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## Establishment Clause Jurisprudence and the Free Exercise Dilemma: A Structural Unitary- Accommodationist Argument for the Constitutionality of God in the Public Square

### I. INTRODUCTION

In 1620, a small band of religious dissenters<sup>1</sup> embarked on a three thousand mile journey across the sea.<sup>2</sup> They would encounter storms, sickness,<sup>3</sup> even death,<sup>4</sup> finally reaching the northeastern American shore exhausted and ill-prepared for the harsh winter ahead.<sup>5</sup> Nearly half of their party would die within the year.<sup>6</sup> But they would stay because this new land was their Zion, a “place where they might have liberty” to worship God freely.<sup>7</sup> From these historic beginnings, America has

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1. These dissenters were Leyden Separatists who believed that true religion could be found only by “separating” from the Church of England. EDNA BARTH, *TURKEYS, PILGRIMS, AND INDIAN CORN: THE STORY OF THE THANKSGIVING SYMBOLS* 16–18 (1975). In this respect, they differed from the Puritans of Massachusetts Bay who desired only to “purify” the Church of England. *Id.* at 17.

2. *Id.* at 28. The trek that would bring the Pilgrims to American soil would take sixty-six days to complete. *Id.*

3. *Id.* at 22–23. Because of the Pilgrims’ late September start, they encountered westerly gales that were so violent that a main beam in the ship buckled. *Id.* at 20, 22–23. Many passengers were ill. *Id.* at 22. William Bradford, the future governor of Plymouth Colony, recounts, “After they had enjoyed fair winds and weather for a season, they were encountered many times with cross winds and met with many fierce storms . . . .” WILLIAM BRADFORD, *OF PLYMOUTH PLANTATION 1620–1647*, at 58 (Alfred A. Knopf, Inc. 1959) (1650).

4. BARTH, *supra* note 1, at 20. Just two years earlier, one hundred thirty passengers died on a journey to Virginia with English Separatist Francis Blackwell. *Id.* On this voyage, a member from the *Mayflower* crew died at sea. *Id.* at 25–26. Blackwell was described as a malicious sailor, having threatened to throw sick passengers to the sharks and then steal their belongings. *Id.*

5. RALPH LINTON & ADELIN LINTON, *WE GATHER TOGETHER: THE STORY OF THANKSGIVING* 48 (1949). The Pilgrims arrived in December of 1620. *Id.* A historian notes, “The devout band which had landed on Plymouth Rock . . . were a courageous and hardworking lot, but they were ill-equipped, both personally and materially, for hewing a livelihood from a formidable wilderness.” *Id.*

6. Of the Pilgrims and crew who left England, approximately half survived. Henry R. Viets, *Some Features of the History of Medicine in Massachusetts During the Colonial Period: (1620–1770)*, 23 *ISIS* 389, 391 (1935).

7. BRADFORD, *supra* note 3, at 24.

continued to build in the tradition of religious freedom. This freedom is the seed of the nation's conception and a primary end of its existence.<sup>8</sup>

Today, statistics indicate that a relatively large percentage of Americans continue to view religion as a fundamental aspect of their lives,<sup>9</sup> especially when compared with other industrialized nations.<sup>10</sup> Americans rank among the highest of developed populations for church attendance and monetary contributions to religious institutions.<sup>11</sup> Some polls indicate that approximately ninety percent of Americans believe in the existence of a god,<sup>12</sup> seventy percent pray,<sup>13</sup> and forty percent read the Bible every week.<sup>14</sup>

Despite these numbers indicating continuing spiritual traditions, religious<sup>15</sup> Americans currently face what has been described as a

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8. Describing the mission of the Continental Congress that would form the nation, Thomas Paine wrote, "The conferring members being met, let their business be to frame a Continental Charter, or Charter of the United Colonies . . . (Always remembering, that our strength is continental, not provincial:) Securing freedom and property to all men, and above all things, the free exercise of religion, according to the dictates of conscience . . ." THOMAS PAINE, *COMMON SENSE* 42 (Bantam Classic ed. 2004) (1776).

9. See generally Richard Morin, *Do Americans Believe in God?*, WASH. POST, Apr. 24, 2000, <http://www.washingtonpost.com/wp-srv/politics/polls/wat/archive/wat042400.htm> (explaining that multiple national surveys indicate most Americans firmly believe in God).

10. See KENNETH D. WALD, *RELIGION AND POLITICS IN THE UNITED STATES* 9 (2d ed. 1997).

11. *Id.* at 9–12.

12. BARRY A. KOSMIN & SEYMOUR P. LACHMAN, *ONE NATION UNDER GOD: RELIGION IN CONTEMPORARY AMERICAN SOCIETY* 9 (1993) (reporting that fifty-eight percent of Americans define religion as "very important" and that ninety-four percent believe in "God or [a] universal spirit"); WARREN A. NORD, *RELIGION & AMERICAN EDUCATION: RETHINKING A NATIONAL DILEMMA* 2 (1995) ("Polls consistently show that nine out of ten Americans believe in the existence of God.").

13. WARREN A. NORD & CHARLES C. HAYNES, *TAKING RELIGION SERIOUSLY ACROSS THE CURRICULUM* 1 (1998) ("The United States is a religious nation. About 90 percent of Americans claim to believe in God, and almost 80 percent say that religion is an important part of their lives. Seventy percent of Americans pray and 40 percent attend religious services and read the Bible each week.").

14. *Id.*

15. This Comment uses the term broadly—"religion" or "believers" refer to those who espouse a religion or belief system that endorses powers other than the "self," which transcend the everyday material world and/or control human destiny. Secular, atheistic, or humanistic lines of thought that recognize no power or existence outside mortality or the "self" are conversely defined as "secular" and its advocates generally termed "nonbelievers." See generally Paul James Toscano, *A Dubious Neutrality: The Establishment of Secularism in the Public Schools*, 1979 *BYU L. REV.* 177, 207 (defining religion broadly to include "any belief system that an individual can call a religion"); PHYLLIS A. TICKLE, *RE-DISCOVERING THE SACRED: SPIRITUALITY IN AMERICA* 115 (1995) ("So long as religion ties together the experiences of life into some kind of purpose and then disciplines the actions of living toward that pattern, it will still be religion. It will be religion, in other words, regardless of whether or not it even mentions God or engages God as a principle."). *But*

culture of disbelief—a legal and political mindset that “belittle[s] religious devotion, . . . humiliate[s] believers, and, even if indirectly, . . . discourage[s] religion as a serious activity.”<sup>16</sup> Problematically, this secular culture infringes on the fundamental right of religious free exercise by “press[ing] the religiously faithful to be other than themselves, to act publicly, and sometimes privately as well, as though their faith does not matter to them.”<sup>17</sup>

This culture of disbelief is reflected in different aspects of American society and life, and is often evidenced in the nation’s judiciary where courts are torn between a heritage that sanctions the coexistence of church and the state,<sup>18</sup> and a secular mindset that insists “where government treads, religion must flee.”<sup>19</sup> Interestingly, in observing the

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see George Freeman, *The Misguided Search for the Constitutional Definition of “Religion,”* 71 GEO. L.J. 1519, 1553 (1983) (defining “religion” as meeting certain paradigmatic requisites such as “[a] belief in a Supreme Being,” “[a] belief in a transcendent reality,” “[a] moral code,” “[a] world view that provides an account of man’s role in the universe and around which an individual organizes his life,” “[s]acred rituals and holy days,” “[w]orship and prayer,” “[a] sacred text or scriptures,” and “[m]embership in a social organization that promotes a religious belief system”).

16. STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 16 (1993).

17. *Id.* at 3; see also Andrew A. Beerworth, *Religion in the Marketplace: Establishments, Pluralisms, and the Doctrinal Eclipse of Free Exercise*, 26 T. JEFFERSON L. REV. 333, 405 (2004) (“Christians are no longer thrown to the lions, but they must constantly endure the scorn of post-modernists and pressure by courts to change their ‘illiberal’ beliefs.” (citing Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOY. U. CHI. L.J. 121 (2001))). Speaking of the American trend toward secularization, William McLoughlin commented, “This country is in more than an economic crisis. It is in a deep cultural crisis. The beliefs and values that our institutions have taught us to respect and obey are no longer congruent with the behavior we see around us.” William G. McLoughlin, *Faith*, 35 AM. Q. 101 (1983).

18. WALD, *supra* note 10, at 6 (“The change in terms of thought, from a God-centered to a human-centered world, is the most dramatic testament to the victory of secularization in the modern world. This understanding of modern society leaves little room for religion as a social or political factor.”). President Ronald Reagan noted,

Religion played not only a strong role in our national life; it played a positive role. The abolitionist movement was at heart a moral and religious movement; so was the modern civil rights struggle. And throughout this time, the state was tolerant of religious belief, expression, and practice. Society, too, was tolerant. But in the 1960’s this began to change. We began to make great steps toward secularizing our nation and removing religion from its honored place.

Ronald Reagan, Remarks at an Ecumenical Prayer Breakfast in Dallas, Texas (Aug. 23, 1984), available at <http://www.reagan.utexas.edu/resource/speeches/1984/82384a.htm>.

19. MATTHEW D. STAVER, *FAITH & FREEDOM: A COMPLETE HANDBOOK FOR DEFENDING YOUR RELIGIOUS RIGHTS* 19 (1995); see also Franklin H. Littell, *The Basis of Religious Liberty in Christian Belief*, 6 J. CHURCH & ST. 132, 134 (1964) (“A modern measure of purely private piety may be useful—particularly in other people, but there is no need for the enlightened man of the

origins of this distinct trend toward disbelief, it appears that the catalyst is not located amidst fanatic nonbelievers or dispassionate scholars. Rather, the forces shifting core American principles are emanating chiefly from the American polity itself.<sup>20</sup>

Paul Blanshard, an outspoken critic of organized religion and writer for *The Humanist*, noted the judiciary's role in the move towards secularism, naming the United States Supreme Court as his "primary hero" in the secularization of American society.<sup>21</sup> As a critic of religion's role in society, Blanshard's observations are perceptive. Twentieth-century courts play a major role in America's legal and political secularization, formulating and upholding interpretations of the First Amendment Establishment Clause that demand "public neutrality on the widest possible range of moral issues."<sup>22</sup> Of course, this public neutrality is neutral in name only<sup>23</sup> because an application of the Establishment Clause that tends to remove even the most innocuous references of God from the state produces a secular mindset that is an orientation unto itself, ultimately discriminating against nonsecular beliefs.<sup>24</sup>

Judicial inconsistency in how the Religion Clause is understood does little to remedy this secularization dilemma. Over the past century, courts have applied a variety of interpretations to the Establishment Clause.<sup>25</sup> Some decisions have advocated a "separationist" approach to church-state relations that wholly precludes church-state interaction.<sup>26</sup> Others

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twentieth century to take religion seriously as an intellectual discipline in his university or a shaping force in his social existence.").

20. See STAVER, *supra* note 19, at 19–20.

21. *Id.* at 19 (citing Paul Blanshard, *Three Cheers for Our Secular State*, HUMANIST, Mar./Apr. 1976, at 17).

22. William A. Galston, *Public Morality and Religion in the Liberal State*, 19 POL. SCI. & POL. 807, 807 (1986).

23. See Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 31 (1998) ("Separationism is not neutral as to either political theory (the nature and role of the state) or ecclesiology (the nature and role of the church).").

24. "[W]hen unmodified by other principles, separationism leads to the quiet advancement of majoritarian bias: by separating religion from the public sphere, it perpetuates, indeed strengthens, the civil religion within that sphere." *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606, 1636–37 (1987) [hereinafter *Religion and the State*]; see also Esbeck, *supra* note 23, at 107 ("A separation of government from all that is religion or religious would result in a secular public square, one hostile to the public face of religion. The Founders intended no such regime.").

25. See, e.g., *infra* Part II.A.1.

26. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 31 (1947) (Rutledge, J., dissenting) (maintaining that the aim of the Establishment Clause is not simply to prohibit establishing a national church, but to forbid any state action respecting religious establishment); Shahin Rezai, Note, County of

support an “accommodationist” approach that allows church-state interface as long as it does not interfere with a citizen’s freedom of religious exercise.<sup>27</sup> In addition, courts have also disagreed whether the Establishment and Free Exercise Clauses are interrelated or mutually exclusive, at times treating the Religion Clauses as different sides of the same coin (“unification”),<sup>28</sup> and at others viewing the Clauses as universally irreconcilable (“disassociation”).<sup>29</sup> Finally, courts are divided regarding the ultimate purpose of the Religion Clauses, some arguing that both Clauses are meant to preserve individual rights<sup>30</sup> (“rights-based” interpretation), others noting that the Free Exercise Clause secures individual rights, but that the Establishment Clause structurally restrains governmental power (“structural” interpretation).<sup>31</sup>

Such doctrinal disputes have produced a chaotic array of Establishment rulings.<sup>32</sup> As a result of the Establishment Clause doctrinal discord, courts have held that a courtroom poster of the Ten Commandments violates the Establishment Clause,<sup>33</sup> but a Ten Commandments monument on the Texas State Capitol grounds does not;<sup>34</sup> a religious message delivered by a student at graduation is permissible,<sup>35</sup> but a student-led invocation at graduation does not pass

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Allegheny v. ACLU: *Evolution of Chaos in Establishment Clause Analysis*, 40 AM. U. L. REV. 503, 508 (1990).

27. See Rezai, *supra* note 26, at 513.

28. See generally *id.*; see also David G. Leitch, Note, *The Myth of Religious Neutrality by Separation in Education*, 71 VA. L. REV. 127 (1985); *Religion and the State*, *supra* note 24.

29. See Rezai, *supra* note 26, at 508.

30. See Esbeck, *supra* note 23, at 2.

31. *Id.*

32. Professor Gedicks notes,

The Court’s decisions in this area have been described as “ad hoc,” “eccentric,” “misleading and distorting,” “historically unjustified and textually incoherent,” and—finally—“riven by contradiction and bogged down in slogans and metaphors. . . . Steven Smith has observed that “in a rare and remarkable way, the Supreme Court’s establishment clause jurisprudence has unified critical opinion: people who disagree about nearly everything else in the law agree that establishment clause doctrine is seriously, perhaps distinctively, defective.”

FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE I* (1995) (citations omitted).

33. *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005).

34. *Van Orden v. Perry*, 125 S. Ct. 2854 (2005).

