illegitimate; many religious groups viewed them as "Federalist plots to ensnare Republicans into praying for John Adams."³²⁸

After losing his bid for re-election to Jefferson, Adams blamed his loss on his religious proclamations: "The National Fast, recommended by me turned me out of office."³²⁹ According to Adams, the fear that he

323. *Id.* at 169–70.

324. GREEN, *supra* note 319, at 270.

325. *Id.*

326. John Adams, Proclamation (Mar. 6, 1799), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 284, 284–85 (James D. Richardson ed., Washington, Gov't Printing Office 1896).

327. JOHN MITCHELL MASON, THE VOICE OF WARNING TO CHRISTIANS (New York, n.p. 1800), reprinted in POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA, 1730–1805, at 1447, 1469 (Ellis Sandoz ed., 1991).

328. Perry Miller, *From the Covenant to the Revival*, in 1 RELIGION IN AMERICAN LIFE: THE SHAPING OF AMERICAN RELIGION 322, 357 (James Ward Smith & A. Leland Jamison eds., 1961).

329. Letter from John Adams to Benjamin Rush (June 12, 1812), in OLD FAMILY LETTERS 391, 392 (Alexander Biddle ed., Philadelphia, J.B. Lippincott Co. 1892).

was supporting the Presbyterian Church as it “aimed at an Establishment as a National Church” both “alarmed and alienated Quakers, Anabaptists, Mennonists, Moravians, Swedenborgians, Methodists, Catholics, protestant Episcopalians, Arians, Socinians, Armenians, &c, &c, &c, Atheists and Deists might be added.”³³⁰ The strong desire to avoid a sectarian President, Adams said, “is at the bottom of the unpopularity of national Fasts and Thanksgiving.”³³¹ The lesson that Adams drew was clear: “Nothing is more dreaded than the National Government meddling with Religion.”³³²

V. LEARNING FROM THE FRAMERS

A. *Speaking to All Americans*

The framing generation did not construct a philosophy of the proper relationship between religion and government in a simplistic way. The intellectual compromise of the framing generation reflects a sophisticated balance. They believed that genuine, devout governmental religious speech was to be permitted. But unlike the unrestricted religious speech of the citizenry, the religious speech of the government was to be strictly limited. The critically important aspect of the framing generation’s compromise was that only the most general, non-sectarian reference to God was deemed appropriate.

The Framers understood from history that religious oppression does not come from a simple belief in God; it arises when a sectarian view of God finds its voice and power in an institution or group that deems itself the sole interpreter of divine will. Accordingly, the Framers decided that the American government should not acknowledge religion in a way that favored any particular creed, denomination, or group of denominations. They were not afraid of a public offering containing truly religious expression. Yet they strove to find a civil vocabulary that could encompass all people, regardless of their faith.

This understanding of the Framers’ view of religious freedom reveals the flaws in Justice Scalia’s defense of the posting of copies of the Ten Commandments inside Kentucky courthouses. According to Justice

330. *Id.*

331. *Id.* at 393. According to Adams, all of the different groups he named believed, “Let us have Jefferson, Madison, Burr, any body, whether they be Philosophers, Deists, or even Atheists, rather than a Presbyterian President.” *Id.* at 392–93.

332. *Id.* at 393.

Scalia, “Publicly honoring the Ten Commandments is . . . indistinguishable, insofar as discriminating against other religions is concerned, from publicly honoring God.”³³³ Justice Scalia based his conclusion on the fact that “[t]he three most popular religions in the United States, Christianity, Judaism, and Islam—which combined account for 97.7% of all believers—are monotheistic. All of them, moreover (Islam included), believe that the Ten Commandments were given by God to Moses, and are divine prescriptions for a virtuous life.”³³⁴

Justice Scalia concluded that since honoring both the Ten Commandments and God “are recognized across such a broad and diverse range of the population—from Christians to Muslims—that they cannot be reasonably understood as a government endorsement of a particular religious viewpoint.”³³⁵

There are numerous problems with this analysis, starting from his apparent assumption that “97.7% of all believers . . . believe that the Ten Commandments were given by God to Moses, and are divine prescriptions for a virtuous life.”³³⁶ First, Justice Scalia’s equating of the number of Christians, Jews, and Muslims with the number of people who believe in the divinity of the Ten Commandments presumes the untenable conclusion that every person who is a member of a religion believes in all of its tenets.³³⁷ Second, using as his statistical base the number of “all believers,” rather than “all citizens,” deliberately ignores the sensibilities and interests of a sizable portion of the population.³³⁸

Most important, perhaps, is that Justice Scalia’s arithmetic analysis was rejected by the Framers, in particular George Washington. During Washington’s presidency, the percentage of Protestants in the country

333. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 894 (Scalia, J., dissenting).

