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Reclaiming Religious Liberty by Restoring the Original Meaning of the Establishment Clause

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Abstract

Religious liberty is currently at a crossroads in America. Part of that divide is that the Supreme Court must choose between two interpretations of the Constitution's Establishment Clause. In recent decades, the justices have usually applied subjective legal tests involving fictional observers and perceptions of religious endorsement. But in the past few years a majority of the Court has looked to objective factors of the historical marks of religious establishments and whether the government is coercing religious participation. The Court may now be poised to explicitly choose some version of the latter, which is also the original public meaning of the Establishment Clause.

"Congress shall make no law respecting
an establishment of religion."
—U.S. Constitution, Amendment I, Clause 1
(Establishment Clause)

Religious liberty is currently at a crossroads in America. Values and virtues that long enjoyed almost universal respect are now openly despised and reviled by certain segments of American society. These opponents include national political leaders, establishment media outlets, educational institutions, and opinion leaders—making the stakes sky-high for people and institutions of faith.[1] The fact that some of the opponents of religious liberty also pressure the management of many large corporations—many of which were not friends of religion to begin with, although not necessarily opposed, either—makes secularism the path of least resistance, and therefore a prudent course of action for those who conclude they do not have

Key Points

- Religious freedom is under attack in the United States. Devout Evangelicals and faithful Catholics are openly ridiculed and discriminated against by opponents of religious faith, along with adherents of various other faiths.
- The current legal and political environment provides an opportunity to restore religious freedom to its rightful place as a fundamental right.
- In the past half-century, the Supreme Court has invalidated as religious establishments displays, expressions, and programs that it held had religious purposes, advanced religion, or endorsed religion.
- Conservative justices have always opposed these rulings as a misinterpretation of the Constitution's Establishment Clause.
- The original public meaning of the Establishment Clause forbids only certain historical hallmarks of an official national religion, such as coercing religious observance under threat of legal penalty.

This paper, in its entirety, can be found at **http://report.heritage.org/lm237**

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a dog in this fight. The result has been an increasingly secular culture in a nation originally founded on religious liberty.

But with the election of President Donald Trump and unified Republican government at the federal level, people of faith are resurgent. While many faiths have been under attack in recent years, Christians have suffered the lion's share of this anti-faith bias. Devout Evangelicals and faithful Catholics are openly ridiculed and discriminated against by opponents of religious faith, along with adherents of various other faiths. But the tide may be turning in their favor—providing an opportunity to restore religious freedom to its rightful place as a fundamental right.

A policy discussion regarding religious liberty in America invariably becomes a legal discussion, because many of the most potent religious liberty protections are found in the Constitution of the United States. One is the Establishment Clause in the Constitution's First Amendment, which provides, "Congress shall make no law respecting an establishment of religion." How the Supreme Court interprets those 10 words has a profound impact on American life, defining a key aspect of religious liberty for more than 320 million people.

Historical Establishments of Religion

Few, if any, religious establishment controversies occurred for over 150 years subsequent to the Establishment Clause's ratification in 1791. When the First Congress discussed drafting the Establishment Clause, it drew upon English history—where the king or queen of England was also the supreme head of the Church of England—and religious establishments throughout Europe.

For the Framers, a governmental establishment of religion would bear those English hallmarks, such as the government's imposing taxes as a mandatory tithe to be given to the state-preferred church.[2] The government also could require people to attend services at churches belonging to the state's official denomination.[3] Itinerant preachers could even be imprisoned for teaching without a license or teaching doctrines that were contrary to the Church of England's.[4]

Like the rest of the Bill of Rights, the Establishment Clause constrained only the federal government. Although it is often glossed over in modern American thought, the First Amendment begins by specifying, "*Congress* shall make no law respecting an establishment of religion." No part of the Bill of Rights applied to state and local governments until the Fourteenth Amendment was ratified in 1868. States could have officially preferred denominations, though the last state-sanctioned denomination was abolished voluntarily and democratically by 1833.[5] It was not until 1947, in *Everson v. Board of Education*,[6] that the Supreme Court determined that the Establishment Clause applied against the states, signaling a shift away from the historical foundation of the Clause in favor of supposed government neutrality.