35. *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330, 1342 (11th Cir. 2001) (allowing a graduating student elected by her class to deliver an unrestricted message of her choice at graduation).

muster;<sup>36</sup> a crèche on government property is unconstitutional, but the Jewish menorah displayed with a Christmas tree and a sign saluting liberty is admissible;<sup>37</sup> and prayer is prohibited in the classroom,<sup>38</sup> but permitted in the Legislature.<sup>39</sup>

In addition to the above-named Establishment Clause issues, twentieth-century Religion Clause interpretations raise another dilemma: under current readings, courts consistently fail to address free exercise considerations in an Establishment Clause context so that the Free Exercise Clause has become little more than an “empty textual platitude” in an Establishment Clause context.<sup>40</sup> This trend is particularly apparent under a separationist interpretation of the Religion Clauses<sup>41</sup> since an application of the Establishment Clause that demands complete separation of God from the state ultimately produces a secular mindset<sup>42</sup> that inhibits free exercise by discriminating against nonsecular faiths.<sup>43</sup> The free exercise dilemma also surfaces under a “disassociated” reading of the Religion Clauses,<sup>44</sup> where the dependent and equivocal nature of the Free Exercise Clause causes it to be overlooked wherever Establishment Clause interests are raised.<sup>45</sup> A “rights-based” interpretation of the Establishment Clause additionally fetters free exercise considerations since under such an understanding the clauses are interpreted as mutually exclusive and fundamentally conflicting,<sup>46</sup> thus precluding a free exercise analysis in an establishment context.

This Comment addresses these and other problems raised under current Establishment Clause tests, focusing on the

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36. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000).

37. *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

38. *Wallace v. Jaffree*, 472 U.S. 38, 59–60 (1985).

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

40. Beerworth, *supra* note 17, at 337.

41. *See infra* notes 167–74 and accompanying text.

42. *See generally* PAUL J. TOSCANO, SECULARISM, NEUTRALITY AND THE SUPREME COURT: INVISIBLE RELIGION IN THE PUBLIC SCHOOLS 15–16 (1990).

43. “[W]hen unmodified by other principles, separationism leads to the quiet advancement of majoritarian bias: by separating religion from the public sphere, it perpetuates, indeed strengthens, the civil religion within that sphere.” *See Religion and the State*, *supra* note 24, at 1636–37.

44. *See infra* notes 209–26 and accompanying text.

45. *See Beerworth*, *supra* note 17, at 335 (noting that the Free Exercise Clause is often overlooked since it lacks self-contained and absolutist language and is thus subject to any constraints emanating from the Establishment Clause); *see also* *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (“The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.”).

46. *See Esbeck*, *supra* note 23, at 11–12.

accommodationist/separationist, unitary/disassociation, and rights-based/structural interpretive debates. It ultimately concludes that a structural unitary-accommodative approach to the Establishment Clause may prove the optimal route to secure free exercise rights within an establishment context. To this end, Section II analyzes the historical trends of Establishment doctrine, concentrating on (1) the separationist versus accommodationist understanding of the Establishment Clause, (2) the disassociated versus unitary usage of the Establishment and Free Exercise Clauses, and (3) the rights-based versus structural interpretation of the Establishment Clause. Section III considers the weaknesses and strengths of these conflicting interpretations, examining Establishment Clause readings that prompt the removal of free exercise considerations in an establishment discourse. Section IV proposes a new Establishment Clause test, which attempts to resolve the free exercise dilemma by adopting a structural unitary-accommodationist approach to the Establishment and Free Exercise Clauses. Finally, Section V will apply the proposed structural unitary-accommodationist test to a series of hypothetical Religion Clause cases and hypothesize on the future of religious symbol jurisprudence in the courts.

## II. FOUNDATIONS OF ESTABLISHMENT JURISPRUDENCE

Religious liberty has been described as America's first freedom—the cornerstone of our political foundation and the privilege that prompted our Pilgrim forefathers to cross the sea.<sup>47</sup> Yet it also constitutes a hotly contested constitutional right—one that has at times alienated both believers and nonbelievers and divided the courts. It is unlikely the Founders envisioned the divisiveness that would erupt over the religious clauses, for their origin is a surprisingly innocuous one.<sup>48</sup>

### *A. The First Amendment: An Establishment and Free Exercise Clause Genesis*

In 1789, James Madison submitted ten proposed amendments to the recently ratified Constitution, the first of which addressed the

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47. Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1243 ("[T]he Free Exercise Clause and the Establishment Clause are the first clauses of our First Amendment, making them our 'first freedoms.'").

48. THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 194 (1986) ("Americans in 1789 largely believed that issues of Church and State had been satisfactorily settled by the individual states.").



coexistence of religion and the state. The draft of that Religion Clause read, “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.”<sup>49</sup> The House and Senate modified the passage several times before both houses passed it into law, with the final clause reading, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”<sup>50</sup>

The first sentence of the amendment allows for multiple interpretations, and its pliancy plays a major role in the religious clause debate today. Three Religion Clause interpretive trends are particularly pertinent in this debate: (1) the separationist versus accommodationist understanding of the Establishment doctrine, (2) the disassociated versus unitary usage of the Establishment and Free Exercise Clauses, and (3) the rights-based versus structural interpretations of the Religion Clauses.

### *1. Separationism versus accommodationism*

The breadth of the Establishment Clause is a central issue in the ongoing Religion Clause debate. The clause’s terminology does not clearly indicate what the Founders<sup>51</sup> meant to prohibit when they barred the “establishment of religion.” The original wording of James Madison’s draft of the First Amendment suggests that the “establishment of religion” doesn’t necessitate complete separation of church and state but rather prohibits the preferential treatment by the federal government to any one religion.<sup>52</sup>

Similar to Madison’s version of the amendment, early drafting reports of the clause also support an interpretation promoting the *inclusion*, not *expulsion*, of God in the state. For example, one congressman strongly opposed shortening the original draft of the Establishment Clause, fearing that the abridged version—included in our

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49. LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 75 (1986).

50. U.S. CONST. amend. I.

51. Importantly, the Founders were by no means a homogenous body with a single disposition. So often we seek the Founders’ “original intent,” but it is highly unlikely that the Framers saw the number of meanings in the highly pliant Amendment that we see today, leaving us to wonder which interpretation captures the Founders’ actual motives and intent.

52. See GEDICKS, *supra* note 32, at 14. The aversion to the state-support of a single religion relates, most likely, to the Founders’ aversion to the Church of England, which was a “national religion.” *Id.*

Constitution today—“might be thought to have a tendency to abolish religion altogether.”<sup>53</sup> Another member of the House expressed his “hope[s] . . . [that] the amendment would be made in such a way as to secure the rights of conscience and a free exercise of the rights of religion, but not to patronize those who professed no religion at all.”<sup>54</sup>

It is also possible that in precluding government establishment of religion, the Framers meant only to remove the question of establishments from the *federal* government while leaving matters of religious involvement to the states.<sup>55</sup> Such an interpretation squares with the fact that at least six states had government-supported churches when the First Amendment was adopted in 1789.<sup>56</sup>

Conversely, various House drafts of the amendment suggest that the Establishment Clause was included not just to prohibit the congressional establishment of a single American church but to remove congressional involvement in religious matters generally.<sup>57</sup> This line of interpretation—often termed “separationism”—advocates the complete separation of church and state, such that any commingling between the two is deemed a religious “establishment.”<sup>58</sup>

*a. Early trends: Jefferson’s insurmountable wall.* Thomas Jefferson did much to promote a separationist interpretation of the Establishment Clause with his “wall of separation” letter, written to a Baptist Association frustrated with the First Amendment’s apparent exclusion of religion from the government.<sup>59</sup> In that letter, Jefferson explained that by

53. 1 ANNALS OF CONG. 729 (Joseph Gales ed., 1834).

54. TOSCANO, *supra* note 42, at 64.

55. GEDICKS, *supra* note 32, at 14; *see also* Esbeck, *supra* note 23, at 16 (arguing that the “vertical restraint” of the Establishment Clause prevented the government from “intermeddling in a matter that was considered the sole prerogative of each state”).

56. Z. Ryan Pahnke, Note, *Originalism, Ceremonial Deism and the Pledge of Allegiance*, 5 NEV. L.J. 742, 761 (2005) (citing AKHIL REED AMAR, *THE BILL OF RIGHTS* 32 (1998)). The Establishment Clause was arguably created to prevent federal interference with these state institutions. *Id.*

57. At one point during the revision process, the Establishment Clause read, “Congress shall make no laws touching religion, or infringing the rights of conscience.” LEVY, *supra* note 49, at 58.

58. *See* Harold E. Fey, *An Argument for Separation*, in *THE WALL BETWEEN CHURCH AND STATE* 26, 35–36 (Dallin H. Oaks ed., 1963).

59. *Reynolds v. United States*, 98 U.S. 145, 164 (1878). Portions of Jefferson’s letter read as follows:

Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature

passing the Establishment Clause, “th[e] legislature . . . buil[t] a wall of separation between church and State.”<sup>60</sup> This separation theory ultimately advocates for a “high and impregnable” partition between religion and the state.<sup>61</sup>

Thomas Jefferson’s wall of separation theory was not eagerly adopted by early America.<sup>62</sup> Separation “conflicted with the religious and moral assumptions”<sup>63</sup> of the country and seemed an impractical endeavor to many who viewed religion “as a fully integrated part of the life of the nation.”<sup>64</sup> However, despite a strong tradition of accommodationist church-state relations, the separationist theory found a place in early America. On a visit to the country in the 1830s, Alexis de Toqueville observed,

I found that [American Catholic clergy] . . . all attributed the peaceful dominion of religion in their country mainly to the separation of church

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should ‘make no law respecting an establishment of religion or prohibiting the free exercise thereof,’ thus building a wall of separation between church and State.

*Id.* (quoting Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802)).

60. *Id.*

61. *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

62. *See* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 144–89 (2002) (noting the Baptist backlash against Jefferson’s proposed separation principle and the general disregard for the wall principle as applied to government). Hamburger comments that “notwithstanding the enthusiasm of a few intellectuals in Europe and the brief support of one group of Baptists in Virginia in 1783, it is difficult to find dissenting denominations or even many individuals in America prior to 1800 who clearly advocated the separation of church and state.” *Id.* at 64.

Although Jefferson’s separationist theory speaks to one Establishment Clause interpretation, it is by no means all-inclusive, and does not reflect the Founders’ intentions any more than an accommodationist theory does. Indeed, some historians argue that a strict separation of church and state is “very different from the [intent of] the religious dissenters whose demands shaped the First Amendment” and that the “wall of separation” imposes limits on government “far beyond” and “contrary” to what many Americans demanded. *Id.* at 9, 12. Even today, a strict separationist theory is an impractical standard, which oversimplifies the complex religious liberty discourse. *See id.* at 479–81; *see also* *Lynch v. Donnelly*, 465 U.S. 668, 668 (1984) (according to the decision summary, “The concept of a ‘wall’ of separation between church and state is a useful metaphor but is not an accurate description of the practical aspects of the relationship that in fact exists. The Constitution does not require complete separation of church and state . . . .”); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1452 (1990) (“[W]hile Jefferson was one of the most advanced advocates of disestablishment, his position on free exercise was extraordinarily restrictive for his day.”); Lisa M. Kahle, Comment, *Making “Lemon-Aid” from the Supreme Court’s Lemon: Why Current Establishment Clause Jurisprudence Should Be Replaced by a Modified Coercion Test*, 42 SAN DIEGO L. REV. 349, 393 (2005).

63. HAMBURGER, *supra* note 62, at 189.

64. *Id.* *But see* Esbeck, *supra* note 23, at 23 (“During the nineteenth century, the progressive opinion in state governments regarded religion as an institution that should be supported voluntarily and thus not subject to the heavy hand of governmental involvement.”).

and state. I do not hesitate to affirm that during my stay in America I did not meet a single individual, of the clergy or the laity, who was not of the same opinion on this point.<sup>65</sup>

Such separationist theories found a following in the early nineteenth century, surfacing as a platform issue for Republicans who sought to remove powerful Federalist ministers from the political arena.<sup>66</sup> Separationism later found marginal popularity among anti-Catholic nativists who adopted the doctrine as an expression of their anticlerical views.<sup>67</sup>

*b. Everson and the strict separationist camp.* The courts did not adopt a separationist response to the Establishment Clause until the 1940s<sup>68</sup> and essentially endorsed an accommodationist theory until that point.<sup>69</sup> *Everson v. Board of Education*<sup>70</sup> launched the modern Establishment Clause epoch<sup>71</sup> in which courts adopted a strict separationist approach to church-state interaction by reference to Jefferson's formidable wall of separation. In that decision, the Supreme Court adopted a hard-line approach to the question of whether a tax

65. 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 308 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf, Inc. 1972) (1840).

66. HAMBURGER, *supra* note 62, at 119–29. “Separation was an idea first introduced into American politics by Jefferson’s allies, the Republicans, who used it to elicit popular distaste against Federalist clergymen in their exercise of their religious freedom.” Notably, these clergymen generated a powerful sway vote against Thomas Jefferson in the election of 1800, “inveigh[ing] against Jefferson, often from their pulpits, excoriating his infidelity and deism.” *Id.* at 109–10.

67. *Id.* at 193–251.

68. *See, e.g.*, Robert M. Hutchins, *The Future of the Wall*, in *THE WALL BETWEEN CHURCH AND STATE*, *supra* note 58, at 17 (“[A]ll was quiet along the wall until *Everson v. Board of Education*.”).

69. *See, e.g.*, Avern L. Cohn & Bryan J. Anderson, *Religious Liberty in Public Life: Ten Commandments, Other Displays & Mottoes*, (June 28, 2005), [http://www.firstamendmentcenter.org/rel\\_liberty/establishment/topic.aspx?topic=public\\_displays](http://www.firstamendmentcenter.org/rel_liberty/establishment/topic.aspx?topic=public_displays). Cohn and Anderson note that the Supreme Court

seemed uneasy with [Jefferson’s strict separation] principle in some early cases when it declared that the United States is a “Christian country” in *Vidal*, and a “Christian nation” in the 1892 decision *Church of Holy Trinity v. United States*. The Supreme Court of South Dakota as late as 1929 declared this a “Christian nation” and Christianity the “national religion” in the case *State ex rel. Finger v. Weedman*.

*Id.*

70. 330 U.S. 1 (1947) (holding that under the Establishment Clause no tax in any amount “can be levied to support any religious activities or institutions”).

71. Kevin Pybas, *Does the Establishment Clause Require Religion To Be Confined to the Private Sphere?*, EXPRESSO PREPRINT SERIES, April 6, 2005, at 3, <http://law.bepress.com/cgi/viewcontent.cgi?article=2865&context=expresso>.

could be levied to support religious activities or institutions.<sup>72</sup> Although the Court ruled that the law in question—a transportation reimbursement to parents who sent their children to either public or parochial school—did not violate Establishment Clause standards, it is clear that the Court wished to extend the separationist doctrine beyond the scope of the ruling.<sup>73</sup> In an oft-quoted portion of that decision, the Court declared that “[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.”<sup>74</sup>

The *Everson* Court’s benchmark separationist methodology was used often in the mid-twentieth century to “justify encroachments on religious practice . . . cloaked in the guise of some non-religious purpose.”<sup>75</sup> In seeking to erect Jefferson’s wall of separation, the Court adopted an establishment policy that regarded the Establishment Clause as a rigid partition between church and state. As explained by one legal commentator, the result of such a policy is that “where government increases, religion must decrease . . . [and that] government and religion mix like oil and water, that where government treads, religion must flee.”<sup>76</sup>

*c. Warren’s neutrality retreat.* Although courts applied the wall of separation approach for decades after the *Everson* decision,<sup>77</sup> it did not last long as the Supreme Court’s Establishment Clause standard. This could be attributed to the fact that *Everson’s* approach failed to deal adequately with the social reality of church-state interaction.<sup>78</sup> This

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72. See *Everson*, 330 U.S. at 16 (“No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.”).