334. *Id.* (citation omitted) (citing U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004–2005, at 55 tbl.67 (2004)).

335. *Id.*

336. *Id.*; see MEYERSON, *supra* note 59, at 270.

337. For example, 45% of U.S. Catholics supported legalized abortion in a 2009 survey. See *Support for Abortion Slips: Issue Ranks Lower on the Agenda*, PEW RESEARCH CTR. (Oct. 1, 2009), <http://people-press.org/report/549/support-for-abortion-slips>, archived at <http://perma.cc/EM48-XV85>.

338. It also ignores “Hindus and Buddhists, rapidly growing segments of American society, [who] are very upset about some displays that denigrate them.” NUSSBAUM, *supra* note 268, at 269. Nussbaum also points out that “[e]ven Muslims, Jews, and Roman Catholics, moreover, would not approve of the Protestant version of the commandments, which is the one in question here.” *Id.* (emphasis added).

was as high, if not higher, than the 97.7% figure for Christians, Jews, and Muslims relied on by Justice Scalia. According to one estimate, as of 1776, Protestants made up 98.1% of all congregations in the nation, with Catholics at 1.7% and Jews at .2%.³³⁹ If Washington had followed Justice Scalia's logic, he would have utilized strictly Protestant language in his proclamations; to be safe he could have used Christian terminology to be in keeping with the beliefs of 99.8% of the populations. Of course, Washington did not. He deliberately chose non-denominational language.³⁴⁰ His goal was that the "National Government, which by the favor of Divine Providence, was formed by the common Counsels, and peaceably established with the common consent of the People, *will prove a blessing to every denomination of them.*"³⁴¹

Unlike Justice Scalia, Washington was not content to use denominational speech merely because it was "recognized across . . . a broad and diverse range of the population."³⁴² Washington's vision for the nation was far more inclusive: "The bosom of America is open to receive," he wrote, "the oppressed and persecuted of all nations and religions; whom we shall welcome to a participation of all our rights and privileges, if by decency and propriety of conduct, they appear to merit the enjoyment."³⁴³

B. *Establishing the Framers' Compromise*

The Framers, however, did not believe that this universal welcome required the avoidance of all public religious language. Their use of theologically equivocal language was a deliberate attempt to create a pious public vocabulary that could be shared, albeit in different ways, by those possessing the full range of religious beliefs. Those from orthodox religions could see this public language not simply as consistent with their own language of worship but actually as part of it. The Framers'

339. Rodney Stark & Roger Finke, *American Religion in 1776: A Statistical Portrait*, 49 SOC. ANALYSIS 39, 49 tbl.5 (1988).

340. NOVAK & NOVAK, *supra* note 297, at 14; *see* notes 286–96 and accompanying text.

341. Letter from George Washington to the Soc'y of Quakers (Oct. 1789), in 4 PGW, *supra* note 259, at 265, 265–66 (emphasis added).

342. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 894 (Scalia, J., dissenting).

343. Letter from George Washington to the Members of the Volunteer Ass'n, and Other Inhabitants of the Kingdom of Ir., Who Have Lately Arrived in the City of N.Y. (Dec. 2, 1783), *quoted in* JOHN B. DILLON, NOTES ON HISTORICAL EVIDENCE IN REFERENCE TO ADVERSE THEORIES OF THE ORIGIN AND NATURE OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA 74 (New York, S.W. Green 1871) (internal quotation marks omitted).

religious language, though, was capacious enough to permit those outside the mainstream of the nation's predominant religious belief systems to join in the experience of a conscientious communion with the rest of their nation. This language was designed to communicate to all, including the deistic, agnostic, and atheistic, that they were each valued members of the political community.