Decades of the Establishment Clause's Wandering in the Wilderness

In *Everson*, the Supreme Court unmoored the Establishment Clause from its historical foundation, setting the stage for outcomes that would have astounded the First Congress that wrote the First Amendment and the state legislatures that ratified it. Almost imperceptible at first, *Everson* laid the framework to transform the Establishment Clause into a wrecking ball, demolishing faith from large swaths of American public life.

The *Everson* Court declared a legal principle of neutrality: Government must be neutral between religions, and even between religion and irreligion. The Court popularized this principle as the "wall of separation between church and state," a phrase found in an 1801 private letter from Thomas Jefferson to the Danbury Baptists.[7] But religious people won in *Everson*, a case in which the Court held that parents were entitled to reimbursement of the transportation costs to send their children to school, whether public or private (many of the latter being Roman Catholic). For more than a decade after *Everson*, the Court's uncoupling of the constitutional text from history did not lead to jarring outcomes—instead producing results that paralleled those that could have been derived from the Clause's original public meaning when it was ratified in 1791.

The Acommodationist View. For instance, in 1952, religious adherents won again in *Zorach v. Clauson*. "We are a religious people whose institutions presuppose a Supreme Being," Justice William Douglas declared, writing for the majority.[8] "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs."[9]

Strict Separation. In contrast to this "accommodationist" view of the Establishment Clause, the competing view of "strict separation" became ascendant in the 1960s during the tenure of Chief Justice Earl Warren. What started with barring prayer in public school in *Engel v. Vitale* (1962)[10] and Bible reading in public school in *School District of Abington Township v. Schempp* (1963)[11] became a revolution by 1968, as both the Court's membership shifted and America's countercultural revolution reached a fever pitch.

That year the justices in *Flast v. Cohen*[12] held that a person could bring an Establishment Clause challenge in federal court merely because the government was directing public funds toward activities that touched on religion. In other contexts, the Court had made clear that the government's alleged misuse of taxpayer money is not a sufficiently personal and distinct injury under Article III of the Constitution to confer standing to pursue a claim in federal court. That same year, in *Epperson v. Arkansas*,[13] the Court made explicit that the government may not generically prefer faith over atheism, recasting *Everson*'s neutrality principle in a more hostile light. The Warren Court in its heyday completely reinterpreted this constitutional provision.

The *Lemon* Test. The pendulum began swinging back after President Richard Nixon took office and filled two Supreme Court seats over the next two years with Warren Burger and Harry Blackmun. Chief Justice Burger attempted, without success, to harmonize the irreconcilable reasoning and inherent contradictions between the accommodationist and strict-separationist cases by adopting the often-maligned "*Lemon* test."

The Court held in *Lemon v. Kurtzman* (1971) that the government violates the Establishment Clause whenever state action intersects with religion, unless the action: (1) has a secular purpose; (2) does not have the principal or primary effect of advancing religion; and (3) does not excessively entangle government with religion.[14] A state action violated the Establishment Clause if it failed any one of these three requirements. Yet this three-pronged test proved so unworkable that by 1973 the Court called *Lemon*'s prongs "helpful signposts" to spot unconstitutional acts, rather than a formulaic "test."[15]

Along the way, the justices occasionally applied the *Lemon* test to invalidate a challenged action, and at other times, ignored *Lemon* altogether. A prime example of the latter is *Marsh v. Chambers* (1983),[16] a challenge to legislative prayer—the opening of meetings of policymaking bodies with an invocation. As discussed in greater detail below, the Court declined to apply the *Lemon* test and upheld governmental funding for chaplains as constitutional. *Marsh* proved to be a harbinger of things to come decades later.