73. See Beerworth, *supra* note 17, at 335 (“The Court’s actual holding in *Everson* belied its unabashed yearning for a sprawling and historically grounded separationist doctrine.”).

74. *Everson*, 330 U.S. at 18.

75. William A. Carroll, *The Constitution, the Supreme Court, and Religion*, 61 AM. POL. SCI. REV. 657, 661 (1967) (quoting *Braunfeld v. Brown*, 366 U.S. 599, 613 (1961) (Brennan, J., dissenting)).

76. STAVER, *supra* note 19, at 19.

77. See, e.g., *Engel v. Vitale*, 370 U.S. 421, 425 (1962) (“[P]rayer in [the] public school system breaches the constitutional wall of separation between Church and State.”); *Epperson v. Arkansas*, 393 U.S. 97, 106–07 (1968) (holding an Arkansas statute that prevented a teacher from explaining the theory of evolution to her students was unconstitutional based on the First Amendment because it violated Jefferson’s “wall of separation”).

78. See *Religion and the State*, *supra* note 24, at 1636 (“Separationism . . . has proven to be unadministrable in the post-New Deal era. It asks the government to cede control over realms in which it has built up elaborate regulations in the modern welfare state.”); Pahnke, *supra* note 56, at

failure prompted a shift from strict separationism to “purposive and substantive neutrality.”<sup>79</sup>

The Establishment Clause neutrality approach—implemented by the Warren Court—purged governmental policies that “formally or functionally inhibited religion.”<sup>80</sup> The approach was adopted on two levels: intent and neutrality. Purposive neutrality necessitated that the government’s intent or purpose reflect a secular or nonreligious motivation.<sup>81</sup> Substantive neutrality examined the actual effect of the government’s actions, rejecting such actions that inhibited or advanced religion.<sup>82</sup> To some degree, these neutrality approaches contemplated the inevitability of church-state interactions, thereby easing burdens on religious activity.<sup>83</sup> Such establishment constructions signaled a notable shift away from the unreasonably strict separationist doctrine.<sup>84</sup>

*d. The modern tests: Lemon, endorsement, and coercion standards.* The modern era’s separationist approach to church and state relaxed as the courts adopted neutrality policies that addressed the intent of church-state interactions and the actual effect of such collaborations. The courts developed three benchmark Establishment Clause tests reflecting the neutrality stance that has influenced much of modern Establishment Clause jurisprudence.

The Burger Court introduced the first of these tests, adopting both purposive and substantive neutrality principles in a hallmark Establishment case, *Lemon v. Kurtzman*.<sup>85</sup> In that decision, the Court outlined a three-step analysis for determining the constitutionality of disputed church-state interaction. For the contested symbol or activity to

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762 (“[The wall of separation’s] simplicity has caused an increasing number of Americans to forget that there have been, and are meant to be, numerous connections between religion and government.”).

79. Beerworth, *supra* note 17, at 335 (citing *Sch. Dist. v. Schempp*, 374 U.S. 203, 222 (1963)).

80. *Id.*

81. *Id.* at 335 n.17; *see also* *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968) (holding that a New York statute that provided free textbooks to schoolchildren in public and parochial schools without differentiation did not either advance or inhibit religion, because “[t]he express purpose of [the statute] was . . . the furtherance of the educational opportunities for the young”).

82. *See Allen*, 392 U.S. 236, 248 (holding also that the New York statute did not violate the Establishment Clause because its effect did not advance or inhibit religion); Beerworth, *supra* note 17, at 335 n.17.

83. Beerworth, *supra* note 17, at 335–36.

84. *Id.*

85. 403 U.S. 602 (1971).

meet Establishment Clause standards, it (1) must have a secular purpose, (2) must have a principal or primary effect that does not advance or inhibit religion, and (3) cannot foster an excessive government entanglement with religion.<sup>86</sup>

A decade later, the Rehnquist Court formulated a second test that similarly espoused purposive and substantive neutrality standards. In her concurring opinion in *Lynch v. Donnelly*,<sup>87</sup> Justice Sandra Day O'Connor outlined two areas in which government-state interactions constituted a violation of Establishment standards: (1) when the church-state action constitutes "excessive entanglement with religious institutions" and (2) when the church-state interaction endorses or disapproves of religion.<sup>88</sup> The "endorsement" test applies a "reasonable observer" standard when determining whether or not "the [religious] expression . . . indicat[es] state endorsement."<sup>89</sup>

Lastly, in 1992 the Rehnquist Court added a final test to its Establishment Clause constellation, reviewing state-church interactions by a "coercion" yardstick.<sup>90</sup> Justice Kennedy advanced a coercion test in the majority opinion for *Lee v. Weisman*, holding that a prayer offered at a middle school graduation could be seen by school children as "an attempt to employ the machinery of the State to enforce a religious orthodoxy."<sup>91</sup> Unlike the endorsement test, the coercion analysis did not apply a "reasonable observer" standard, opting to avoid the "risk of indirect coercion" by applying the coercion examination to the at-risk group: young students in a public school context.<sup>92</sup> In essence, the coercion test medially reflects a substantive approach to the Establishment Clause since the test does not analyze the actual effect of

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86. *Id.* at 612–13 (citing *Allen*, 392 U.S. at 243 (1968)) (quoting *Walz v. Tax Comm'n.*, 397 U.S. 664, 674 (1970)).

87. 465 U.S. 668 (1984) (finding that a city Christmas display including a nativity scene did not violate the Establishment Clause).

88. 465 U.S. at 687–88 (O'Connor, J., concurring). Justice O'Connor noted, "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." *Id.* at 688.

89. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 784 (1995) (Souter, J., concurring).

90. *See Lee v. Weisman*, 505 U.S. 577, 587 (1992) (invalidating a public school district's practice of inviting a religious figure to deliver a nonsectarian invocation during the middle school graduation ceremony).

91. *Id.* at 592.

92. *Id.* at 592–98.

state-church interaction but instead examines the *potential* effect of such collaboration.

The modern tests—*Lemon*, endorsement, and coercion—constitute standards that have governed a majority of the Court’s modern Establishment Clause jurisprudence. In recent years, the Rehnquist Court has employed these tests—particularly *Lemon*—to further an accommodationist gloss on the neutrality doctrine, focusing heavily on the substantive aspects of an Establishment Clause analysis.<sup>93</sup> On a fundamental level, Justice Rehnquist’s stance tacitly subscribes to an understanding of the Establishment Clause that at least partially mirrors Madison’s initial draft of the First Amendment, suggesting that the clause was meant to prevent the formation of a national church, or at most bar the national preference of one religion over another.<sup>94</sup> In *Wallace v. Jaffree*, Chief Justice Rehnquist’s dissenting opinion argued that the Establishment Clause merely “forbade establishment of a national religion, and forbade preference among religious sects or denominations.”<sup>95</sup> Rehnquist’s approach to Establishment jurisprudence moves far from the strict separation of the Court, in some ways endorsing a *de facto* accommodationist approach to church-state relations.<sup>96</sup>

*e. Ceremonial deism and the revived separation of church and state.* Current trends in Establishment Clause jurisprudence have moved the Establishment analysis to a historical examination of church-state interaction and its role in the nation’s heritage.<sup>97</sup> This analysis, termed “ceremonial deism,”<sup>98</sup> identifies historically significant religious

93. See Beerworth, *supra* note 17, at 336. See also, for example, *Wallace v. Jaffree*, 472 U.S. 38, 106 (Rehnquist, J., dissenting), in which Chief Justice Rehnquist enunciates the nonpreferentialist position as forbidding “preference among religious sects or denominations.” *Id.* Such a stance would allow government to aid religion on a non-discriminatory basis.

94. See *supra* notes 49–56 and accompanying text.

95. *Wallace*, 472 U.S. at 106 (Rehnquist, J., dissenting); see also *Lynch v. Donnelly*, 465 U.S. 668, 673–74 (1984) (“A significant example of the contemporaneous understanding of [the Establishment] Clause is . . . [that in] the very week that Congress approved the Establishment Clause . . . it enacted legislation providing for paid Chaplains for the House and Senate.”).

96. See *Zelman v. Simmons-Harris*, which upheld a facially neutral school voucher program consisting of substantial aid transfers to overwhelmingly religious school coffers. 536 U.S. 639 (2002).

97. The “ceremonial deism” approach is applied mainly as a gloss to modern Establishment Clause trends and thus coexists with the three aforementioned Establishment Clause tests.

98. “The phrase, ‘ceremonial deism,’ was coined by former Yale Law School Dean Walter Rostow in a 1962 lecture delivered at Brown University.” Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2091 (1996). Since Rostow’s



practices as a “class of public activity, which . . . [could] be accepted as so conventional and uncontroversial as to be constitutional.”<sup>99</sup> The ceremonial deist doctrine is a serious contender with substantive neutrality in cases defending the constitutionality of religious tokens such as the national motto,<sup>100</sup> legislative prayer,<sup>101</sup> religious holiday displays,<sup>102</sup> the Ten Commandments,<sup>103</sup> and the Pledge of Allegiance.<sup>104</sup>

In a 1970 case, *Aronow v. United States*,<sup>105</sup> the Ninth Circuit deemed the national motto, “In God We Trust,” compatible with the Establishment Clause, finding that “[i]t is quite obvious that the national motto and the slogan on coinage and currency ‘In God We Trust’ has nothing whatsoever to do with the establishment of religion. . . . [I]t is excluded from First Amendment significance because the motto has no theological or ritualistic impact.”<sup>106</sup> The Supreme Court decision *Marsh v. Chambers*<sup>107</sup> likewise held that a government-endorsed religious token—in this case a legislative session prayer—was constitutional because it only amounted to “ceremonial practices” and was not at its core religious.<sup>108</sup>

One year later, the Court held in *Lynch v. Donnelly* that a city’s display of a Christmas crèche did not violate the Establishment Clause due to the display’s “historical origins of this traditional event long recognized as a National holiday.”<sup>109</sup> Though Justice Brennan questioned the constitutionality of the *Lynch* decision, he noted that religious symbols like the Pledge, the national motto, and Thanksgiving are “uniquely suited to serve such wholly secular purposes as

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identification of the trend, the term has been used by the courts to describe the historical justification for religious symbols or practices. *See, e.g.*, *County of Allegheny v. ACLU*, 492 U.S. 573, 603–04 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting).

99. Arthur E. Sutherland, Book Review, 40 *IND. L.J.* 83, 86 (1964) (reviewing WILBER G. KATZ, *RELIGION AND AMERICAN CONSTITUTIONS* (1963)).

100. *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970).

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

102. *Allegheny*, 492 U.S. at 620.

103. *Van Orden v. Perry*, 125 S. Ct. 2854 (2005).

104. *Elk Grove Unified Sch. Dist. v. Newdow*, 524 U.S. 1, 14–36 (2004).

105. 432 F.2d at 242.

106. *Id.* at 243–44.

107. 463 U.S. 783 (1983) (finding that the practice of opening the Nebraska Legislature with a prayer offered by a state-chosen chaplain did not violate Establishment Clause standards).

108. *Id.* at 815 (Brennan, J., dissenting) (quoting L. PFEFFER, *CHURCH AND STATE FREEDOM* 170 (rev. ed. 1967)).

109. 465 U.S. 668, 680 (1984).

solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely nonreligious phrases.”<sup>110</sup> Such symbols are vestiges of our religious past, he argued, and are “probably necessary to serve certain secular functions, and that necessity, coupled with their long history, gives those practices an essentially secular meaning.”<sup>111</sup> Most recently, the Supreme Court upheld the display of a Ten Commandments monument on the grounds of the Texas state capitol since “[m]embers of th[e] Court have concluded that the term or symbol at issue has no religious meaning by virtue of its ubiquity or rote ceremonial invocation.”<sup>112</sup>

Fundamentally, *Aronow, Marsh, Lynch*, and other “ceremonial deist” rulings<sup>113</sup> advocate the notion that religious practices and symbols may pass Establishment Clause muster due to historic precedence and secular context.<sup>114</sup> Such a view bypasses traditional Establishment Clause tests, proving that history can be “a vehicle for altering the religiousness of certain practices and symbols.”<sup>115</sup>

## *2. Unification versus disassociation: the bifurcation of the religion clauses*

Establishment Clause jurisprudence is additionally divided regarding whether the Establishment and Free Exercise Clauses were intended as a single passage to be interpreted in tandem or whether the Founders meant the clauses to be interpreted separately. As has been noted by

110. *Id.* at 716–17 (Brennan, J., dissenting).

111. *Id.* at 717.

112. *Van Orden v. Perry*, 125 S. Ct. 2854, 2866 (2005) (Thomas, J., concurring); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37 (2004) (O’Connor, J., concurring); *Freethought Soc’y v. Chester County*, 334 F.3d 247, 266 (3d Cir. 2003) (holding that the display of a Ten Commandments plaque outside a county courthouse did not violate the Establishment Clause because that religious symbol, “when viewed in the context of its history, is not ‘real threat,’ but is instead [a] ‘mere shadow’” (quoting *Sch. Dist. v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring))).

113. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 630–31 (1989) (O’Connor, J., concurring) (arguing that ceremonial references to God are permissible because of their nonsectarian nature and their long-standing existence along with the fact that they are “generally understood as a celebration of patriotic values rather than particular religious beliefs”).

114. Alexandra D. Furth, Comment, *Secular Idolatry and Sacred Traditions: A Critique of the Supreme Court’s Secularization Analysis*, 146 U. PA. L. REV. 579, 587 (1998) (explaining that the Court analyzes history not only for original intent, but also for its perspective on the religious nature of symbols and practices).

