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Establishment Clause Mythology

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ABSTRACT

For 75 years, the Supreme Court's opinions have reflected stark conflict between two competing narratives about the Establishment Clause's meaning and legal foundation. One view holds that the Constitution requires a separation between church and state. The other view asserts that the government may promote religion. The former view—which we call separationism—is based on the framers' understanding of the nature of civil government, and on a political theory of liberal pluralism. The latter view—which we call religionism—is usually grounded in tradition, and principally has its roots in the Second Great Awakening of the nineteenth century and its urge to transform political society to serve religion.

This conflict has a definite trajectory. From the middle of the twentieth century until the 1980s, the separationist view almost always prevailed in the Court's decisions. Starting in the 1980s, the alternative, religionist view began to displace the separationist view. This trend has recently accelerated.

We seek to provide a comprehensive account of the development of the religionist view of the Establishment Clause. Proponents of the religionist account typically claim that "history and tradition" support their approach, but they have not explained why tradition is a sufficient normative basis for current constitutional understandings. This turn toward tradition as a preferred normative methodology demands critical evaluation. When tradition becomes the source of adjudicative norms, courts must answer difficult questions about the choice, scope, age, duration, and depth of the claimed tradition. In addition, reliance on tradition requires consideration of the role that contemporary interpreters play in reconstituting the past when they seek to address present issues. Traditions are not found; they are created, because interpreters have deemed some past practices worthy of persisting normative force. Proponents of the religionist account have not explained why the practices that they elevate are more worthy of normative respect than other practices that cannot be reconciled with their claim of tradition.

The Court's construction of a religionist Establishment Clause narrative coincides with the rise of an aggressive form of Christian nationalism in our politics. Both ultimately rely on a mythology that imagines a special relationship between the United States and God, in which God's blessing depends on the American people's reverence for God and obedience to divine law. We can step back from the civil conflict that this mythology threatens to foment only by recommitting to separationism—and its core principle that religion and civil government ought to occupy distinct spheres.

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INTRODUCTION

For 75 years, the Supreme Court's opinions have reflected stark conflict between two competing narratives about the Establishment Clause's meaning and legal foundation. One view holds that the Constitution requires a separation between church and state. The other view asserts that the government may promote religion—and sometimes has the constitutional obligation to do so. The former view—which we call separationism—is based on the framers' understanding of the nature of civil government, and on a political theory of liberal pluralism. The latter view—which we call religionism—is usually grounded in tradition, and principally has its roots in the Second Great Awakening of the nineteenth century and its urge to transform political society to serve religion.

This conflict has a definite trajectory. From the middle of the twentieth century until the 1980s, the separationist view almost always prevailed in the Court's decisions. Many of those decisions, however, prompted dissents that gradually developed an alternative account of the Establishment Clause's meaning. Starting in the 1980s, the alternative, religionist view began to displace the separationist view. The religionist account gradually moved from dissent to majority opinion, in cases about government aid to religion, government displays and speech about religion, and finally religious exercise in public schools.

In this paper, we have three objectives. First, we seek to provide a comprehensive account of the development of the religionist view of the Establishment Clause. We spend a considerable amount of time on this project both because it is instructive about how constitutional doctrine can shift through consistent resistance and change in personnel, and because it reveals a subtle but important evolution in the religionist account over time. As we will see, the religionist account began by conceding the normative force of separationism but asserting that some state practices that acknowledge or promote religion are nevertheless permissible because of their similarity to longstanding practices. In more recent years, proponents of the religionist account have explicitly rejected separationism and instead asserted that the Constitution permits a close relationship between government and the dominant faith. Similarly, whereas earlier articulations of the religionist view were based principally on practices that post-dated the framing era, more recent accounts have suggested (albeit without much elaboration) that the religionist view is consonant with the original meaning.

Second, we question the validity of tradition as a metric for constitutional decision. Until very recently, proponents of the religionist account tended implicitly to concede that the approach lacks a foundation in the Constitution's original meaning. Instead, proponents typically claim that "history and tradition" support their approach. Justices who advance this position have emphasized a set of nineteenth- and twentieth-century practices that officially acknowledged the divine. Proponents of this account, however, are usually vague about why those past practices are sufficiently similar to the practices at issue in modern disputes to control those decisions. In addition, Justices who

advance the religionist view have not explained why tradition is a sufficient normative basis for current constitutional understandings.

More important, proponents of the religionist account ignore the role that contemporary interpreters play in reconstituting the past when they seek to address present issues. On their account, we can access the past and its meaning without the intermediation of present preferences or biases. But traditions are not found; they are created, because interpreters have deemed some past practices worthy of persisting normative force. Proponents of the religionist account have not explained why the practices that they elevate are more worthy of normative respect than other practices that cannot be reconciled with their claim of tradition.