Ideological Divides. When the Court applied the *Lemon* test, it would divide along ideological lines. From the time of his confirmation in 1971—several months after *Lemon* was decided—William Rehnquist was the sole consistent conservative on the Court for 15 years, and would almost invariably side with the challenged practice to find no Establishment Clause violation. Antonin Scalia joined Rehnquist on originalist grounds once Scalia ascended to the Court in 1986.

The liberal wing of the Court, including William Brennan, Thurgood Marshall, and John Paul Stevens, consistently voted to invalidate the challenged practice. The remaining justices would lean one way in some cases, and the opposite way in others. Conservative-leaning moderates Byron White and Potter Stewart typically sided with the accommodationist view; liberal-leaning moderate Harry Blackmun typically sided with the separationist view, and true moderates Lewis Powell and Sandra Day O'Connor were seemingly always up for grabs. It was a constant guessing game as to who would prevail at the Supreme Court in Establishment Clause cases throughout the Reagan years.

The *Lemon* Instability. This see-sawing was due to the hopeless subjectivity of the *Lemon* test. The three prongs—purpose, effects, and entanglement—were manifestly malleable. Most lawmakers can articulate some sort of secular purpose when government touches upon faith, but it is quite possible that one or more lawmakers are acting with religious motives. How can a court determine whether a legislative body as a whole was motivated to act for a secular or sectarian purpose? Any such action has the effect, to some degree, of advancing religion. How can a court discern whether that is its principal effect? And any such action entangles the government with religion to some degree. How can a court determine if such entanglement is excessive?

For all three prongs, whether the challenged government action passed muster predictably turned on the judge deciding the case. At bottom, faith-friendly

judges tended to find secular purposes, that the primary effect did not advance religion, and that the entanglement was not excessive. Judges who seemed wary of faith in the public square tended to reach the opposite conclusion on one or more of those same prongs. Courts looking at identical facts in different jurisdictions would reach opposite conclusions.

At the Supreme Court, the faith-supporting party lost more often than not in the 1970s and 1980s when *Lemon* was the predominant rule. In 1982, the Court invalidated a measure allowing churches a voice in the licensing of nearby liquor stores.[17] In 1985, the Court invalidated moments of silence in public schools.[18] In 1987, the Court invalidated a Louisiana statute requiring public schools to teach scientific evidence supporting creationism alongside evidence supporting evolution.[19]

There were, however, some wins for religious liberty. For example, the Court in *Lynch v. Donnelly* upheld a Christmas Nativity display on public property because it was part of a diverse display including Santa Claus, candy canes, and other items that had no connection to the Christian religion.[20] And in *Bowen v. Kendrick*, the Court upheld funding for counseling connected to faith-based programs alongside secular programs.[21] Whether something was impermissible under the Constitution depended on what a bloc of moderate justices decided was the true purpose of the legislation, its principal effect, and its degree of entanglement in each case.

The Endorsement Test. Eventually the Court revised *Lemon* in a 1989 case involving a Nativity scene on the grand staircase of the county courthouse in Pittsburgh, as well as a menorah and Christmas tree located in a park area outside the courthouse. By a 5–4 vote in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*,[22] the Court adopted the "endorsement test," which would later be used to decide some—but not all—Establishment Clause claims. Justice Harry Blackmun, writing for the majority, adopted an interpretation of the Clause that Justice Sandra Day O'Connor first enunciated in a concurring opinion in *Lynch*.

Blackmun wrote that the government violates the Establishment Clause whenever its action has a "purpose or effect" that would lead a "reasonable observer" to conclude that the government is endorsing religion.[23] The reasonable (or "objective") observer is not a party to the litigation—or even a real person. The reasonable observer is instead a fictitious being who takes in every observable aspect of the state action; is also aware of contextualizing facts (such as history and tradition); and essentially makes a judgment on the totality of the circumstances.[24] The narrow majority held that such an endorsement violates the Establishment Clause because it makes a person's religious beliefs relevant to his standing in the community, making non-adherents feel like political outsiders. Although looking at "purpose or effect" would seem to cover both of the first two *Lemon* prongs, at first this "endorsement test" was regarded as revising only *Lemon*'s effects prong.