115. Pahnke, *supra* note 56, at 760 (quoting *Marsh v. Chambers*, 463 U.S. 783, 793 (1983)).

Supreme Court justices, under certain circumstances the Establishment and Free Exercise Clauses are at odds with one another, one clause tugging toward limitation of religious exercise and the other pulling toward expansion of exercise rights.<sup>116</sup> The Establishment Clause, which requires that “Congress shall make no law respecting an establishment of religion,”<sup>117</sup> seems to engender “government discrimination against religion,”<sup>118</sup> while the Free Exercise Clause, which commands that “Congress shall make no law . . . prohibiting the free exercise [of religion],”<sup>119</sup> “singles out religion for favorable treatment.”<sup>120</sup> Thus, in principle, the Establishment Clause forbids the accommodative church-state interaction that the Free Exercise Clause demands.<sup>121</sup>

The Supreme Court recognizes this paradox, noting that it “has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.”<sup>122</sup> Justice O’Connor describes the dilemma as one of application:

On the one hand, a rigid application of [the Establishment Clause] would invalidate legislation exempting religious observers from generally applicable government obligations. . . . On the other hand, judicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause.<sup>123</sup>

Despite the conceptual differences between the establishment and free exercise doctrines, the Clauses are not wholly contradictory.<sup>124</sup> Justice O’Connor has noted that “[a]lthough a distinct jurisprudence has enveloped each of [the Religion] Clauses, their common purpose is to secure religious liberty.”<sup>125</sup> A possible solution to the disparate interests

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116. See, e.g., *Schempp*, 374 U.S. at 309 (Stewart, J., dissenting). Justice Stewart noted, “[W]hile in many contexts the Establishment Clause and the Free Exercise Clause fully complement each other, there are areas in which a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause.” *Id.*

117. U.S. CONST. amend. I.

118. Beerworth, *supra* note 17, at 334.

119. U.S. CONST. amend. I.

120. Beerworth, *supra* note 17, at 334.

121. *Id.* at 335.

122. *Walz v. Tax Comm’n*, 397 U.S. 664, 668–69 (1970).

123. *Wallace v. Jaffree*, 472 U.S. 38, 82 (1985) (O’Connor, J., concurring).

124. See, e.g., *Brown v. Gilmore*, 258 F.3d 265, 273 (4th Cir. 2001) (identifying a shared goal of the religious clauses “to protect religious liberty”).

125. *Wallace*, 472 U.S. at 68 (O’Connor, J., concurring).

of the Religious Clauses is to synthesize the Clauses in practice, interpreting the Clauses based on their shared interest in “religious liberty.”<sup>126</sup>

There are two fundamental ways to approach the apparent conflict between the Religion Clauses: (1) a “bifurcated” approach that advocates treating the Establishment and Free Exercise Clauses as separate rights, which are to be considered in independent spheres;<sup>127</sup> and (2) a “unitary” interpretation that recognizes the competing interests of the Clauses but seeks to unite the rights through a synoptic reading of the Clauses based on their shared interest: religious liberty.<sup>128</sup>

*a. Unitary/disassociation trends.* It is difficult to distinguish an early trend in the treatment of the Free Exercise Clause in an establishment context since the Establishment Clause was “basically . . . dormant from its inception until the 1940s when the Supreme Court said that it should be ‘incorporated’ into the Fourteenth Amendment making it applicable against the states.”<sup>129</sup> However, modern courts have tended to separate both clauses in practice, so that there are definitive categories of “Establishment Clause cases” and “Free Exercise cases.”<sup>130</sup>

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126. *Id.* Professor Mary Glendon advocates the view that the Religion Clauses do not contain contradictory principles but rather the single and fundamental command of religious liberty. She thus “depart[s] from the standard practice of referring to that amendment’s religion language as containing two clauses,” instead treating the First Amendment “as containing a single, coherent Religion Clause whose establishment and free exercise provisions are both in the service of the same fundamental value: religious freedom.” Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 478 n.8 (1991).

127. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 828–29 (1978). Professor Tribe argues that a bifurcated approach to the clauses would prevent the Establishment Clause from forbidding “‘legislation whose purpose or effect is to advance human dignity, equality, national destiny, freedom, enlightenment, and morality[.]’ . . . especially if the legislation was the result of pressure by church or religious groups.” *Id.* at 831 (quoting Marc Galanter, *Religious Freedom in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 266).

128. “Commentators have proposed strategies of . . . unification to reconcile the apparently growing conflict between the clauses. . . . Strategies of unification strike more deeply at the current doctrinal conflict. They propose, with varying degrees of persuasiveness, principles whose pursuit would effect a synoptic reading of the clauses.” *Religion and the State*, *supra* note 24, at 1634–35; see also Phillip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 860 (1986) (indicating unitary direction of First Amendment toward individual freedom).

129. Pahnke, *supra* note 56, at 760 (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)); see also Esbeck *supra* note 23, at 24 (“[T]he national-level restraint in the [Establishment] Clause was rarely brought into contention during the first half of this century.”).

130. See Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 674–75 (1980) (“[T]he Court’s separate tests for the Religion Clauses have provided virtually no guidance for determining when an accommodation for religion,

*b. Modern bifurcation and the association/separation paradox.* Notably, advocates of the separationist doctrine have tended to oppose a disassociated treatment of the Religion Clauses.<sup>131</sup> Landmark separationist decision, *Everson v. Board of Education*, emphasized the complimentary nature of the Religion Clauses, and the Court observed that both establishment and free exercise rights protect the government from religious institutions and preserve religious liberty.<sup>132</sup> Separationist ruling, *Abington School District v. Schempp*,<sup>133</sup> similarly advocated a unitary understanding of the Religion Clauses, most notably in Justice Brennan's concurring opinion, which states, "The inclusion of [establishment and free exercise] restraints . . . shows unmistakably that the Framers of the First Amendment were not content to rest the protection of religious liberty exclusively upon either clause."<sup>134</sup> As will be discussed shortly, this unitary understanding of the Religion Clauses does much to foster the religious liberty at the heart of the Clauses.<sup>135</sup>

While separationists generally support a unitary reading of establishment and free exercise rights, accommodationists tend to adopt a disassociated approach to the Religion Clauses.<sup>136</sup> In *Lee v. Weisman*,

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seemingly required under the Free Exercise Clause, constitutes impermissible aid to religion under the Establishment Clause."); Philip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 821–22 (1984) (noting that judges and commentators view the Religion Clauses as contradictory and tend to separate issues into one or the other category); *Religion and the State*, *supra* note 24, at 1633–34 ("As a result of the Court's differing standards, the outcome of cases may often depend on whether a particular dispute is characterized as an establishment or a free exercise claim.").

131. See Rezaei, *supra* note 26, at 508 (noting that strict separationists generally maintain that the Religion Clauses must be read together).

132. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947); see also *id.* at 40 (Rutledge, J., dissenting) (indicating that the Religion Clauses' interdependent ideas represent different facets of same general principle). But see *Engel v. Vitale*, 370 U.S. 421, 430 (1962) ("Although [the Religion Clauses] may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom.").

133. 374 U.S. 203, 219–20 (1963) (quoting *Zorach v. Clawson*, 343 U.S. 306, 312 (1952) ("[T]he First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the 'free exercise' of religion and an 'establishment' of religion are concerned, the separation must be complete and unequivocal.").

134. 374 U.S. 203, 232–33 (Brennan, J., concurring).

135. See *Religion and the State*, *supra* note 24, at 1635 ("Strategies of unification strike more deeply at the current doctrinal conflict.").

136. See Rezaei, *supra* note 26, at 511 ("Accommodationists argue that there is an inherent tension between the free exercise and establishment clauses and that if each were taken to its logical conclusion they will inevitably clash."); *Religion and the State*, *supra* note 24, at 1631 ("Both the Supreme Court and commentators currently perceive Religion Clause doctrine as a bipolar conflict."); Leitch, *supra* note 28, at 132–33 (asserting that in light of the perceived conflict between

the Court points to such a bifurcated methodology, noting that “[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.”<sup>137</sup> *Walz v. Tax Commission* similarly indicates accommodationist courts’ disassociated view that “the [Religion Clauses] are cast in absolute terms, and either[,] . . . if expanded to a logical extreme, would tend to clash with the other.”<sup>138</sup>

As will be discussed in the next section, free exercise rights are at particular risk under a bifurcated system since the Establishment Clause, historically and by nature, is the more controlling of the two clauses.<sup>139</sup> Thus, disassociated readings of the clauses tend to focus exclusively on Establishment Clause considerations even when free exercise issues are present.<sup>140</sup> In this way, the disassociated approach to the Religion Clauses may actually contradict accommodationists’ goal: to “respec[t] the religious nature of [the] people and accommodat[e] the public service to their spiritual needs.”<sup>141</sup>

### *3. Rights-based versus structural objectives: the intended aim of the Establishment Clause*

A final question that arises in the context of the Religion Clauses is whether the clauses are rights-based so that they both aim to preserve individual liberties, or whether the Free Exercise Clause is rights-based and the Establishment Clause is merely structural in the sense that it primarily monitors governmental influence in the religious arena. The unitary/disassociation debate stems in part from this final interpretive dispute. Fundamentally, a rights-based interpretation of both the Free Exercise and Establishment Clauses invokes the conflict at the heart of

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underlying principles of the Religion Clauses, the Supreme Court abandoned a strict separation doctrine).

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

138. *Walz v. Tax Comm’n*, 397 U.S. 664, 668–69 (1970). *See also* *Wallace v. Jaffree*, 472 U.S. 38, 82–83 (1985) (O’Connor, J., concurring) (justifying a separate and more flexible Establishment Clause analysis when Establishment rights conflict with the Free Exercise Clause); *Marsh v. Chambers*, 463 U.S. 783, 811 (1983) (Brennan, J., dissenting) (noting the conflicts that exist between the Establishment and Free Exercise Clauses).

139. *See infra* notes 220–30 and accompanying text.

140. “The Establishment Clause has been the enduring focal point of judicial tinkering in matters of religion; free exercise has ever been an unattractive afterthought. As long as this myopia persists, sound doctrinal answers to the more complex Religion Clause questions will remain extremely difficult to come by.” Beerworth, *supra* note 17, at 338.

141. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

the bifurcation argument.<sup>142</sup> If the Establishment Clause is viewed as securing an individual's freedom from religion and the Free Exercise Clause as safeguarding the right to exercise religion, the clauses inevitably collide.<sup>143</sup> Conversely, some legal scholars have argued that a rights-based understanding of the Free Exercise Clause and a structuralist interpretation of the Establishment Clause tend to reconcile perceived tension between the clauses.<sup>144</sup>

From its inception, the Establishment Clause has been burdened with conflicting rights-based and structural interpretations.<sup>145</sup> Carl H. Esbeck noted that nineteenth-century state-law interpretations of the Establishment Clause were based on "notions of individual freedom and equality among sects."<sup>146</sup>

The Supreme Court upheld a similar rights-based interpretation in *Larson v. Valente*,<sup>147</sup> where the Court invoked the Establishment Clause to strike down state charitable solicitation legislation that favored religious groups with substantial member-revenue, thus discriminating against newly formed religious sects.<sup>148</sup> The Court concluded that the preference of any religious denomination "violate[d] the Establishment Clause."<sup>149</sup> For the most part, however, twentieth-century courts have favored a structural interpretation that views the Establishment Clause not as a rights-based protection but as a structurally limiting device that demarcates governmental and religious spheres.<sup>150</sup> As will be discussed in the next section, such a structural view is fundamental to a cohesive relationship between the Religion Clauses.<sup>151</sup>

The rights-based/structuralist debate is an interesting one, especially in light of certain inconsistencies in the Court's treatment of the

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142. See *supra* notes 116–28 and accompanying text.

143. Esbeck, *supra* note 23, at 12.

144. This argument is dealt with later in this Comment. See *infra* notes 246–48 and accompanying text.

145. See Esbeck, *supra* note 23, at 21 ("[F]rom its inception the Establishment Clause . . . had the role of a structural clause rather than a rights-based clause.").

146. *Id.* at 23.

147. 456 U.S. 228 (1982).

148. *Id.* at 247 n.23.

149. *Id.* at 255.

150. See Esbeck, *supra* note 23, at 4 ("Since *Everson*, the Court has sub silentio given the Establishment Clause a far different application than if its object were to guarantee individual religious rights.").

151. See *infra* notes 240–45 and accompanying text.

question.<sup>152</sup> An example of such inconsistency is evidenced in the Court's approach towards standing issues in the Religion Clause context. Typically, claimants seeking redress from the court must have suffered a personal, concrete injury that can be rectified in a judicial setting.<sup>153</sup> Under a structural interpretation, however, the Court has applied a less rigorous standard, thereby allowing persons to assert Establishment Clause claims as federal taxpayers,<sup>154</sup> to assert violations for religious symbols on government property,<sup>155</sup> and to allege endorsement of religion in a manner violative of the Clause<sup>156</sup> even without specific injury.<sup>157</sup> This differs from rights-based free exercise claims where the Court requires individualized and concrete injury.<sup>158</sup>

The Court's dual standing policy may be based on the idea that under a structural doctrine, personal constitutional rights are not at stake, but instead constitutional limitations on the reach of governmental power.<sup>159</sup> Thus, while the rights-based Free Exercise Clause protects individual exercise of religion, the structurally based Establishment Clause sets checks on the reach of government within the religious sphere. These "checks must be honored whether or not [an] individual . . . suffer[s] a concrete 'injury in fact.'"<sup>160</sup>

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152. Esbeck, *supra* note 23, at 33. See also *id.* at 33–60 for a discussion of other rights-based versus structuralist disparities seen in the Court's treatment of class-wide remedies, church autonomy, and the nondelegation rule.

153. *Id.* at 33 (citing *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (holding that standing requires that plaintiffs allege some personal injury fairly traceable to the defendants' alleged conduct and seek a remedy that is judicially cognizable)).

154. See *Flast v. Cohen*, 392 U.S. 83 (1968).

155. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 778–82 (1995) (O'Connor, J., concurring); see also *Suhre v. Haywood County*, 131 F.3d 1083, 1086–88 (4th Cir. 1997).

156. See *Robinson v. City of Edmond*, 68 F.3d 1226 (10th Cir. 1995), *cert. denied*, 517 U.S. 1201 (1996); see also Esbeck, *supra* note 23, at 37–38 (noting that even the *Everson* Court allowed a taxpayer to pursue an Establishment claim without any discussion of standing).

157. See Esbeck, *supra* note 23, at 35–40.

158. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & St.*, 454 U.S. 464, 485–86 (1982) (holding that the violation of the Free Exercise Clause without identification of personalized injury suffered *as a consequence* of the constitutional error does not provide injury sufficient to confer standing under Article III).

159. See Esbeck, *supra* note 23, at 39.

160. *Id.* at 104.



### III. ESTABLISHMENT CLAUSE INTERPRETATIONS AND THE FREE EXERCISE DILEMMA

Clearly, there is much confusion concerning which interpretive approach best achieves the aims of the Religion Clauses.<sup>161</sup> This Part analyzes arguments for and against separationist and accommodationist readings of the Establishment Clause, unitary and bifurcated treatments of the Religion Clauses, and rights-based and structural applications. In addition, it addresses potential religious freedom concerns raised under current Establishment Clause tests, concluding that a unitary-accommodative approach may prove the optimal route to secure free exercise rights within an establishment context.

#### *A. Separationism, Accommodationism, and the Free Exercise Dilemma*

There has been little consensus on whether the Religion Clauses dictate an accommodationist or separationist approach.<sup>162</sup> Generally, historical movements indicate a shift from early accommodationist trends,<sup>163</sup> to a strict separationist stance,<sup>164</sup> back to a “flexible”<sup>165</sup> accommodationist interpretation<sup>166</sup> of the Establishment Clause doctrine.