This is not to say, however, that the religionist account lacks a historical basis. Indeed, both separationism and religionism have deep roots in American—and, more broadly, Western European—history. Although the history is complex, separationism has its strongest roots in the mid- to late-eighteenth century. Religionism, in contrast, became dominant in the nineteenth century. For the last three centuries, both have exerted strong influences on understandings of the proper relationship between religion and civil government.

The Court's focus on tradition as a metric for constitutional decision in Establishment Clause cases is part of a larger trend of elevating tradition to normative status. In *New York State Rifle & Pistol Ass'n v. Bruen*,[3] the Court held that firearms regulations are constitutionally valid only when "consistent with the Nation's historical tradition" of such regulation.[4] Similarly, in *Dobbs v. Jackson Women's Health Org.*,[5] the Court held that the right to terminate a pregnancy is not "rooted in the Nation's history and tradition."[6]

The Court's turn toward tradition as a preferred normative methodology demands critical evaluation. In this paper, we focus on tradition as a recurrent theme in Establishment Clause opinions, but our critique is generalizable to other contexts in which the Court relies on tradition as a basis for decision. When tradition becomes the source of adjudicative norms, courts must answer difficult questions about the choice, scope, age, duration, and depth of the claimed tradition.

If the relevant history points in two starkly different directions, we need some basis other than appeal to history or tradition to resolve constitutional disputes. At bottom, the rival approaches rely on competing substantive principles about the proper relationship between religion and the state. Our third objective is to identify and evaluate those principles.

The Court's construction of a religionist Establishment Clause narrative coincides with the rise of an aggressive form of Christian nationalism in our politics. Both ultimately rely on a mythology that imagines a special relationship

[3] 142 S.Ct. 2411 (2022).
[4] *Id.* at 2126.
[5] 142 S.Ct. 2228 (2022).
[6] *Id.* at 2244.

between the United States and God, in which God's blessing depends on the American people's reverence for God and obedience to divine law. We can step back from the civil conflict that this mythology threatens to foment only by recommitting to separationism—and its core principle that religion and civil government ought to occupy distinct spheres.

I. THE COMPETING ESTABLISHMENT CLAUSE NARRATIVES

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof …."[7] Conflicts about the meaning of most constitutional provisions tend to arise at the margins.[8] Conflict about the meaning of the Establishment Clause, in contrast, involves its very core. Over time, members of the Court have embraced competing historical narratives to determine the meaning of the Clause. To understand those narratives, we provide a close reading of the Court's modern Establishment Clause decisions.

A. Everson *and the Separationist Narrative*

Before the middle of the twentieth century, the Supreme Court decided only a handful of cases that involved the Establishment Clause, and most of those decisions provide little guidance about the core meaning of the Clause.[9]

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[7] U.S. CONST., amend. I.

[8] There is no dispute, for example, that the Equal Protection Clause prohibits official discrimination on the basis of race and national origin. *See, e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954); Yick Wo v. Hopkins, 118 U.S. 356 (1886). Conflicts arise over whether the clause's scope should extend to other forms of discrimination, such as discrimination on the basis of sexual orientation. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644 (2015).

[9] *See* Reynolds v. United States, 98 U.S. 145 (1878); Bradfield v. Roberts, 175 U.S. 291 (1899); Quick Bear v. Leupp, 210 U.S. 50 (1908); Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930); Watson v. Jones, 80 U.S. 679 (1871); United States v. Ballard, 322 U.S. 78 (1944). The opinions in most of those cases included no meaningful narrative of the history and meaning of the Clause. In *Bradfield*, the Court considered a challenge to the provision of federal funds for the construction of a hospital in the District of Columbia. The plaintiff alleged that the corporation receiving the funds was composed of members of a monastic order or sisterhood of the Roman Catholic Church and, as a consequence, payment of the funds would violate the Establishment Clause. The Court was willing to assume for purposes of the decision that provision of funds to a religious corporation would violate the Clause, 175 U.S. at 297, but concluded that the contract and documents of incorporation did not identify the corporation as religious in nature, *id.* at 298. The Court also concluded that it was immaterial "that the hospital may be conducted under the auspices of the Roman Catholic Church," because it was required to "be managed pursuant to the law of its being," which was a charter issued by Congress. *Id.* The Court continued, "That the influence of any particular church may be powerful over the members of a nonsectarian and secular corporation, incorporated for a certain defined purpose and with clearly stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body." *Id.*