The *Allegheny* Court completely fractured in applying the new test. The justices voted 5–4 to strike down the Nativity display as an endorsement of Christianity. They upheld the Christmas tree 6–3, with the controlling two-justice plurality positing that a Christmas tree has such a watered-down religious pedigree—actually having pagan origins and used by many non-Christians as a generic seasonal display, and moreover that its placement outside the courthouse further mitigated any government affiliation—that it did not rise to the level of a religious endorsement. That two-justice plurality also upheld the menorah under the same rationale, surprising some Jewish Americans who regarded their menorah as a distinctly religious symbol more akin to a Nativity display (also called a crèche) than a generic "holiday tree."

In the end, three justices wanted to strike down all three displays, four justices wanted to uphold all three, and two justices rendered a split decision—part in a unified two-justice plurality opinion and part in separate one-justice opinions. This deep and convoluted fracturing turned out to foreshadow the reality that the endorsement test would prove every bit as unworkable as the original *Lemon* test.

The only unity came from the four justices who rejected the very concept of an endorsement test. Justice Anthony Kennedy wrote a dissenting opinion, joined by William Rehnquist, Byron White, and Antonin Scalia. The dissenters looked primarily to history, with Kennedy writing that the government violates the Establishment Clause by coercing any American "to support or participate in any religion or its exercise."[25] The dissenters contended that Nativity displays have been celebrated throughout American history, and do not coerce anyone. Kennedy wrote, "Passersby who disagree with the message conveyed by these displays are free to ignore them,

or even to turn their backs, just as they are free to do when they disagree with any other form of government speech. There is no realistic risk that [the display] represent[s] an effort to proselytize or are otherwise the first step down the road to an establishment of religion."[26] Thus, because there was no coercion, there was no Establishment Clause violation.

The Debate Continues. Between the years 1989 and 2005, the endorsement-versus-coercion debate continued at the Court, usually resulting in 5–4 decisions. Only twice did Kennedy vote to invalidate a challenged action under the Establishment Clause, both times utilizing his coercion theory. Both cases involved children in public schools, where he made clear his view that peer pressure could be coercive for children in a school environment. The first case, *Lee v. Weisman*[27] in 1992, invalidated benedictions at high school graduation ceremonies at public schools. The second case, *Santa Fe Independent School District v. Doe* in 2000, invalidated prayers at high school football games.[28]

Along the way, the Court condensed *Lemon*'s three prongs into two. In *Agostini v. Felton*,[29] the Court collapsed the third prong into the second, treating excessive entanglement as merely a factor in determining whether something had the primary effect of advancing religion, which, in turn, would be viewed through the lens of the fictitious reasonable observer who would determine whether the government was endorsing religion. Until 2005, the Court continued to be closely divided in Establishment Clause cases, with Justice O'Connor usually providing the deciding vote.

A Shift in Establishment Clause Jurisprudence: 2005 to the Present

Two cases decided the same day in 2005 marked the beginning of a shift for Establishment Clause jurisprudence and highlighted how intractable the Court's earlier precedents had become. Both cases involved Ten Commandments displays in different parts of the nation—and capped off decades of fundamental disagreement over the meaning of the Establishment Clause.

McCreary. In *McCreary County v. ACLU of Kentucky*,[30] the Court heard a challenge to a local government's hanging of the Ten Commandments on a wall of the county courthouse. Government leaders referred to the Decalogue as Kentucky's "precedent legal code" and "good rules to live by." During the ceremony hanging the framed Commandments—a display which included a reference to Exodus 20:3–17 in the Bible—a local leader referred to the Ten Commandments as "a creed of ethics" and recounted an astronaut's story of how viewing the Earth from space convinced him that "there must be a divine God."[31]

The Court, by a 5–4 vote, invalidated the display, holding that the county had a religious purpose that predominated over its stated secular purpose. The narrow majority also recast *Lemon*'s purpose prong as part of the endorsement test, invoking that test's rationale to say that showing the county had a religious purpose makes religious beliefs relevant to a person's standing in the community and makes nonadherents feel excluded. As the perennial fifth vote, O'Connor penned a separate concurrence adding that the county's religious purpose for hanging the display would lead a reasonable observer to conclude that the government was endorsing religion. After *McCreary*, the endorsement test had, in effect, swallowed all three prongs of the original *Lemon* test.