Some scholars—and even some courts—argue for a strict separationist interpretation of the Establishment Clause.<sup>167</sup> Such separationists view the clause as precluding any interaction between religion and the government,<sup>168</sup> including any aid to religion, be it direct or indirect.<sup>169</sup> Ultimately, separationists maintain that a strict

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161. See Cohn & Anderson, *supra* note 69 (maintaining that recent Supreme Court decisions demonstrate little consensus over what approach to apply when evaluating the constitutionality of potential Establishment Clause violations).

162. See *id.*

163. See *supra* notes 51–56 and accompanying text.

164. See *supra* notes 57–76 and accompanying text.

165. See Rezaei, *supra* note 26, at 521–26.

166. See *supra* notes 77–96 and accompanying text.

167. See generally *Everson v. Bd. of Educ.*, 330 U.S. 1, 28–74 (Rutledge, J., dissenting); David R. Dow, *Toward a Theory of the Establishment Clause*, 56 UMKC L. REV. 491 (1988) (maintaining that strict neutrality is a fundamental concept of the Establishment Clause); Steve Gey, Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463 (1981).

168. See *Everson*, 330 U.S. at 31–32 (Rutledge, J., dissenting) (“The Amendment was broadly but not loosely phrased. . . . [T]he object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.”).

169. See *id.* at 33 (finding that the Establishment Clause prohibits any state support of religion); see also Rezaei, *supra* note 26, at 507–09.

separationist view of the Establishment Clause, or the “wall of separation” doctrine, corresponds with the Framers’ intent.<sup>170</sup> In *Everson v. Board of Education*, the Court held that the Establishment Clause precluded interaction between church and state, all governmental aid to religion, and any government participation in religious affairs.<sup>171</sup> As explained by the Court, “In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and State.’”<sup>172</sup> Justice Brennan’s dissent in *Lynch v. Donnelly* expresses the view that the Establishment Clause reserves the “promoti[on]” of religious beliefs strictly to “churches, religious institutions, and spiritual leaders.”<sup>173</sup> The Court similarly noted in *Aguilar v. Felton* that to best serve its purpose, religion must be left entirely free within its “respective sphere.”<sup>174</sup>

Other scholars and courts have noted the complications of a separationist interpretation of the Establishment Clause.<sup>175</sup> They remark that logistically a strict separationist approach might be unrealistic.<sup>176</sup> One scholar explained, “Separationism . . . has proven to be unadministrable in the post-New Deal era. It asks the government to cede control over realms in which it has built up elaborate regulations in the modern welfare state.”<sup>177</sup> Another commentator observed, “[The] broad tendency [of the Constitution] to penetrate all social groups and institutions, including religious ones, with ‘universal’ ordering principles necessarily implies the destruction of religious consciousness.”<sup>178</sup>

The “universal” separation of church and state advocated by separationists might prove difficult to apply: religion is an integral part

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170. See LEVY, *supra* note 49, at 89 (maintaining that the Religion Clauses are meant to preclude government from legislating on subject of religion); see also *Everson*, 330 U.S. at 18 (stating that no aid may be given to religion, while quoting Jefferson’s words that that Establishment Clause was intended to erect a “wall between church and state”).

171. *Everson*, 330 U.S. at 16.

172. *Id.*

173. 465 U.S. 668, 725 (1984) (Brennan, J., dissenting).

174. 473 U.S. 402, 410 (1985) (quoting *McCullum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948) (“[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.”)).

175. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 598 (1992); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *Religion and the State*, *supra* note 24, at 1636 (positing that separationism is both “unworkable in practice” and “unviable in theory”).

176. See *Religion and the State*, *supra* note 24, at 1636.

177. *Id.*

178. Gerard V. Bradley, *Dogmatomachy: A Privatization Theory of the Religion Clauses*, 30 ST. LOUIS U. L.J. 275, 280 (1986).

of American culture and history, and thus serves both secular and religious functions.<sup>179</sup> In his *Lynch* concurrence, Justice Brennan noted, “The practices by which the government has long acknowledged religion are . . . probably necessary to serve certain secular functions.”<sup>180</sup> The Supreme Court similarly noted,

In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the [religious] practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance . . . is simply a tolerable acknowledgment of beliefs widely held among the people of this country.<sup>181</sup>

Indeed, even in the landmark separationist case, *Everson v. Board of Education*, a separationist doctrine proved unworkable and problematic, thereby causing the Court to find a parochial transportation reimbursement plan permissible—a decision that fundamentally violated the “no aid”<sup>182</sup> separationist policy posited in the first half of the opinion.<sup>183</sup>

There are also inherent inconsistencies in a strict separationist policy.<sup>184</sup> The stricter versions of separationism call for no aid to

179. See Pahnke, *supra* note 56, at 762 (“[The wall of separation’s] simplicity has caused an increasing number of Americans to forget that there have been, and are meant to be, numerous connections between religion and government.”).

180. *Lynch v. Donnelly*, 465 U.S. 668, 717 (1984).

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

182. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947) (“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.” (citation omitted)).

183. “[T]he undertones of the [*Everson*] opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters.” *Everson*, 330 U.S. at 19 (Jackson, J. and Rutledge, J., dissenting).

Justice Black’s prohibitions, applied rigorously, would forbid reimbursement, because it would amount to a transportation subsidy for parochial schools. The general benefit requirement, in contrast, would oppose the exclusion of parochial school students (and their parents) from the transportation reimbursement plan because attendance at parochial school is not a sufficient reason for exclusion.

John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 95 n.57 (1986) (maintaining that *Everson* demonstrates the narrow scope of strict neutrality doctrine).

184. See generally TRIBE, *supra* note 127, § 14-3, at 1167, § 14-7, at 1189 (arguing that in view of inherent inconsistencies in strict neutrality theory—allowing subsidies to religious institutions as long as religious classifications are not used—“it is not surprising that the Supreme Court has rejected strict neutrality”); Kenneth Mitchell Cox, Recent Development, *The Lemon Test*

religion whatsoever.<sup>185</sup> However, a complete separation of church and state might at times *aid* religion, for example when a church is considered beyond the scope of certain government regulations.<sup>186</sup> “Thus, the ‘no-aid’ view is at odds with genuine separationism, which ‘opposes involvement by the government in the affairs of religious organizations, whether the involvement is a benefit or a burden.’”<sup>187</sup>

Most importantly, however, a strict separationist approach to establishment cases might hinder religious free exercise, thus inhibiting one of the fundamental purposes of the Religion Clauses—“religious liberty.”<sup>188</sup> Problematically, an application of the Establishment Clause that demands complete separation of God from the state produces a secular mindset, which is an orientation unto itself, ultimately discriminating against nonsecular beliefs.<sup>189</sup> In this way, separationism moves the courts far from an ideological neutrality, essentially establishing a secular canon that acts much like a “national religion” forbidden in Madison’s initial draft of the Establishment Clause.<sup>190</sup>

Shortly after the *Everson* decision, scholar George E. Reed forecast the consequences of the strict separationist movement, commenting,

Unless the current doctrinaire formula of separation of Church and State is abandoned as a basis for judicial and legislative action, we may ultimately witness the death of religious liberty and with it separation of Church and State in the true meaning of the term, for it is conditioned upon religious liberty.<sup>191</sup>

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*Soured: The Supreme Court’s New Establishment Clause Analysis*, 37 VAND. L. REV. 1175, 1177–78 (1984) (maintaining that although the Supreme Court has advocated strict neutrality policies, the Court has never adopted it in practice).

185. See *Religion and the State*, *supra* note 24, at 1636.

186. *Id.* (citing *NLRB v. Catholic Bishop*, 440 U.S. 490 (1971)).

187. *Id.* (citations omitted).

188. *Wallace v. Jaffree*, 472 U.S. 38, 68 (1985) (O’Connor, J., concurring) (arguing that “religious liberty” is the shared aim of both Religion Clauses); see also *TRIBE*, *supra* note 127, § 4–7, at 1189 (arguing that most commentators regard the concept of strict neutrality as incompatible with the Free Exercise Clause).

189. “[W]hen unmodified by other principles, separationism leads to the quiet advancement of majoritarian bias: by separating religion from the public sphere, it perpetuates, indeed strengthens, the civil religion within that sphere.” *Religion and the State*, *supra* note 24; see also Esbeck, *supra* note 23, at 107 (“A separation of government from all that is religion or religious would result in a secular public square, one hostile to the public face of religion. The Founders intended no such regime.”).

190. 1 ANNALS OF CONG. 432–33 (Joseph Gales ed., 1789).

191. George E. Reed, *Separation of Church and State—Its Real Meaning!*, CATH. ACTION, Mar. 1949, at 10.

In *Zorach v. Clausen*, the Supreme Court similarly explained that failing to “accommodate[] the public service to . . . spiritual needs . . . find[s] in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.”<sup>192</sup> The Court again commented in *Lee v. Weisman* that a “relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution”<sup>193</sup> and that not “every . . . action implicating religion is invalid if one or a few citizens find it offensive.”<sup>194</sup> Fundamentally, a separationist approach to Establishment Clause questions may enforce a secular regime that is far from neutral and actually limits the free exercise rights that a separationist approach avers to protect.

Accommodation, on the other hand, engenders a more neutral regime in practice. Under an accommodationist theory, the objective of the Establishment Clause shifts from removing all vestiges of religion from the state to “forb[idding] establishment of a national religion, and forb[idding] preference among religious sects or denominations.”<sup>195</sup> This allows the government to “respect[] the religious nature of [its] people and accommodat[e] the public service to their spiritual needs” without breaching the “constitutional standard [of] the separation of Church and State.”<sup>196</sup>

Such an interpretation of the Establishment Clause is not without merit.<sup>197</sup> Indeed, First Amendment drafts, comments from various Founders, and the church-state relations existing in early America comport with such a view.<sup>198</sup> The Supreme Court upheld

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192. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

193. *Lee v. Weisman*, 505 U.S. 577, 598 (1992).

194. *Id.* at 597.

195. *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting).

196. *Zorach*, 343 U.S. at 314.

197. Speaking of the erroneously applied “wall of separation” doctrine, Chief Justice Rehnquist noted,

There is simply no historical foundation for the proposition that the Framers intended to build the ‘wall of separation’ that was constitutionalized in *Everson*. . . . But the greatest injury of the ‘wall’ notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights. . . . [N]o amount of repetition of historical errors in judicial opinions can make the errors true. The ‘wall of separation between church and state’ is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.

*Wallace*, 472 U.S. at 106–07 (Rehnquist, J., dissenting).

198. *See supra* notes 49–58 and accompanying text.

accommodation in *Lynch v. Donnelly*, positing that “[the Constitution] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”<sup>199</sup> A recent Supreme Court decision, *Van Orden v. Perry*, similarly maintains the accommodationist view that religious symbols or actions “[s]imply having religious content or promoting a message consistent with a religious doctrine d[o] not run afoul of the Establishment Clause.”<sup>200</sup>

Ultimately, an accommodationist view recognizes the important role that religion plays in many Americans’ lives and attempts to accommodate those religious beliefs while concurrently respecting the views of nonbelievers.<sup>201</sup> This accommodationist approach must, by necessity, dismantle the wall of separation erected by some as a “philosophy of hostility to religion.”<sup>202</sup>

The problems surrounding the ceremonial deist approach to the Establishment Clause are illustrative of the difficulties stemming from a separationist philosophy. While the ceremonial deist approach is in many ways accommodationist since it accommodates some level of church-state interface, it allows such church-state interaction only if the religious symbol or practice is deemed secular<sup>203</sup> or of historic value.<sup>204</sup> Courts thus prescribe secular—or nonreligious—values to religious tokens that, to many citizens, retain religious meaning. Such a practice leans more toward a separationist approach because religion is ultimately separated from public life in the sense that a symbol or practice is rejected unless a court finds it “nonreligio[us].”<sup>205</sup>

Professor Frederick Gedicks comments on this trend, noting that “the Court has generally defended [religious] practices by reference to the secular individualist value of neutrality between religion and nonreligion

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199. 465 U.S. 668, 668 (1984).

200. 125 S. Ct. 2854, 2863 (2005).

201. See *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (“[W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.”).

202. *Id.* at 315.

203. *County of Allegheny v. ACLU*, 492 U.S. 573, 616 (1989) (“[B]oth Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society.”).

204. *Lynch*, 465 U.S. at 716–17 (Brennan, J., dissenting) (“[S]uch practices as the designation of ‘In God We Trust’ as our national motto, or the references to God contained in the Pledge of Allegiance . . . serve certain secular functions, and that necessity, coupled with their long history, gives those practices an essentially secular meaning.”).

205. GEDICKS, *supra* note 32, at 63.

rather than the religion communitarian value of encouraging socially valuable religion.”<sup>206</sup> Thus, the ceremonial deist approach is potentially more adverse to church-state interrelations than even a strict separationist stance since it must prescribe secular or nonreligious value-sets on feasibly religious practices. This necessarily “forces the Court into the awkward position of arguing the secularity of activities that seem indisputably religious.”<sup>207</sup> Under such a requisite, free exercise rights are at risk since “the individual’s freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority.”<sup>208</sup>

*B. Unification, Disassociation, and the Free Exercise Paradox*

Similar to the separationist/accommodationist debate addressed above, there is little consensus regarding whether the Founders intended the Establishment and Free Exercise Clauses to be read as a unitary passage to be employed in tandem (“unification”), or as distinct clauses with separate purposes and legal meaning (“disassociation”). However, given the consistency and applicability of a unification approach, not only will a unified view of the Clauses protect religious liberty, but also this view was likely the original intention of the Founders.

Scholars arguing for a disassociated approach to the Clauses maintain that establishment and free exercise rights are fundamentally contradictory.<sup>209</sup> To surmount the irreconcilability of the Clauses, disassociation advocates propose methods for “maneuvering between the clauses”<sup>210</sup> and determining whether a case invokes establishment or free exercise considerations.<sup>211</sup> Laurence Tribe has advocated one such

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206. *Id.*

207. *Id.*

208. *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985).

209. *See Walz v. Tax Comm’n*, 397 U.S. 664, 668–69 (1970) (“The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.”); George Freeman, *The Misguided Search for the Constitutional Definition of “Religion,”* 71 GEO. L.J. 1519, 1563–64 (1983) (advocating a bifurcated definition of Establishment and Free Exercise Clauses’ definition of “religion”); *Religion and the State*, *supra* note 24, at 1638–39 (stating that the Religion Clauses are functionally interdependent).

210. *Religion and the State*, *supra* note 24, at 1634.