To take the lessons from the Framers' practices and create a modern test for evaluating the constitutionality of governmental religious speech requires a subtle but significant modification of the endorsement test. That test is premised on the principle that "[e]ndorsement 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."³⁴⁴

The framing generation shared the concern that all citizens, regardless of their religious beliefs, must be treated and valued as "full members of the political community."³⁴⁵ But the Framers would not have agreed that every endorsement of religion communicated second-class citizenship to non-adherents. Carefully chosen, theologically equivocal phraseology can be seen as respecting all members of our pluralistic nation because the words are designed to be capable of multiple meanings.³⁴⁶ The inclusive, non-denominational religious language of Washington's Thanksgiving Proclamation, Jefferson's Statute for Religious Freedom, and Madison's Inaugural Address was not considered divisive or insulting. A workable test reflecting the Framers' wisdom, then, would only view as unconstitutional governmental speech or practices that endorsed religion *in such a way* that it "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."³⁴⁷

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

345. *Id.*; MEYERSON, *supra* note 59, at 272.

346. *See, e.g., Ledewitz, supra* note 274, at 753 ("[L]ike the Sunday closing laws, religious imagery can retain its religious meaning for the believer and still be constitutional, as long as it also contains a secular component. In other words, if the government can plausibly maintain a secular meaning for a word like God, there should not be a violation of neutrality because religious believers understand the word God differently, just as the religious desire for Sunday closing laws did not remove a parallel secular justification.").

347. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). Mike Schaps, in trying to make sense out of the disparate opinions in the two Ten Commandment cases, created a summary similar to my proposed standard: "One may sketch the standard as follows: Government

While determining which endorsements of religion communicate such inappropriate messages will not always be simple, the path created by the Framers can provide some important guidelines. Sectarian governmental language, such as Kentucky's posting of the Ten Commandments in the courthouse, would generally violate that standard. Many common forms of governmental religious speech, those that rely on general, non-sectarian references to God, would pass this test.

The phrase "one Nation under God" in the Pledge of Allegiance and the national motto, "In God We Trust," for example, would be entirely permissible. Properly viewed, those phrases are not "a profession of a religious belief, namely, a belief in monotheism."³⁴⁸ Rather, they are perfectly consistent with the inclusive, non-sectarian language of the Framers. They are functionally the same as Thomas Jefferson's Statute for Religious Freedom that began with the phrase "Whereas Almighty God hath created the mind free."³⁴⁹

The invocation that precedes sessions of the Supreme Court, "God save the United States and this Honorable Court," also is not problematic. It should not be considered "the government's endorsement of a transcendent, monotheistic, Judeo-Christian God."³⁵⁰ Instead, it would be treated as consistent with the non-sectarian language of Washington, Jefferson, and Madison. By contrast, it would be unconstitutional for a court to begin its sessions, as one did in North Carolina, with the judge saying,

Let us pause for a moment of prayer O Lord, our God, our Father in Heaven, we pray this morning that you will place your divine guiding hand on this courtroom Let truth be heard

cannot favor one religion over another, or act to benefit religion over nonreligion, unless a government practice promotes nonsectarian religion only slightly and is so deeply woven into our national traditions that enjoining it would be highly divisive." Mike Schaps, Comment, *Vagueness as a Virtue: Why the Supreme Court Decided the Ten Commandments Cases Inexactly Right*, 94 CALIF. L. REV. 1243, 1244 (2006) (emphasis omitted).

348. *Newdow v. U.S. Cong.*, 328 F.3d 466, 487 (9th Cir. 2003), *rev'd sub nom.* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 5 (2004).

349. An Act for Establishing Religious Freedom, ch. 34 (1786), in 12 THE STATUTES AT LARGE BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 84 (William Waller Hening ed., Richmond, George Cochran 1823) (capitalization omitted). See also George Washington's Thanksgiving Day Proclamation, asserting the nation's duty "to acknowledge the providence of Almighty God." Washington, *supra* note 259, at 131.

350. Epstein, *supra* note 19, at 2144.

and wisdom be reflected in the light of your presence with us here today. Amen.³⁵¹

The relevant difference between the two judicial statements can be seen in George Washington's refusal to follow the Continental Congress's practice of declaring it the "the indispensable duty of all men to adore the superintending providence of Almighty God."³⁵² Rather than directing the citizenry to pray, Washington stated it was "the duty of all Nations to acknowledge the providence of Almighty God."³⁵³ In the same spirit, Madison declared, "It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him."³⁵⁴ The Establishment Clause should reject any "exhortation from government to the people that they engage in religious conduct."³⁵⁵

Similarly, the practice of legislative prayer that was upheld by the Supreme Court in *Marsh* should be limited to situations where the prayer is "directed at the legislators themselves."³⁵⁶ By contrast, it should be unconstitutional for a city council, attended by citizens with business before the council, to open with a prayer that "urge[s] citizens to engage in religious practices."³⁵⁷

The Framers will not always be a sufficient guide for applying the proposed standard. We know that the Framers studiously avoided sectarian governmental speech, but we cannot know precisely what they would have done with sectarian governmental displays that had been in place for a substantial time. Nonetheless, such sectarian displays that post-date the founding period but are of long-standing lineage, such as the forty-year-old Ten Commandments display that was upheld in *Van*

351. *N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1147 (4th Cir. 1991).