Van Orden. That same day, the Court in *Van Orden v. Perry* upheld a Ten Commandments display in a park outside the Texas statehouse by a 5–4 vote.[32] Chief Justice Rehnquist wrote a plurality opinion for four justices, examining American history and the role the Ten Commandments played throughout the life of the nation. There was no mention of endorsement or coercion. The plurality explicitly eschewed all previous iterations of the *Lemon* test, adding, "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."[33]

Justice Stephen Breyer supplied the fifth vote to uphold the display, concurring in the judgment only, and not joining any part of the plurality opinion. Four dissenting justices, including O'Connor, argued that the Texas display was an unconstitutional endorsement of religion. Breyer rejected that conclusion in his concurrence, writing that in "borderline cases" such as this, courts must exercise good "legal judgment" instead of following any formal test as a rule. This "I know it when I see it" approach to the Establishment Clause was even more subjective than the endorsement test—and left lower courts utterly bewildered as to when to apply the original *Lemon* test, when to follow the endorsement test

that had now supplanted all three prongs of *Lemon*, and when to ignore either test and just use their best "legal judgment."

When O'Connor announced her retirement later that summer, experts wondered what this would mean for the Establishment Clause. The Court did not decide another Establishment Clause case on the merits until 2012, years after Justice Samuel Alito took O'Connor's seat.[34]

Refusing to Follow the *Lemon* Test: Legislative Prayer from *Marsh* to *Town of Greece*

To understand how the Supreme Court would treat the Establishment Clause after O'Connor retired, it is helpful to go back to the 1983 case *Marsh v. Chambers*, in which the Court declined to apply *Lemon*. The lower courts in that litigation had struck down legislative prayer under the *Lemon* test.

Marsh. Chief Justice Warren Burger, writing for the six-member majority, noted that in the very same week of 1789 that the First Congress voted on the Bill of Rights—including the First Amendment with its Establishment Clause—the House and Senate also created the offices of chaplain in both chambers, with salaried clergymen who would offer prayers on a daily basis when Congress was in session. The Court concluded that whatever the Establishment Clause meant, this "unique history" meant that the Constitution clearly did not forbid a practice that lawmakers had approved the same week they voted on the Establishment Clause. Burger wrote, "Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns," noting that "their actions reveal their intent."[35] Burger concluded that so long as the prayer opportunity was not exploited to proselytize or similarly advance any one faith or disparage other faiths by statements of condemnation or otherwise, judges should not parse the content of prayers.

Justice William Brennan wrote the lead dissent, making the point that the only reason the Court was not applying *Lemon* was because legislative prayer clearly would not survive review under *Lemon*. Brennan was right that under the *Lemon* test, this practice would undoubtedly have been invalidated. But that just goes to show that the *Lemon* test was wrongheaded to begin with, not that legislative prayer is unconstitutional.

Some scholars criticized *Marsh*.[36] They noted that it articulated no principled rationale. The only rule of decision it articulated concerned the extreme circumstances in which a court could invalidate a particular prayer practice (i.e., proselytizing, condemning other religions, etc.). These critics noted that the Court never gave an explicit rule that made clear why such prayers are constitutional to begin with—and further noted how incongruous the Court's approach in *Marsh* was to other Establishment Clause cases from that time. It looked to them as if the Court simply was not willing to strike down a centuries-old practice.

In reality, the *Marsh* Court engaged in a historical inquiry. It examined history and determined that if the practice of paying for chaplains who offered public prayers was accepted by the very same Framers who voted for the Establishment Clause, then it must be consistent with the Establishment Clause. The Court in *Marsh* handed down an implicitly originalist decision, one in which the Court determined the *original public meaning* of the Establishment Clause and applied it to a modern case.