211. Choper, *supra* note 130, at 674–75 (“[T]he Court’s separate tests for the Religion Clauses have provided virtually no guidance for determining when an accommodation for religion, seemingly required under the Free Exercise Clause, constitutes impermissible aid to religion under the Establishment Clause. Nor has the Court adequately explained why aid to religion, seemingly violative of the Establishment Clause, is not actually required by the Free Exercise Clause.”);

strategy, proposing that courts apply different definitions of religion to establishment and free exercise cases—a broad meaning of religion is appropriate for cases falling under a Free Exercise Clause designation, and narrower definitions of religion must be maintained to appropriately deal with Establishment Clause issues.<sup>212</sup> George Freeman advocates a similar definitional approach, suggesting that under an Establishment Clause analysis “religion” is defined under a set of “paradigmatic features,”<sup>213</sup> but “[u]nder the free exercise clause . . . religion must be given its standard meaning.”<sup>214</sup>

Other scholars have noted that such bifurcated approaches to the Religion Clauses are troublesome, producing an “unprincipled and inconsistent framework for Religion Clause decisions.”<sup>215</sup> For example, disassociation advocates treat establishment and free exercise concerns as separate rights that necessitate different tests yet provide little guidance as to when an establishment versus a free exercise designation applies.<sup>216</sup> Noting this problem of case “characterization,” Philip Johnson explained,

Judges and commentators have often observed that the free exercise and the establishment clauses look in opposite directions, so that a direct conflict may arise if one is allowed to intrude into territory properly belonging to the other. What is less frequently noted is that many significant problems can be categorized so as to fall under the

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Johnson, *supra* note 130, at 821–22 (noting that significant problems arise when the courts “categorize” cases under either “Establishment” or “Free Exercise” labels).

212. *Religion and the State*, *supra* note 24, at 1634 (citing TRIBE, *supra* note 127, at 826–33). *But cf.* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-6, at 1186 n.53 (2d ed. 1988) (criticizing the two-definitions approach advocated in Tribe’s first edition).

213. Such paradigmatic religious features include “[a] belief in a Supreme Being,” “[a] belief in a transcendent reality,” “[a] moral code,” “[a] world view that provides an account of man’s role in the universe and around which an individual organizes his life,” “[s]acred rituals and holy days,” “[w]orship and prayer,” “[a] sacred text or scriptures,” and “[m]embership in a social organization that promotes a religious belief system.” Freeman, *supra* note 15, at 1553.

214. *Id.* at 1564.

215. *Id.*; *see also* *Everson v. Bd. of Educ.*, 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting) (“‘Religion’ appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid ‘an establishment’ and another, much broader, for securing ‘the free exercise thereof.’”); Esbeck, *supra* note 23, at 7 (noting that the “two definitions” approach is problematic since it might find an activity permissible under the Establishment meaning of religion but impermissible under the free exercise meaning). Esbeck also finds the definitional approach “puzzling” since “the word ‘religion’ appears only once in the text of the First Amendment, applicable to both Clauses.” *Id.*

216. Choper, *supra* note 130, at 674–75 (stating that the Supreme Court subordinates Establishment Clause principles in face of substantial free exercise claims).



rule of *either* the establishment clause or the free exercise clause, depending upon which we would prefer to have govern the situation.<sup>217</sup>

As a result of accommodationists' separate treatment of the clauses, the outcome of a case may differ drastically based on a court's designation of the case as dealing with establishment issues or with free exercise questions.<sup>218</sup>

A bifurcated interpretation of the Establishment and Free Exercise Clauses also potentially inhibits the religious freedom both clauses are meant to protect.<sup>219</sup> Under an approach that requires courts to divide cases along establishment and free exercise lines,<sup>220</sup> free exercise is often dragged through the mud since it lacks self-contained and absolutist language<sup>221</sup> and is thus subject to any constraints emanating from the Establishment Clause.<sup>222</sup> *Lee v. Weisman* is illustrative of this establishment-favored approach, holding that prayer at a school graduation ceremony is unconstitutional since "[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause."<sup>223</sup> Such a ruling turns the Free Exercise Clause into little more than an "empty textual platitude"<sup>224</sup> so that religious freedom rights are at risk wherever Establishment Clause considerations are evoked.<sup>225</sup> Andrew Beerworth explains,

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217. Johnson, *supra* note 130, at 821–22.

218. "As a result of the Court's differing standards, the outcome of cases may often depend on whether a particular dispute is characterized as an establishment or a free exercise claim." *Religion and the State*, *supra* note 24, at 1633–34.

219. *See id.* at 1634–35 (arguing that a disassociated approach to the Religion Clauses "may obscure the underlying values the clauses are meant to protect").

220. Esbeck, *supra* note 23, at 11 ("[C]ourts are increasingly confronted with supposed 'collisions' of the Establishment Clause with other Clauses in the First Amendment that force them to subordinate one Clause to give the other full play.").

221. Beerworth, *supra* note 17, at 335 n.14.

222. *Id.*; *see also*, *Lee v. Weisman*, 505 US 577, 587 (1992).

223. *Lee*, 505 U.S. at 587.

224. Beerworth, *supra* note 17, at 337.

225. *See*, for example, *Employment Division v. Smith*, 494 U.S. 872 (1990), in which the Supreme Court abandoned the former requirements of strict scrutiny and compelling interests in free exercise cases involving government policy, for fear that allowing such considerations would "[risk] a violation of the Establishment Clause by arbitrarily limiting its religious exemptions." *Id.* at 916 (Blackmun, J., dissenting). Such free exercise considerations were deemed a "luxury" that "we cannot afford." *Id.* at 888 (majority opinion).

The Establishment Clause has been the enduring focal point of judicial tinkering in matters of religion; free exercise has ever been an unattractive afterthought. As long as this myopia persists, sound doctrinal answers to the more complex Religion Clause questions will remain extremely difficult to come by.<sup>226</sup>

Thus, a disassociated reading of the Religion Clauses is problematic since it tends to overlook free exercise considerations in an Establishment Clause analysis.

Free exercise liberties are additionally fettered by the breadth of the modern Establishment Clause tests.<sup>227</sup> Mary Ann Glendon and Raul F. Yanes noted that “[o]nce the court had interpreted the establishment provision so broadly as to forbid, in principle, any governmental aid to religion, conflict with the mandate to accommodate free exercise was inevitable.”<sup>228</sup> With twentieth-century courts’ lingering separationist tendencies, “it was further almost inevitable that free exercise would be narrowly construed to avoid conflict, for ‘accommodations’ of religious belief and action, when viewed through separationist lenses, were hard to distinguish from impermissible assistance to religion.”<sup>229</sup> Problematically, this free exercise suppression surfaces only in cases where the free exercise of “believers” is at stake—in cases concerning nonbelievers, separationism and free exercise are “mutually reinforcing.”<sup>230</sup>

Unitary advocates offer a possible solution to the disassociation dilemma, arguing that the Religion Clauses should not be separated but synthesized in such a way as to promote the clauses’ shared interest in religious liberty.<sup>231</sup> Such advocates note that where the Free Exercise

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226. Beerworth, *supra* note 17, at 338.

227. Paul Toscano notes,

The Court [has] . . . shifted the syntactical force of the word ‘establishment’ from that of a noun (‘a church or religious institution’) to that of a verb (‘to advance or aid’). . . . Where the national government was originally committed to keeping its hands off institutional and personal religion, it is now committed, by the United States Supreme Court, to a policy of continual interference in the form of case-by-case line drawing, as the courts attempt to determine which activities of government amount to a religious preference and which to religious interference.

TOSCANO, *supra* note 42, at 65.

228. Glendon & Yanes, *supra* note 126, at 489.

229. *Id.*

230. *Id.*

231. See *Brown v. Gilmore*, 258 F.3d 265, 273 (4th Cir. 2001); Kurland, *supra* note 128, at 860 (noting the unitary direction of the Religion Clauses toward individual freedom).

Clause protects spiritual liberty, the Establishment Clause safeguards the environments and institutions needed to preserve that freedom.<sup>232</sup>

To properly invoke a unitary reading of the clauses, courts would necessarily reject the “definitional” approach to the Religion Clauses that defines religion narrowly in an Establishment Clause context and broadly under a Free Exercise Clause framework.<sup>233</sup> Thus, under a unitary understanding, a court would focus on the shared understanding of the clauses that “the free exercise clause protects the individual’s choice of his identity [as to religion], and the establishment clause protects the pluralistic structure of the background social institutions necessary to make that choice both possible and meaningful.”<sup>234</sup> Under a unitary understanding, an individual’s free exercise rights would be properly limited only when that freedom endangers the governmental authority—or structure—necessary to protect that exercise of autonomy.<sup>235</sup> In this way, a unitary reading of the clauses is useful since it creates a system of checks and balances between the clauses that allows neither governmental authority nor citizens’ rights to encroach upon the other. Such an approach would ultimately foster the religious liberty at the heart of the Clauses.<sup>236</sup>

*C. Rights-Based Versus Structural Objectives  
and the Free Exercise Counterpart*

A third interpretative Religion Clause dilemma arises when comparing the rights-based and structuralist interpretations of the Religion Clauses. While a rights-based understanding of the Establishment Clause might be thought to reconcile the Religion Clauses on a *definitional* level, the structuralist interpretation does much to ease the actual tension between establishment and free exercise considerations.

The rights-based/structuralist debate is in reality a subset of the unification/disassociation argument: similar to unification/disassociation, it considers how the Establishment and Free Exercise Clauses interact with one another. However, unlike unification/

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232. See *Religion and the State*, *supra* note 24, at 1638–40.

233. See *id.* at 1634–35.

234. *Id.* at 1638 (citations omitted).

235. *Id.*

236. See *id.* at 1635 (“Strategies of unification strike more deeply at the current doctrinal conflict.”).

disassociation, the rights-based/structural concern is not whether the Clauses are considered in tandem, but rather *how* the clauses are viewed in application. The rights-based/structural argument focuses specifically on the Establishment Clause and whether courts treat the clause as a constitutional doctrine protecting individual rights or a structural mechanism<sup>237</sup> that “police[s] the boundary between government and religion.”<sup>238</sup>

Fundamentally, a rights-based interpretation of the Establishment Clause invokes the clause conflict at the heart of the bifurcation argument. Carl Esbeck notes,

A major cause of this imagined ‘tension’ [between the Religion Clauses] is the uncritical assumption that the Establishment Clause is rights-based. If the object of that Clause really was to secure a freedom *from* religion (and the Free Exercise Clause doubtlessly secures some right to exercise religion) then of course the two Clauses would frequently be found on a collision course.<sup>239</sup>

A structure-based understanding of the Establishment Clause does much to ease the supposed conflict between the clauses.<sup>240</sup> If the Free Exercise Clause is viewed as protecting the individual’s right to religion and the Establishment Clause as limiting governmental influence over religion, then both clauses strive toward the same goal: protection of religious liberty. This understanding squares with a unitary interpretation in which the clauses work in tandem so that neither governmental authority nor citizens’ rights encroach upon the other.<sup>241</sup>

To apply a rights-based interpretation to the Free Exercise Clause and a structural interpretation of the Establishment Clause, courts need not do much—a rights-based/structural treatment has been nearly

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237. Justice Brennan advocated a structural interpretation of the Establishment Clause, noting the following:

Most of the provisions of the Bill of Rights, even if they are not generally enforceable in the absence of state action, nevertheless arise out of moral intuitions applicable to individuals as well as governments. The Establishment Clause, however, is quite different. It is, to its core, nothing less and nothing more than a statement about the proper role of *government* in the society that we have shaped for ourselves in this land.

Marsh v. Chambers, 463 U.S. 783, 802 (1983) (Brennan, J., dissenting).

238. Esbeck, *supra* note 23, at 12.

239. *Id.*

240. *Id.* (“These ‘battles of the Clauses’ would not occur if the Establishment Clause were openly acknowledged as structural.”).

241. See *supra* notes 234–36 and accompanying text.

consistent since *Everson*.<sup>242</sup> However, courts would do well to dismiss the two-definitional approach applied in a disassociated reading of the Religion Clauses.<sup>243</sup> A single definition of religion under the rights-based/structural argument seems counterintuitive since, as Esbeck notes, the rights-based Free Exercise Clause must have a broad definition of religion to protect the rights of religious nonconformists or the religious minority, but the Establishment Clause must have a narrower, fixed definition so as to properly manage sovereign power.<sup>244</sup> In this way, Esbeck argues that the “difference in task[s] between a structural clause and a rights clause . . . [requires] a broad, flexible definition of religion for the Free Exercise Clause and a narrow, fixed definition for the Establishment Clause.”<sup>245</sup> Others have argued that a rights-based/structural interpretation does not necessitate two definitions of religion. Kathleen M. Sullivan proposes that the definitional problem is “solved not by defining ‘religion’ narrowly for establishment clause purposes, but rather by defining narrowly what constitutes ‘establishment.’”<sup>246</sup> Maintaining the broader free exercise definition for “religion” under an Establishment test might *further* religious liberty in the sense that “secular religion” would be suspect under the Establishment Clause, and rulings that limit religious practices in favor of “secular” or “atheistic” beliefs would be limited.

Additionally, the rights-based/structural interpretation is furthered if courts openly acknowledge the structural nature of the Establishment Clause,<sup>247</sup> and employ a balancing test between the Free Exercise Clause that protects individual rights and the Establishment Clause that limits governmental rights. Importantly, a structural interpretation of the government-religion boundary does not merit the complete separation of government from all things religious.<sup>248</sup> If structural establishment limits are not weighed properly against individual free exercise rights, the

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242. See Esbeck, *supra* note 23, at 4 (“Since *Everson*, the Court has sub silentio given the Establishment Clause a far different application than if its object were to guarantee individual religious rights.”).

243. *But see id.* at 8–9 (arguing that a “two definition” approach necessarily follows a structural Establishment Clause and a rights-based Free Exercise Clause).

244. *Id.*

245. *Id.* at 9.

246. KATHLEEN M. SULLIVAN & GERALD GUTHER, *FIRST AMENDMENT LAW* 468 (1999).

247. See Esbeck *supra* note 23, at 75 (“Openly applying the Establishment Clause as a structural, rather than a rights-based, clause would bring about a shift in how judges and litigants conceptualize problems involving government-religion relations.”).

248. *Id.* at 107.

courts unwittingly endorse a kind of secular faith. This sounds a death-knell for free exercise rights, and religious citizens are thus subject to discrimination from a culture of disbelief. The delicate balance between establishment structural limitations and free exercise rights is lost.

#### IV. THE UNITARY-ACCOMMODATIONIST THEORY

In response to the establishment and free exercise dilemma outlined above, the following discussion proposes a new structural unitary-accommodationist test that focuses not just on the Establishment Clause portion of the religious liberty clauses; rather, the proposed test addresses both establishment and free exercise rights in a two-pronged framework that considers the following: (1) whether the words “under God” endorse or discourage a specific religion or religious belief in such a way that violates the structural limitations of the Establishment Clause, and (2) whether the contested symbol or governmental action prevents a reasonable individual from projecting his religious beliefs on the symbol or practice. Such a test would reconcile establishment doctrine with free exercise considerations as well as resolve the Court’s trend of secularizing religious beliefs under a ceremonial deist argument. Most importantly, the test fulfills both ends of the religion clauses at a fundamental level: it protects an individual’s spiritual liberty while safeguarding the institutions essential to the preservation of that liberty. To this end, Section A will address the first prong of the structural unitary-accommodationist test and how it compares to modern establishment tests. Section B will address the second prong and similarly analyze the prong in light of current Establishment Clause doctrine.