352. *Adams*, *supra* note 255, at 854.

353. *Washington*, *supra* note 259, at 131.

354. *Madison*, *supra* note 237, at 299.

355. *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 603 n.52 (1989), *abrogated by* *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

356. *N.C. Civil Liberties Union*, 947 F.2d at 1149.

357. *Cnty. of Allegheny*, 492 U.S. at 603 n.52. The Court in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), held that prayer before a city council did not violate the Establishment Clause. 134 S. Ct. at 1813. Justice Alito, in his concurrence, pointed out that the prayer at issue in the case occurred prior to "the 'legislative' portion of its agenda, during which residents were permitted to address the board. After this portion of the meeting, a separate stage of the meetings was devoted to such matters as formal requests for variances." *Id.* at 1829 (Alito, J., concurring). Accordingly, he stated, "I do not understand this case to involve the constitutionality of a prayer prior to what may be characterized as an adjudicatory proceeding." *Id.*

Orden or the treatment of Christmas as a national holiday,³⁵⁸ should not be considered violative of the Establishment Clause. Despite their secular nature, the longevity of such sectarian displays will blunt the hostile message to non-adherents that the displays would have conveyed when originally created.³⁵⁹

VI. CONCLUSION

When the Establishment Clause was included in the First Amendment, it was seen as ensuring, in the words of James Madison, “the practical distinction between Religion & Civil Gov[ernmen]t” which was “essential to the purity of both.”³⁶⁰ Those who fought for the Establishment Clause considered the prevention of religious establishments to be an essential part of religious freedom. The Reverend William Tennent, a South Carolina Presbyterian minister, who fought to disestablish the state’s Anglican Church, argued that the simple designation of a denomination as the “established church . . . operates as an abridgment of religious liberty.”³⁶¹ Even if they are free to practice their own faith, Tennent argued, non-adherents “must at least submit to this inferiority, or rather bear the reproach of the law as not being on a level with those that are Christians in its esteem.”³⁶²

358. 5 U.S.C. § 6103 (2012). Christmas was first declared a national holiday in 1870. Act of June 28, 1870, ch. 167, 16 Stat. 168.

359. See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 701 (2005) (Breyer, J., concurring in the judgment) (stating that “the monument’s 40-year history on the Texas state grounds indicates” that the state intended “the latter, nonreligious aspects of the tablets’ message to predominate”); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 38 (2004) (O’Connor, J., concurring in the judgment) (“[T]he ‘history and ubiquity’ of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion.” (quoting *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 630 (1989) (O’Connor, J., concurring in the judgment))).

360. Letter from James Madison to Jesse Jones and Others (June 3, 1811), in 3 *THE PAPERS OF JAMES MADISON: PRESIDENTIAL SERIES* 323, 323 (J.C.A. Stagg ed., 1996). This letter was written by Madison, explaining his veto of a law that would have transferred federal land to the Baptist Church, in violation of Madison’s understanding of the Establishment Clause. See 22 *ANNALS OF CONG.* 1097–98 (1811).

361. William Tennent, Speech on the Dissenting Petition (Jan. 11, 1777), reprinted in Newton B. Jones, *Writings of the Reverend William Tennent, 1740–1777* (pt. 2), 61 *S.C. HIST. MAG.* 189, 196, 202 (1960).

362. *Id.* at 202. Tennent was not prepared, however, to show the same solicitude to Catholics and other non-Protestants. He approved of the eventual state establishment of “[t]he Christian Protestant religion” because “not one sect of Christians in preference to all others, but Christianity itself is the established religion of the state.” S.C. CONST. of 1778, art. 38, in *THE STATUTES AT LARGE OF SOUTH CAROLINA* 137, 144 (Thomas Cooper ed., Columbia, A.S. Johnston 1836); Tennent, *supra* note 361, at 203.