Town of Greece. The Court would hear a second legislative prayer case, *Town of Greece v. Galloway*, in 2014.[37] The challenged legislative prayers in this New York town were offered by clergy from local houses of worship—all of which were Christian—or local volunteers who had been invited by the town supervisor. The plaintiffs contended that the local government setting, plus the fact that these Christian prayer-givers often mentioned Jesus and made other Christian references, were sufficiently different from *Marsh* to make the prayers unconstitutional. While the trial court upheld the legislative prayers, the appeals court reversed, holding that this practice was an endorsement of Christianity. When the Supreme Court granted review, the plaintiffs brought on new legal counsel, who attempted to recast *Marsh*'s scope and tried to win over Kennedy by arguing that local legislative prayers are coercive.

Ultimately, Justice Kennedy rejected that approach, writing for a 5–4 Court that *Marsh* must not be treated as some sort of one-off anomaly, and instead "that the Establishment Clause must be interpreted by reference to historical practices and understandings."[38] Legislative prayer was such a practice. "Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change,"[39] he added—a statement that cannot be squared with either the original *Lemon* test or the endorsement test.

Historical religious establishments would include compulsory church attendance or state-ordered tithing for the government's preferred denomination, state licensing of clergy to teach the preferred faith, passing laws to settle doctrinal disputes, or penalizing followers of other denominations. Taking legislative prayer as an example, a court must "determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures." The Court concluded that Christian clergy and laypeople giving Christian prayers in local settings was well within the historical tradition, quoting heavily from Kennedy's 1989 dissent in *Allegheny*.

Kennedy then wrote further for a three-justice plurality (joined by Chief Justice John Roberts and Justice Samuel Alito) to tackle the endorsement-versus-coercion debate. "It is an elemental First Amendment principle that government may not coerce its citizens to support or participate in any religion or its exercise," he wrote, continuing to draw from his *Allegheny* dissent.[40] He roundly criticized the underpinnings of the endorsement test, noting that nonbelievers may feel excluded as outsiders when they hear a prayer they reject and that they might even be offended. "Offense, however, does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views."[41]

Justice Clarence Thomas, joined by Justice Scalia, agreed that religious coercion was unconstitutional. However, the kind of coercion he believed violated the Establishment Clause was "actual legal coercion."[42] Quoting an earlier case, he explained, "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*."[43] Thomas added that there is "no support" for "modern notions that the Establishment Clause is violated whenever the 'reasonable observer' feels 'subtle pressure'...or perceives governmental 'endors[ment].'"[44]

A Chance to Restore the Establishment Clause

Town of Greece represents an inflection point in Establishment Clause jurisprudence, one that lower courts are resisting, but which could result in a sea-change in as few as the next couple of years. It has become increasingly apparent that the Court took a wrong turn in 1989 in *Allegheny* in light of more recent cases like *Van Orden* in 2005—and in light of how the Court has interpreted other First Amendment provisions like the Free Exercise Clause.[45] The dissenting view in *Allegheny*—advocating a coercion test—has achieved support from a majority of the current justices, and the Court needs only the right opportunity to restore—at least in part—the original meaning to the Establishment Clause. Over the course of half a century, the Court has flipped from a strict-separationist view back to an accommodationist view.

Revisiting *Lemon*. It is no cause for concern among religious-liberty supporters that the Court did not overrule *Lemon* or its endorsement variation in *Town of Greece*. Although the town asked the Court to repudiate the endorsement test, as did a number of states and Members of Congress, it was not necessary for the Court to do so because *Marsh*—not *Lemon*—was the most relevant precedent on the books. Furthermore, when the Court effectuates a major change in the law, it often does so gradually.