In *Quick Bear*, the Court considered a suit seeking to enjoin payments from the Commissioner of Indian Affairs to a Catholic mission school to provide education to children on Indian lands. The plaintiffs argued that the payments reduced the amount of government money available for tribal education and were in violation of a federal statutory prohibition on funding for sectarian schools. The Court concluded that the statutory provision did not apply to expenditures from a trust fund created by a treaty. The Court also rejected the plaintiffs' claim that the "spirit" of the Establishment Clause requires the government to act in non-sectarian fashion. The Court reasoned that to deny the tribes funding for religious education would interfere with the free exercise of religion. 210 U.S. at 81-82. *See also Cochran*, 281 U.S. 370 (1930) (rejecting a takings claim against a state law that authorized the purchase of text books for

The modern era of Establishment Clause jurisprudence began in 1947 with the Court's decision in *Everson v. Ewing Township Board of Education*.[10] *Everson* involved a challenge to a town's policy of subsidizing parents for the cost of transporting their children to school, including to parochial schools.[11] The Court upheld the policy in a 5-4 decision. Although the Court divided over the constitutionality of the policy, all nine Justices agreed about the original meaning and operative principles of the Establishment Clause.[12]

Justice Black, writing for the Court, recounted eighteenth-century history,[13] with a particular focus on the controversy in Virginia over taxes to support teachers of the Christian religion.[14] In light of this history, and especially the views of Madison and Jefferson, he offered a thoroughly separationist understanding of the Clause:

> 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. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No

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students, including students enrolled in parochial schools, and reasoning that the children, rather than the schools, were the beneficiaries of the program); *Watson*, 80 U.S. 679 (1871) (requiring judicial deference to decisions about the ownership of congregational property made by the highest body within a Church and invoking a "broad and sound view of the relations of church and state under our system of laws"); *cf. Ballard*, 322 U.S. 78 (1944) (holding that the Religion Clauses preclude courts from examining the truth or falsity of religious beliefs).

The Court did, however, explain the history of the Religion Clauses in *Reynolds*, which involved a free exercise defense to a prosecution for polygamy. The Court relied on James Madison's Memorial and Remonstrance Against Religious Assessments and Thomas Jefferson's letter to the Danbury Baptist Association, which included the wall of separation metaphor, "almost as an authoritative declaration of the scope and effect" of the Clauses. 98 U.S. at 162-164.

[10] 330 U.S. 1 (1947).

[11] 330 U.S. at 3-4.

[12] *See id.* at 26-27 (Jackson, J., dissenting, joined by Frankfurter, J.) ("[T]he effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense.… This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse."); *id.* at 28 ("I cannot read the history of the struggle to separate political from ecclesiastical affairs … without a conviction that the Court today is unconsciously giving the clock's hands a backward turn."); *id.* at 31-32 (Rutledge, J. dissenting, joined by Frankfurter, Jackson, and Burton, JJ.) ("The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the 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."); *id.* at 39 ("All the great instruments of the Virginia struggle for religious liberty thus became warp and woof of our constitutional tradition, not simply by the course of history, but by the common unifying force of Madison's life, thought and sponsorship.").

[13] 330 U.S. at 8-14.

[14] *Id.* at 11-13.

> person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. 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. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. 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."[15]

Notwithstanding this strong, and seemingly absolute, language, the Court upheld the policy.[16] The Court acknowledged that the challenged policy resulted in the expenditure of public funds to support travel to religious schools.[17] But the Court concluded that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."[18] Indeed, the Court asserted that a state's refusal to provide basic public services, such as fire and police protection, to religious organizations would be inconsistent with Free Exercise principles.[19] Accordingly, the Court declared that "State power is no more to be used so as to handicap religions than it is to favor them."[20]

The four dissenting Justices agreed with the Court's statement of Establishment Clause principles.[21] Their disagreement was based on the Court's failure to apply those principles in what they deemed a rigorous manner, as required by their understanding of strict separation. In their view, the town's funding of travel to religious schools functioned as impermissible support for those schools.[22]

B. McCollum*,* Zorach*, and the Genesis of the Religionist Narrative*

Just one year later, the Court confronted a case that tested the principles identified in *Everson*. *McCollum v. Board of Education*[23] concerned a policy of "released time" religious education for children enrolled in public schools. Under the policy, schools reserved instructional time during which students could receive religious education from ministers and teachers of various faith