Accordingly, the Framers decided that the American government should not acknowledge religion in a way that favored any particular creed, denomination, or group of denominations. But they did not believe that all religious governmental speech was inconsistent with that goal. Some commentators have dismissed the use of public religious language by Jefferson and Madison as instances where they simply "diverged from principle" or where, as Justice David Souter succinctly stated, "Homer nodded."³⁶³ In reality, they, like George Washington, consciously refused to eliminate religious expression from their public speeches.

All three realized that they needed to find terminology that permitted them to express reverential concepts without implying that those not of a favored faith were second-class citizens. They strove to avoid any action that, in the words of Madison's *Memorial and Remonstrance*, "degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority."³⁶⁴

Thus, they did use genuine, devout governmental religious speech, but only with the most general, non-sectarian references to God. Their use of theologically equivocal language permitted them to communicate with a diverse nation, encompassing all people, regardless of their faith.

Some contemporary atheists and other nonbelievers might object to any governmental religious language, especially in light of the exclusionary use of so much modern public religious speech. The Framers, however, did not consider people with such beliefs to be second-class citizens. Not only was their individual liberty of conscience to be safeguarded, the federal Constitution's prohibition of religious test oaths guaranteed that they were to be considered full members of the American body politic. Moreover, the restricted nature of the Government's religious vocabulary was broad enough, in Jefferson's words, "to comprehend . . . the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and infidel of every denomination."³⁶⁵

Some people have questioned whether the practices and attitudes from the framing generation are truly "suited for the more religiously

363. *Lee v. Weisman*, 505 U.S. 577, 624 n.5 (1992) (Souter, J., concurring), *corrected by Erratum*, 535 U.S. II (2003).

364. Madison, *supra* note 237, at 302.

365. JEFFERSON, *supra* note 264, at 62.

pluralistic twenty-first century.”³⁶⁶ The American religious landscape is certainly far different from what it was two centuries ago. A 2008 survey revealed that “the United States is on the verge of becoming a minority Protestant country.”³⁶⁷ Protestants make up barely 51% of the American population.³⁶⁸ In a development that would have shocked the Framers, Catholics are the largest single American denomination, representing almost 24% of the nation.³⁶⁹ American religious pluralism now includes Mormons, Jehovah’s Witnesses, Jews, Muslims, Buddhists, Hindu, and many others, including the unaffiliated, atheists, and agnostics.³⁷⁰

But it does not follow that because the “religious composition and habits of contemporary America are so radically different from those at the time of the founding that using the founding as a baseline is a non sequitur.”³⁷¹ It is precisely because we are a pluralistic nation that the Framers’ understanding of religious liberty is so valuable. Their example teaches us the importance of respecting religious differences. They showed that it is possible to protect individual freedom of conscience while utilizing inclusive public religious expression. The framing generation also reminds us that, especially during times of distrust and antagonism, respect for our fellow citizens’ personal religious beliefs is a fundamental American value.

366. Steven K. Green, *A “Spacious Conception”: Separationism as an Idea*, 85 OR. L. REV. 443, 477 (2006).

367. PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY—RELIGIOUS AFFILIATION: DIVERSE AND DYNAMIC 5 (2008), available at <http://www.pewforum.org/files/2013/05/report-religious-landscape-study-full.pdf>, archived at <http://perma.cc/ET2H-WFG6>.

368. *Id.*

369. *Id.*

370. According to the Pew Forum’s Landscape Survey, the following are the percentages for each American denomination: 26.3% Evangelical (including Baptists and Methodists, Pentecostals, Holiness, Adventists, Lutherans, Presbyterians, Anglicans/Episcopalians, Restorationists, Congregationalists, Reformed, and Anabaptists “in the Evangelical Tradition”); 23.9% Catholic; 18.1% Mainstream Protestant (which includes “mainline” Baptists and Methodists, Lutherans, Presbyterians, Anglicans/Episcopalians, Restorationists, Congregationalists, Reformed, Anabaptists, and Friends); 6.9% Historically Black Churches (including the Baptist, Methodist, Nondenominational, and Pentecostal); 1.7% Mormon; 1.7% Jewish; and 0.6% Muslim. Buddhist, Hindu, Jehovah’s Witness, Other Christian, Orthodox, Wiccan, Native American, Pagan, and other world religions make up about 3.9% of the population, and “unaffiliated,” including atheism, agnosticism, and those reporting no religion, total 16.1%. *Id.* at 12.

371. Epstein, *supra* note 19, at 2157.