Fortunately, opportunities abound for the Court to revisit the *Lemon*/endorsement test and reconsider how to interpret and apply the Establishment Clause. A circuit split has emerged between *en banc* courts of appeals over the scope of *Town of Greece*. The Fourth Circuit recently held that it violates the Establishment Clause for elected lawmakers to offer legislative prayers, while the Sixth Circuit held that it does not.[46] This *en banc* circuit split presented the Supreme Court with an opportunity to continue unpacking what Judge Alice Batchelder called the "major doctrinal shift" seen in *Town of Greece*,[47] although the justices ultimately declined to resolve the matter, over the dissent of Justices Clarence Thomas and Neil Gorsuch.[48]

***American Legion*.** But setting aside that opportunity to take a "baby step," the Supreme Court will vote during the fall of 2018 whether to take *American Legion v. American Humanist Association*,[49] a case that gives the justices an opportunity to go the full distance of revisting *Lemon* and the endorsement test. Justices Scalia and Thomas declared shortly after *Town of Greece* was decided that "*Town of Greece* abandoned the antiquated 'endorsement test,'"[50] and the justices now can reveal whether a majority of the Court agrees.

The *American Legion* case involves a challenge to the Bladensburg World War I Veterans Memorial, a

93-year-old war memorial in Maryland commemorating soldiers from the local county who made the ultimate sacrifice during the Great War. The centerpiece of the venerable memorial is a 32-foot Latin cross with Celtic features, modeled after American battlefield grave markers in Europe from World War I, many rows of which can also be found in Arlington National Cemetery. Avowed atheists sued over the cross-shaped memorial. The U.S. Court of Appeals for the Fourth Circuit struck down the memorial as an endorsement of Christianity, with a sweeping opinion that necessarily casts doubt on the constitutionality of Arlington National Cemetery's many cross-shaped headstones and the similarly large memorial crosses standing watch over that solemn place.

The American Legion—which erected the Bladensburg memorial and has helped maintain it for almost a century—is defending it in court. This case is a perfect vehicle for the Supreme Court to clarify its Establishment Clause jurisprudence. Even though a "reasonable observer" should understand that such a memorial has a secular meaning, it is not beyond the pale for a left-leaning judge to construe several wrongly decided Supreme Court cases in such a way that a reasonable observer would instead wrongly conclude that a large cross-shaped memorial endorses Christianity. Such an observer might easily reach the same conclusion regarding the many crosses in Arlington National Cemetery.

If the endorsement test were correct, then there would be room to question the constitutionality of long-standing passive monuments, even though the memorial should survive even such a hostile test. However, if courts interpret the Establishment Clause according to historical understandings of religious establishments and by looking for coercion, then such memorials are fully consistent with the Constitution. For that matter, Christmas displays, religious holiday celebrations, Ten Commandments displays in public parks, school voucher programs for religious schools, and voluntary public prayers could all be resurgent in American life, because none were historically forbidden by the Framers of the Constitution, and none of them coerces anyone.

In any of these instances, the government would not be forcing anyone to bow, kneel, pray, put money in a box, or recite a creed. If the Court decides to take up *American Legion*, the justices could complete what they began in *Town of Greece*—restoring the Establishment Clause to its proper understanding. The Court made a mistake in the 1960s with its shift toward strict separation, systematized that mistake in 1971 in *Lemon*, and doubled down on that mistake in 1989 in *Allegheny*. The time is long past for the Court to fix these mistakes.

The Supreme Court's unequivocal rejection of *Lemon* and all versions of the endorsement test in favor of a historical inquiry standard would be an epic victory for religious liberty and the rule of law mandated by the Constitution.