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[15] *Id.* at 15-16 (quoting Reynolds v. United States*,* 98 U.S. 145, 164 (1878)).
[16] *Id.* at 17-18.
[17] *See id.* at 17 ("It is undoubtedly true that children are helped to get to church schools.").
[18] *Id.* at 18.
[19] *Id.* at 17-18.
[20] *Id.* at 18.
[21] *See supra* note 12.
[22] *See* 330 U.S. at 214 (Jackson, J., dissenting) ("Catholic education is the rock on which the whole structure rests, and to render tax aid to its Church school is indistinguishable to me from rendering the same aid to the Church itself…. The state cannot maintain a Church and it can no more tax its citizens to furnish free carriage to those who attend a Church. The prohibition against establishment of religion cannot be circumvented by a subsidy, bonus or reimbursement of expense to individuals for receiving religious instruction and indoctrination."); *id.* at 44 (Rutledge, J., dissenting) ("Does New Jersey's action furnish support for religion by use of the taxing power? Certainly it does, if the test remains undiluted as Jefferson and Madison made it, that money taken by taxation from one is not to be used or given to support another's religious training or belief, or indeed one's own.").
[23] People of State of Illinois ex rel. McCollum v. Board of Education of School Dist. No. 71, Champaign County, Ill., 333 U.S. 203 (1948).

communities.[24] The religious instruction was provided in school classrooms during the school day. The school gave parents a choice whether to send their children to the religion class of their faith. Students whose parents chose not to send them to religion classes instead attended a study hall during the time of religious instruction.[25]

Justice Black again wrote the Court's opinion, which largely reaffirmed *Everson*'s commitment to the separation of church and state. The Court concluded that the school district's policy impermissibly supported religion. Because the policy involved the use of the "tax-supported" public school system to "aid religious groups to spread their faith," Justice Black reasoned that the policy constituted support for religious activities in violation of *Everson*'s understanding of the Establishment Clause.[26]

Justice Frankfurter concurred in the judgment.[27] He supplemented the Court's analysis in *Everson* with a more robust historical defense of separationism in the field of public education.[28] At the time of the founding, there was no widespread, comprehensive system of public schools. Although some cities had a functioning public school system, most education was provided by religious schools. As Justice Frankfurter explained, "organized education in the Western world" traditionally "was Church education," and "[c]olonial schools certainly started with a religious orientation."[29] But this changed over time. Justice Frankfurter noted that one of the first debates over the appropriate relationship between secular and religious authority concerned education. Madison's Memorial and Remonstrance, which articulated a strong separationist view, responded to a proposal to use public funds to support teachers of the Christian religion.[30] As Justice Frankfurter explained, the movement for "common" (or public) schools in the first half of the nineteenth century fundamentally changed the character of American education.[31] He explained that the "evolution of colonial education, largely in the service of religion, into the public school system of today is the story of changing conceptions regarding the American democratic society, of the functions of

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[24] *Id.* at 207-209.

[25] *Id.*

[26] *Id.* at 209-210. Justice Black asserted that the Court's decision did not "manifest a governmental hostility to religion or religious teachings." He continued:

> A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion. For the 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. Or, as we said in the *Everson* case, the First Amendment had erected a wall between Church and State which must be kept high and impregnable.

Id. at 211-212.

[27] 333 U.S. at 212 (opinion of Frankfurter, J.).

[28] *Id.* at 213 ("To understand the particular program now before us as a conscientious attempt to accommodate the allowable functions of Government and the special concerns of the Church within the framework of our Constitution and with due regard to the kind of society for which it was designed, we must put this Champaign program of 1940 in its historic setting.").

[29] *Id.* at 213-214.

[30] *Id.* at 214.

[31] *See id.* at 214-217.

State-maintained education in such a society, and of the role therein of the free exercise of religion by the people."[32]

Justice Frankfurter noted that the leaders of the common-school movement did not intend to marginalize religion. Instead, many of the leaders were deeply religious people who believed that secular public schools were the best mechanisms in a religiously pluralist society to provide education without sectarian conflict.[33] He asserted that "by 1875 the separation of public education from Church entanglements, of the State from the teaching of religion, was firmly established in the consciousness of the nation."[34]

Justice Frankfurter acknowledged the persistent desire of some parents to educate their children in schools that integrated religion throughout the curriculum, a goal shared by some religious authorities.[35] And he recognized that the constitutional prohibition on public funding of religious education left some religious schools with inadequate resources for their purposes.[36] Justice Frankfurter explained how these pressures led to the proposal and implementation of released-time policies such as the one at issue in *McCollum*.[37]

In light of the history that Justice Frankfurter outlined, the policy at issue in the case was obviously constitutionally problematic; it involved state aid to religion with a "candid purpose" of "sectarian teaching."[38] Justice Frankfurter then noted a feature of the program that made it even more problematic. Not only did the policy involve religious instruction in public schools, but in practice it pressured all students to participate.[39] Referring to peer pressure, Justice Frankfurter noted that the "law of imitation operates, and nonconformity is not

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[32] *Id.* at 214.