##### *A. Structural Accommodation: The Establishment Threshold Prong*

As discussed earlier,<sup>249</sup> a strictly separationist view of church-state relations may be “unworkable in practice [and] unviable in theory.”<sup>250</sup> For the government to maintain the free exercise liberties guaranteed in the Constitution, it cannot wholly separate itself from religious affairs.<sup>251</sup>

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249. See *supra* notes 175–94 and accompanying text.

250. See *Religion and the State*, *supra* note 24 at 1636.

251. *Id.*; see also Jesse H. Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943, 947–48 (1986) (“On the one hand, the Court has read the establishment clause as saying that if a law’s purpose is to aid religion, it is unconstitutional. On the other hand, the Court has read the free exercise clause as saying that,

Importantly, the Establishment Clause is structural in nature, so that while it allows interplay between the church and state, it also serves as a structural restraint that removes government from matters where it might hinder religious liberty.<sup>252</sup>

The Establishment Clause prong of the structural unitary-accommodationist test asks whether by allowing the symbol or practice, a governmental institution appears to endorse or discourage a particular religious sect or denomination. The prong is heavily posited in Justice Rehnquist's accommodationist interpretation of the Establishment Clause expressed in his dissent in *Wallace v. Jaffree*, which provides that "[the Establishment Clause] d[oes] not mean that the Government should be neutral between religion and irreligion," but instead "it forb[ids] establishment of a national religion, and forb[ids] preference among religious sects or denominations."<sup>253</sup> As the court recently expressed in *Van Orden*, the fact that a symbol or practice "[s]imply ha[s] religious content or promot[es] a message consistent with a religious doctrine does not [mean the symbol or practice] run[s] afoul of the Establishment Clause."<sup>254</sup> Thus, unlike the *Lemon* test, the first prong of a unitary-accommodationist test does not require that the religious symbol or practice have a primarily secular "purpose and effect."<sup>255</sup> Instead, the religious symbol or practice is permissible (under the first prong) as long as it does not breach the structural safeguards of the Establishment Clause that protect free exercise rights. The safeguards guarantee that an individual's religious liberty is not inhibited by governmental favoritism or religious discrimination.

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under certain circumstances, the state must aid religion. Logically, the two theses are irreconcilable.").

252. Esbeck, *supra* note 23 at 62.

253. *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting). Quoting Thomas Cooley, Rehnquist noted,

But while thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings. . . . Undoubtedly the spirit of the Constitution will require, in all these cases, that care be taken to avoid discrimination in favor of or against any one religious denomination or sect; but the power to do any of these things does not become unconstitutional simply because of its susceptibility to abuse.

*Id.* at 105–06 (citations omitted).

254. 125 S. Ct. 2854, 2863 (2005).

255. See generally *Lemon v. Kurtzman*, 403 U.S. 602 (1971); see also *supra* notes 85–86 and accompanying text.

In application, the Establishment Clause prong of unitary-accommodationism acts like the endorsement test introduced in Justice O'Connor's *Lynch* concurrence.<sup>256</sup> Like the endorsement test, the first prong focuses on governmental endorsement or disapproval of specific religious sects or denominations that might suppress free exercise rights.<sup>257</sup> As Justice O'Connor noted, such endorsement "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."<sup>258</sup>

Unlike the endorsement test, however, a unitary-accommodationist analysis does not evaluate the level of "entanglement" between the state and the religious symbol or practice, nor does the test implicate religious symbols or practices that accommodate "general"—i.e. nonspecific, nondenominational

—religion. Striking down generally religious symbols or practices endorsed by the government would provoke the very problems that the endorsement test seeks to solve: religious believers would feel "that they are outsiders, not full members of the political community, and . . . [secular] adherents [would feel] that they are insiders, favored members of the political community."<sup>259</sup> Thus, the inverse of Justice O'Connor's worries becomes a reality—and it is in every respect as dangerous as her hypothesis. Ultimately, a strict application of Justice O'Connor's endorsement test necessitates a relentless pursuit of the elusive "government neutrality" at the heart of the separationist doctrine.<sup>260</sup>

256. *Lynch v. Donnelly*, 465 U.S. 668, 687–88 (1984).

257. See *supra* notes 88–89 and accompanying text.

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

259. *Id.*

260. See DANIEL A. FARBER, *THE FIRST AMENDMENT* 273 (1998) ("[T]he endorsement test has difficulty evaluating issues of religious accommodation."). Under the Establishment prong, the unitary-accommodationist test avoids the impractical aims of government neutrality. Commenting on the unfeasibility of a neutral government regime, Paul Toscano comments,

To be truly neutral, [the government] . . . must avoid the promulgation of any assumption, aspiration, expectation, belief structure or meaning. . . . A religiously neutral [environment] must avoid theism because it is premised on the religious assumption that God exists. It must also avoid atheism, because that view is premised on the equally religious assumption that God does not exist. . . . And it cannot promote agnosticism, which assumes that the existence of God is not or cannot be known—a view that, like others, is religious because it constitutes a positive and non-neutral a position as the proposition that God's existence can be known.

TOSCANO, *supra* note 42, at 15–16.



Instead of imposing a regime where the accommodation of religion might be perceived as an impermissible endorsement of religion, the first prong of unitary-accommodationism seeks a more feasible form of neutrality by sanctioning of a wide range of views without specifically endorsing any one belief.

*B. A Unitary Reading: The Free Exercise Threshold*

Alone, the first prong of the unitary-accommodationist test does not adequately deal with Free Exercise Clause considerations in its Establishment Clause analysis. The government might endorse a generally religious symbol or practice that passes under the first prong (by virtue that the symbol or practice does not reflect a specific religious tenet or belief) but still inhibits a person's Free Exercise Clause liberties. The second prong thus considers whether the contested symbol or practice permits a reasonable individual to project his religious beliefs on the symbol or practice, thus allowing him to enjoy his free exercise right to religious liberty. Fundamentally, a court must analyze the nature of the religious symbol or practice and whether it allows an individual to bring his personal values and religious beliefs to the table. For example, a general or innocuous religious statement that accommodates many different kinds of religions would not inhibit free exercise rights. Religious elements that are little more than religious umbrella statements likely would not violate the second prong of the unitary-accommodationism test.

The second prong of unitary-accommodationism is an inverse reading of Justice Kennedy's coercion test, which provides that "government may not coerce anyone to support or participate in any religion or its exercise."<sup>261</sup> Unlike the coercion test, unitary-accommodationism does not ask whether governmental accommodation of a symbol or practice *prevents* an individual from exercising his free exercise rights, but whether it *permits* an individual to realize those rights. Like the coercion test, the second unitary-accommodationism prong assesses only the potential effect of the religious symbol or practice on an individual's free exercise rights rather than its actual effect.

The second prong is similar to Justice O'Connor's endorsement test in that both tests apply a reasonable observer<sup>262</sup> standard when

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261. County of Allegheny v. ACLU, 492 U.S. 573, 659 (1989).

262. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 784 (1995).

determining the effect of the religious symbol or practice on an individual. While the reasonable observer standard has been criticized as unworkable since a person's reaction to a symbol or practice might "var[y] with [his or her] religious standpoint,"<sup>263</sup> courts need not determine what constitutes a "reasonable denomination" or "reasonable religious belief" but only what level of religious devotion might be considered representative of the paradigmatic citizen. Courts will inevitably vary slightly in their judgments of what is considered reasonable.

#### V. UNITARY-ACCOMMODATION THEORY APPLIED

The structural unitary-accommodationist test provides a more practical Establishment Clause standard that addresses the need to unify Establishment Clause and Free Exercise Clause rights as well as accommodate a wide variety of religious and nonreligious beliefs. The following section outlines several hypothetical Religion Clause cases and hypothesizes on the future of religious jurisprudence in the courts, finding that the structural unitary-accommodationist test may provide a workable solution to the free exercise and inconsistency dilemmas engendered in modern Religion Clause jurisprudence.<sup>264</sup>

##### *A. Religious Ceremony: The Pledge of Allegiance*

In 2004, Michael Newdow challenged the constitutionality of a public school policy permitting daily recitation of the Pledge of Allegiance, which includes the words "under God."<sup>265</sup> Although students were not required to participate in the exercise, Newdow and the lower court claimed that by endorsing the Pledge, the government was "putting the idea of God" in [students'] minds.<sup>266</sup> The Supreme Court declined to rule whether the Pledge or the school policy breached the Establishment or Free Exercise Clauses, finding instead that Newdow—

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263. FARBER, *supra* note 260, at 273. Noting the difficulty of the "reasonable observer" standard, Daniel Farber comments, "Whose reaction determines whether the message is one of endorsement? It is not easy to specify what kind of person operates as the bellwether (the reasonable member of a minority religion? The average citizen? The most sensitive person?), or what information they have available (in particular, how well do they understand the legal context?)." *Id.*

264. The following brief analyses are in nowise designed to provide an exhaustive examination of the complex Religion Clause question, but are designed to highlight the main points of analysis that would be involved in an application of the structural unitary-accommodationist test.

265. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, (2004).

266. Transcript of Oral Argument at 30, *Elk Grove*, 542 U.S. 1 (No. 02-1624).

the father of a student from the Pledge-reciting school—had no standing to bring the case. Dicta from the decision suggest, however, that the Court would potentially find the words “under God” constitutional under a ceremonial deist argument that declared the words secular.<sup>267</sup>

Applying the analysis set forth in this Comment under a hypothetical nonmandatory school Pledge case like the one above, a court would begin a structural unitary-accommodationist test by analyzing whether the words “under God” endorse or discourage a specific religion or religious belief. Second, the court would evaluate whether the Pledge policy allows a reasonable individual to project his religious beliefs—i.e. exercise his or her religion—on the Pledge. Importantly, the court’s holding cannot accommodate every claimed religious tenet but must fairly satisfy as many beliefs as possible.<sup>268</sup>

Under the first prong of the unitary-accommodationist test, the words “under God” do not point to a specific religion or religious belief. The word “God” is not defined by any single concept. In the Talmud, “God is the place of the world, but the world is not God’s place,”<sup>269</sup> and in the Bible, God is “Love,”<sup>270</sup> “the Word,”<sup>271</sup> “the LORD of Hosts” and “the first, and . . . the last.”<sup>272</sup> Hindus worship the God, Brahma, “the eternal origin who is the cause and foundation of all existence.”<sup>273</sup> Scientologists “affirm[] the existence of a Supreme Being.”<sup>274</sup> Muslims believe in Allah, an “eternal, omniscient, and omnipotent” God.<sup>275</sup> Pagans find God “in many different forms,”<sup>276</sup> and Unitary Universalists

267. *Elk Grove*, 542 U.S. 1. In oral argument, Justice Souter suggested that the phrase “under God” was constitutional because those words no longer indicate a religious principle but rather a historic concept “so tepid, so diluted” that it flies beneath the “constitutional radar.” He further commented, “the religious, as distinct from a civic content, is close to disappearing here.” Transcript of Oral Argument at 39, *Elk Grove*, 542 U.S. 1 (No. 02-1624).

268. See *Lee v. Weisman*, 505 U.S. 577, 597 (1992) (“[Not] every . . . action implicating religion is invalid if one or a few citizens find it offensive.”).

269. *Genesis Rabbah* 68:9.

270. 1 *John* 4:8.

271. *John* 1:1.

272. *Isaiah* 44:6.

273. Religion and Ethics: Hinduism, <http://www.bbc.co.uk/religion/religions/hinduism/beliefs/index.shtml> (last visited Feb. 1, 2006).

274. Church of Scientology International, Concept of God, [http://www.scientology.org/html/opencms/cos/scientology/en\\_US/news-media/faq/pg015.html](http://www.scientology.org/html/opencms/cos/scientology/en_US/news-media/faq/pg015.html) (last visited Feb. 1, 2006).

275. Religion and Ethics: Islam, <http://www.bbc.co.uk/religion/religions/islam/beliefs/index.shtml> (last visited Feb. 1, 2006).

276. Religion and Ethics: Paganism, <http://www.bbc.co.uk/religion/religions/paganism/beliefs/index.shtml> (last visited Feb. 1, 2006).

define God loosely as “a spirit of life or a power within themselves, which some choose to call God.”<sup>277</sup> To the atheist, God is man’s primitive “explanation[] for all phenomena.”<sup>278</sup> To others, God is no more than “the extraordinary process called Life.”<sup>279</sup> Thus, in the American experience, God exists as a near-universal concept “down under all the variousnesses [sic] in humanity’s religious representations of him and therefore [is] equally accessible ultimately by means of any and all reverent religious methodologies.”<sup>280</sup> With such wide-ranging and abstruse connotations, a court might easily find that the words “under God” do *not* favor a particular religion’s tenets.<sup>281</sup> Additionally, the words “under God” cannot be said to endorse a specific religion that would implicate free exercise rights. The expression of America as “one nation under God” cannot be said to endorse a single belief. To a Christian, America might be said to be “under an accessible, monotheistic God.” To a Jew, America could be “under an unknowable, undefined, yet omnipresent God.” Even to an atheist, America might be “under a concept of progress which man historically refers to as ‘God.’”<sup>282</sup>

277. Religion and Ethics: Atheism, <http://www.bbc.co.uk/religion/religions/atheism/types/uuism.shtml> (last visited Feb. 1, 2006).

278. GORA ATHEIST CENTER, ATHEISM: QUESTIONS AND ANSWERS (1992), available at <http://www.positiveatheism.org/india/gora31.htm>.

279. Todd Leopold, *Meet the New God*, CNN, June 14, 2004, available at <http://edition.cnn.com/2004/SHOWBIZ/books/06/14/tomorrows.god/index.html> (quoted in NEALE DONALD WALSCH, *TOMORROW’S GOD: OUR GREATEST SPIRITUAL CHALLENGE* (Atria 2004)).

280. TICKLE, *supra* note 15, at 117.

281. Importantly, the words “under God” were initially included in the Pledge as representation of a Christian-Judaic God. A 1954 House Resolution on the addition of “under God” to the Pledge noted, “recognition of God as the Creator of mankind, and the ultimate source both of the rights of man and of the powers of government . . . [is] the basis of the political philosophy on which the Federal Government and all the State governments were built and continue to operate.” H.R. Res. 1693, 83d Cong. (1954) (enacted). Despite these originally limited interpretations of God, the concept has undeniably expanded to fit the needs of a multicultural, pluralistic nation. The interpretations of the Pledge’s authors need not define a modern citizen’s understanding of the Pledge.

282. Some might argue that the words “under God” fundamentally evoke a Protestant Christian god, since this is likely the god envisioned by the authors who added the words to the Pledge. *See, e.g.*, H.R. Res. 1693, 83d Cong. (1954) (enacted) (noting that the addition of the words “under God” to the Pledge is a “recognition of God as the Creator of mankind, and the ultimate source both of the rights of man and of the powers of government . . . [and] the basis of the political philosophy on which the Federal Government and all the State governments were built and continue to operate”). However, the focus of the structural unitary-accommodationist test is not what the symbol or practice means to its proponents, or the governmental purpose or intent behind the symbol’s institution. Rather, the focus is on the different meanings that an individual might reasonably impose on the symbol or practice.