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Endnotes

1. For example, former Secretary of State Hillary Clinton, in April 2015, gave a speech criticizing historically orthodox Christian beliefs on issues such as abortion, marriage, and sexuality, arguing that such attitudes "have to be changed." On September 8, 2016, Clinton infamously said at an LGBT event that many supporters of Donald Trump are "bigoted" people who are "deplorable" and "unredeemable." One day prior, on September 7, then-Chairman Martin Castro of the U.S. Commission on Civil Rights issued a statement accompanying a civil rights report, in which Castro said that people of faith often use the term "religious liberty" as code words for discrimination.
2. Michael W. McConnell, *Coercion: The Lost Element of Endorsement*, 27 Wm. & Mary L. Rev. 933, 936–39 (1986).
3. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2144–46 (2003).
4. The Puritan John Bunyan, famous for writing the bestseller *The Pilgrim's Progress*, was incarcerated in Great Britain in the late 17th century for unauthorized preaching.
5. The last state to do so was Massachusetts.
6. 330 U.S. 1 (1947).
7. *Id.* at 16.
8. Zorach v. Clauson, 343 U.S. 36, 313 (1952).
9. *Id.* at 314.
10. 370 U.S. 421 (1962).
11. 374 U.S. 203 (1963).
12. 392 U.S. 83 (1968).
13. 393 U.S. 97 (1968).
14. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).
15. Hunt v. McNair, 413 U.S. 734, 741 (1973).
16. 463 U.S. 783 (1983).
17. Larkin v. Grendel's Den, 459 U.S. 119 (1982).
18. Wallace v. Jaffree, 472 U.S. 38 (1985).
19. Edwards v. Aguillard, 482 U.S. 578 (1987).
20. 465 U.S. 668 (1984).
21. 487 U.S. 589 (1987).
22. 492 U.S. 573 (1989).
23. *Id.* at 592.
24. Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring).
25. *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in the judgment in part and dissenting in part).
26. *Id.* at 664.
27. 505 U.S. 577 (1992).
28. 530 U.S. 290 (2000). In an opinion authored by Justice John Paul Stevens, the *Santa Fe* Court invalidated those prayers both on endorsement and coercion grounds, attempting to merge those two lines of cases, perhaps trying to accommodate Kennedy. This might be the only case where Kennedy did not dissent from an endorsement application.
29. 521 U.S. 203 (1997).
30. 545 U.S. 844 (2005).
31. *Id.* at 851.
32. 545 U.S. 677 (2005).
33. *Id.* at 686 (plurality opinion of Rehnquist, C.J.).
34. Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, 565 U.S. 171 (2012).
35. *Marsh*, 463 U.S. at 790.
36. *See* Christopher C. Lund, *The Congressional Chaplaincies*, 17 Wm. & Mary Bill of Rights Journal 1171, 1210–14 (2009) (discussing various criticisms).
37. 134 S. Ct. 1811 (2014).
38. *Id.* at 1819.

39. *Id.*
40. *Id.* at 1825 (plurality opinion of Kennedy, J.) (quoting *Allegheny*, 492 U.S. at 659 (Kennedy, J.)).
41. *Id.* at 1826.
42. *Id.* at 1838 (Thomas, J., concurring in part and concurring in the judgment).
43. *Id.* at 1837 (emphasis in original).
44. *Id.* at 1838.
45. *Hosanna-Tabor*, 565 U.S. at 171.
46. Lund v. Rowan County, 863 F.3d 268 (4th Cir. 2017) (en banc); *Bormuth v. County of Jackson*, 870 F.3d 494 (6th Cir. 2017) (en banc).
47. Judge Alice Batchelder noted in earlier case, "*Town of Greece* is apparently a major doctrinal shift regarding the Establishment Clause," one that looks to history and coercion. Smith v. Jefferson County Board of School Commissioners, 788 F.3d 580, 602 (6th Cir. 2015) (Batchelder, J., concurring in part and concurring in the result).
48. 138 S. Ct. 2564 (2018) (Thomas, J., dissenting from the denial of certiorari).
49. The case is Docket No. 17-1717 at the Supreme Court, and in the lower court was named American Humanist Association v. Maryland-National Capital Park and Planning Commission, 874 F.3d 195 (4th Cir. 2017). The state commission in the case separately petitioned the Supreme Court to review the matter in Docket No. 18-18. The author is co-counsel for the petitioners in *American Legion* and also litigated other cases mentioned in this article.
50. Elmbrook School District v. Doe, 134 S. Ct. 2283, 2284 (2014) (Scalia, J., dissenting from the denial of certiorari).