Under the second prong of the unitary-accommodationist test, a court would analyze whether a reasonable person could project his individual beliefs on the Pledge. Under this hypothetical, the school Pledge policy does not force a student to participate in the Pledge. In fact, as of 1943, *no* school policy can make the recitation of the Pledge mandatory.<sup>283</sup> Students are not required to pledge allegiance to the flag; they may also say the Pledge without the traditional “hand over heart” gesture, and they may pledge without invoking the words “under God.”<sup>284</sup> Additionally, the Pledge does not compel only one belief. The innocuous and potentially secular words<sup>285</sup> “under God” allow a student to impose his views—religious or otherwise—on the pledge act. To some, pledging “under God” may invoke a religious affirmation. To others, it might represent no more than a patriotic exercise.<sup>286</sup> Given the inclusive nature of the phrase, the Pledge serves as an umbrella statement that allows an individual to bring his personal values and religious or nonreligious beliefs to the table. The phrase violates no Establishment Clause constraints and likewise passes Free Exercise Clause muster. Under a structural unitary-accommodationist test, it is constitutional.

### *B. Religious Displays: The Ten Commandments*

The Supreme Court is divided on the constitutionality of Ten Commandments displays, and in two recent cases, the high Court ruled

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283. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

284. In 2004, a Colorado statute permitting teachers to lead students in the Pledge daily, but allowing students to opt out of recitation with parental permission, was challenged in federal court. The plaintiffs alleged that in being asked to say the pledge, even with exemption provisions, violated their “rights to be free from state-compelled expression.” H.B. 04-1002, 64th Gen. Assem., 2d Reg. Sess. (Co. 2004). The case was stayed until the end of the legislative season when the statute was amended. The new law provides, “Any person not wishing to participate in the recitation of the Pledge of Allegiance shall be exempt from reciting the Pledge of Allegiance and need not participate.” *Id.*

285. Under a ceremonial deist argument, the words “under God” might be viewed as a secular phrase that evokes only the historical vestiges of America’s founding. For example, the concurrence in a recent Supreme Court decision indicated that “under God” passed constitutional muster because the words referred only to the Pledge’s ceremonial history. *Elk Grove*, 542 U.S. 1, 8–16 (2004) (Rehnquist, J., concurring). In his majority opinion, Justice Stevens referred to the Pledge as a “patriotic exercise,” and Justice O’Connor called it a permissible example of “ceremonial deism.” *Id.* at 2323. In oral argument, Justice Souter suggested that the phrase “under God” was constitutional because those words no longer indicate a religious principle, but rather a historic concept “so tepid, so diluted” that it flies beneath the “constitutional radar.” Respondent’s Oral Argument at 39, *Elk Grove*, 542 U.S. 1 (2004) (No. 02-1624). He further commented that “the religious, as distinct from a civic content, is close to disappearing here.” *Id.*

286. *Elk Grove*, 542 U.S. 1.

five to four that a historic Ten Commandments monument on the Texas Capitol grounds passed constitutional muster,<sup>287</sup> while Ten Commandments posters in two county courthouses did not.<sup>288</sup> The rulings indicate that the Court's benchmark standard for the constitutionality of the displays was the *intent* of the exhibits—the monument on Texas grounds constituted a “broad[] moral and historical message reflective of a cultural heritage,”<sup>289</sup> while the courtroom posters exhibited a “religious rather than secular” “foundational value.”<sup>290</sup> Although the Court failed to apply one specific Establishment Clause test to the cases, the plurality ruling in *Van Orden* appears to adopt a ceremonial deist argument that analyzes the “historical message” of the Commandments<sup>291</sup> while the *McCreary* plurality touches on *Lemon's* secular “purpose and effect” test.<sup>292</sup> A structural unitary-accommodationist analysis of the Ten Commandments question resolves many of the inconsistencies raised in these recent decisions.

For the purposes of a unitary-accommodationist analysis, the following hypothetical considers the constitutionality of a Ten Commandments display similar to the one in *Van Orden* (minus any potential historic messages included on the monument). As explained above, a court would first address whether by allowing the Ten Commandments display, the government appears to endorse or discourage a particular religious sect or denomination. Next, the court would analyze whether a reasonable individual could project his religious beliefs on the display. Notably, the court does not have to find

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287. The six-foot stone monument prominently displayed the Ten Commandments, with carvings of “an eagle grasping the American flag, an eye inside of a pyramid, and two small tablets with what appears to be an ancient script” along the top. Below the Ten Commandments text are “two Stars of David and the superimposed Greek letters Chi and Rho, which represent Christ.” *Van Orden v. Perry*, 125 S. Ct. 2854, 2858 (2005).

288. The posters were displayed beside copies of the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice. Together, the display was entitled, “The Foundations of American Law and Government.” *McCreary County v. ACLU*, 125 S. Ct. 2722, 2731 (2005).

289. *See supra* note 287 and accompanying text.

290. *McCreary County*, 125 S. Ct. at 2731.

291. *Van Orden*, 125 S. Ct. at 2857 (“The public visiting the capitol grounds is more likely to have considered the religious aspect of the tablets’ message as part of what is a broader moral and historical message reflective of a cultural heritage. For these reasons, the Texas display falls on the permissible side of the constitutional line.”).

292. The *McCreary County* plurality commented, “We hold only that purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context.” *McCreary County*, 125 S. Ct. at 2741.

against the display if it holds both religious *and* secular meaning since there is “no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.”<sup>293</sup>

A court might begin a structural unitary-accommodationist analysis by considering the nature of the Ten Commandments generally. The Commandments, also known as the Decalogue, encompass religious values espoused by Christianity, Judaism, and Islam. The Commandments also constitute the basis of Western Civilization’s moral foundation, which has since been translated into what is generally known as common law.<sup>294</sup> The Ten Commandments play an important role in the Nation’s heritage and provide a framework for social and legal justice.<sup>295</sup> Thus, “[w]hile the Commandments are religious, they have an undeniable historical meaning.”<sup>296</sup> The principles enshrined in the Decalogue embody not just the tenets of religion, but the canons of our country. Therefore, it would be difficult for a court to show that a Ten Commandments monument represents only a particular sect or denomination.<sup>297</sup>

The second prong of the unitary-accommodationist test asks whether a reasonable person could project his religious beliefs on the Ten Commandments memorial. First, courts must ascertain the ways in which a viewer might perceive the monument. Is the monument a statement of the history of law? Is it testimony of the government’s devotion to Christianity, Judaism, or Islam? Does the monument assert that Moses was a divinely led prophet? Or that he even existed at all? Is it merely a statement of the country’s origins? Here, a Christian might view the monument as a demonstration of God’s rule of law, where an atheist might see it as a manifestation of common law’s historic antiquity. Where a government display engenders numerous, potentially religious,

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293. *Zorach v. Claiborn*, 343 U.S. 306, 313–14 (1952).

294. *See Stone v. Graham*, 449 U.S. 39, 45 (1980) (“It is . . . undeniable . . . that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World.”); *McGowan v. Maryland*, 336 U.S. 420, 462 (1961) (noting that “state prohibitions of murder, theft and adultery reinforce commands of the decalogue”).

295. *Van Orden*, 125 S. Ct. at 2863.

296. *Id.* at 2856.

297. Like the Pledge analysis, one might argue that a Ten Commandments display *does* serve a specifically religious purpose and reflects the religious motives of the display proponents. Again, the structural unitary-accommodationist test is not concerned with the specific intent of the government in permitting the display or the level of “entanglement” between the state and the religious symbol or practice. *See supra* notes 260–65, 289–90 and accompanying text.

potentially secular interpretations, none of which inhibit a reasonable individual's exercise of belief, a court must find that the display does not breach Free Exercise Clause limitations. Under unitary-accommodationism, displays of the Ten Commandments pass constitutional muster.

### *C. Religious Practices: School Prayer*

In *Engel v. Vitale*, the Supreme Court ruled that a nondenominational, voluntary school prayer violated Establishment Clause standards because the "union of government and religion tends to destroy government and to degrade religion."<sup>298</sup> Two decades later, the Court found that a one-minute period of silence also violated the Establishment Clause because it failed the secular purpose and effect prong of the *Lemon* test.<sup>299</sup> Most recently, the Court ruled that an invocation offered during high school commencement<sup>300</sup> and a student-led prayer offered at a school football game similarly violated *Lemon* secular standards.<sup>301</sup>

A unitary-accommodationist analysis of the constitutionality of public school prayer would first ask if a nondenominational prayer endorses or discourages a particular religious sect or denomination. Second, the test would analyze whether a school-offered prayer policy permits a reasonable person to project his religious beliefs on the prayer.

Under the first prong, a court would be hard pressed to find a nondenominational prayer that didn't favor a particular sect or denomination. Prayer is generally defined as "an address ([or] petition) to God or a god in word or thought."<sup>302</sup> Thus, one might recite the "Submariner's Prayer,"<sup>303</sup> a St. Cosmus & St. Damian's parish prayer,<sup>304</sup> an ancient Jain "prayer of love for all,"<sup>305</sup> the Oglala Sioux

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298. 370 U.S. 421, 431 (1962).

299. *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985).

300. *Lee v. Weisman*, 505 U.S. 577 (1992).

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

302. Merriam Webster OnLine, "Prayer," <http://www.m-w.com/dictionary/prayer/index.htm> (last visited Feb. 1, 2006).

303. "Almighty, Everlasting God, the Protector of all those who put their trust in Thee: hear our prayers in behalf of Thy servants who sail their vessels beneath the seas . . ." World Prayers Index, <http://www.worldprayers.org> (last visited Feb. 1, 2006).

304. "Lord God, Giver of Life, Source of all healing, who alone can help us grow in wholeness: We thank you for the gift of life and health, and remembering your faithful servants Cosmus and Damian we ask you to guide and uphold all doctors, surgeons, hospital staffs and all engaged in the ministry of healing . . ." *Id.*



“offering of the pipe,”<sup>306</sup> a New Age “invocation of the soul,”<sup>307</sup> the Celtic “Carmina Gadelica,”<sup>308</sup> or one of King David’s psalms.<sup>309</sup> Because the act of public prayer necessitates a single-voiced invocation, it precludes the broad range of interpretations available to a participant under a Ten Commandments or Pledge analysis.<sup>310</sup> Where an individual views a Decalogue monument, he may invoke numerous religious and secular interpretations,<sup>311</sup> and when he recites the Pledge, he may pledge in various ways, with or without the words “under God.”<sup>312</sup> With public prayer, however, an individual has less interpretive latitude and little opportunity to modify the prayer or the way in which he prays, especially where the individual is not offering the prayer himself. The act of prayer also discriminates against “nonbelievers” who do not accept a sentient God since in the act of praying one implies the existence of a higher source. A school-led prayer thus does not pass the first prong of unitary-accommodationism.

In addition, government-sponsored prayer likely would not satisfy the second prong of unitary-accommodationism. The act of praying necessitates some belief that a God exists, the God is sentient, and the God is capable of receiving prayers. An individual’s concept of God is

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305. “Satveshu Maitrim Gunishu Pramodham, Klishteshu Jivehu Krupa Parathvam, Madhyastha Bhavam Viparita Vruthow, Sada Mamatma Viddhatu Deva.” *Id.*

306. “Grandfather, Great Spirit, you have been always, and before you no one has been. There is no other one to pray to but you. You yourself, everything that you see, everything that has been made by you . . .” *Id.*

307. “I am the Soul. I am the Light Divine. I am Love. I am Will. I am Fixed Design.” *Id.*

308. “Valiant Nuada of the white sword, Who subdued the Firbolg of blood, For love of the Tribe, for pains of Danu’s children, Hold thy shield over us, protect us all . . .” *Id.*

309. “Lord, I cry unto thee: make haste unto me; give ear unto my voice, when I cry unto thee. Let my prayer be set forth before thee as incense; and the lifting of my hands as the evening sacrifice.” *Psalms* 141:1–2.

310. The American Atheists note the difficulty of adopting a single nondenominational prayer, or even a “rotating” multi-denominational prayer:

What sort of a “prayer” would [a nondenominational one] be? Many religious groups are skeptical about organized school prayer because they fear that doctrines and prayers of other religions may be used. . . . [T]here are hundreds, even thousands of diverse religious beliefs. Many would clamor for ‘equal time’ in this prayer lottery. How would Catholics react to having, say, Jewish Orthodox prayers read? What happens if a Scientologist, or Seventh-Day Adventist, or Satanist demands that prayers from those sects be used? Communities, schools, and ultimately students would become divided against each other in a religious free-for-all.

American Atheists, FAQ’s About Prayer in Schools, <http://www.atheists.org/publicschools/faqs.prayer.html#offend>.

311. *See supra* notes 294–97 and accompanying text.

312. *See supra* notes 269–82 and accompanying text.

therefore limited by the very nature of prayer. This differs from the Pledge analysis where the words “under God” do not circumscribe specific deistic characteristics, or the Ten Commandments assessment where a monument does not dictate the nature of God’s law. Additionally, religious freedom is limited by a school-offered prayer since one need not offer the prayer personally to have indirectly participated in the prayer.<sup>313</sup> This differs from the Pledge analysis where a person may remove the words “under God” from his personal pledge or refrain from pledging entirely. Ultimately, free exercise rights are limited under a school prayer policy so that the practice is unconstitutional.<sup>314</sup>

#### VI. CONCLUSION

The twentieth and early twenty-first century trends in Establishment Clause jurisprudence are troubling ones, especially when viewed in light of Free Exercise Clause deficiencies. Certainly, courts must adopt a new understanding of establishment and free exercise doctrines if religious liberty is to be maintained. The structural unitary-accommodationist test offers a solution to persistent Religion Clause inconsistencies that threaten religious belief. Primarily, the test resolves the free exercise dilemma raised by modern Religion Clause tests that overlook free exercise considerations in an Establishment Clause context. Additionally, the structural unitary-accommodationist test resolves many of the disparities engendered in current Religious Clause jurisprudence. Correcting such deficiencies is vital, for if courts continue to adopt free-exercise-inhibiting and inconsistent doctrine, our nation risks becoming the very fortress of religious persecution our forefathers sought to flee. We must cling to our religious rights and defend the freedom to believe. To do otherwise would not only spurn the sacrifice of our Pilgrim parentage but also defeat the founding principle of our nation.

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313. A person can be said to participate in prayer when he is merely present during the prayer offering.

314. Notably, a moment of silence does not encounter the same problems as a voiced prayer. Under a structural unitary-accommodationist test, a moment of silence would likely pass muster since a person is not required to pray, or even acknowledge a higher being, during the silence. *But cf.* *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985) (holding that a one-minute period of silence violated the Establishment Clause because it failed the secular purpose and effect prong of the *Lemon* test).