[33] *Id.* at 216-17 ("Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice."). As Justice Frankfurter explained, "The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered." *Id.* at 216.

[34] *Id.* at 217; *accord id.* at 215 ("The upshot of these controversies, often long and fierce, is fairly summarized by saying that long before the Fourteenth Amendment subjected the States to new limitations, the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people."); *see also id.* at 215 ("[T]he Fourteenth Amendment merely reflected a principle then dominant in our national life").

[35] *See id.* at 217, 220-222.

[36] *See id.* at 220-221.

[37] *Id.* at 222-225.

[38] *Id.* at 226.

[39] *Id.* at 227 ("The Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects. The fact that this power has not been used to discriminate is beside the point. Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally. That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the domain.")

an outstanding characteristic of children. The result is an obvious pressure upon children to attend."[40] As a consequence, children who declined to participate would "have inculcated in them a feeling of separatism when the school should be the training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents."[41] For Justice Frankfurter, coercion was not a necessary element of an Establishment Clause violation, but it was a significant feature of the arrangement at issue—and of many other policies that would violate the Clause.

Justice Reed alone dissented.[42] His opinion is notable because it was the first to sketch the alternative narrative of the Establishment Clause. He sought to direct "attention to the many instances of close association of church and state in American society" and to demonstrate that "many of these relations are so much a part of our tradition and culture that they are accepted without more."[43]

Justice Reed only briefly addressed the original meaning of the Establishment Clause, asserting that the framers' intent was to prohibit Congress from creating an official church.[44] He then lamented that the Court's understanding of non-establishment significantly expanded the Clause's reach.[45] In particular, he thought that programs such as the one at issue, which provided optional, extra-curricular opportunities for students of faith, were "far from the minds" of the framers of the Clause.[46]

As evidence, Justice Reed began with Jefferson's suggested rules for the University of Virginia, which permitted students to organize and attend religious services while enrolled as students.[47] Justice Reed offered this example to suggest that Jefferson's "wall of separation" happily tolerated religious education at public institutions.[48] He discounted Madison's Remonstrance on the ground that it addressed state "support [for] Christian sects by taxation"

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[40] *Id.*

[41] *Id.* at 227-228.

[42] 333 U.S. at 238 (Reed, J., dissenting).

[43] *Id.* at 239.

[44] *Id.* at 244 ("The phrase 'an establishment of religion' may have been intended by Congress to be aimed only at a state church. When the First Amendment was pending in Congress in substantially its present form, 'Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.' " (quoting 1 Annals of Congress 730)).

[45] *See id.* at 244 ("[N]ever until today, I believe, has this Court widened its interpretation to any such degree as holding that recognition of the interest of our nation in religion, through the granting, to qualified representatives of the principal faiths, of opportunity to present religion as an optional, extracurricular subject during released school time in public school buildings, was equivalent to an establishment of religion.").

[46] *Id.* at 244.

[47] *Id.* at 245-246.

[48] Justice Reed's analysis did not acknowledge any of the obvious differences between college students' voluntary attendance at religious services while enrolled as students, on the one hand, and the experience of public school children who are compelled to attend school and who are given the choice of sitting idly in a sparsely populated room or joining the majority of students in religious education.

rather than the more general relationship between public education and religious teaching.[49]

Justice Reed professed agreement with *Everson*'s general principles, including its prohibition on aid to religious institutions.[50] But he argued that "aid" must "be understood as a purposeful assistance directly to the church itself or to some religious group or organization doing religious work of such a character that it may fairly be said to be performing ecclesiastical functions."[51]

Justice Reed then turned to custom and tradition, offering examples of longstanding relationships between religion and state, some of which the Court had expressly approved.[52] Justice Reed noted the common practice of extending tax exemptions for church income and property;[53] Congress's hiring and use of a chaplain;[54] the availability of federal funding, under the Servicemen's Readjustment Act of 1944, for veterans who wish to pursue a career in the ministry;[55] prayer in the D.C. public schools;[56] and the military academies' hiring and use of chaplains along with compulsory attendance by students at worship services.[57] Justice Reed concluded, "In the light of [these] precedents, customs, and practices …, I cannot agree with the Court's conclusion that when pupils compelled by law to go to school for secular education are released from school so as to attend the religious classes, churches are unconstitutionally aided."[58]

Justice Reed's dissent provides the seeds of what we call the religionist narrative of the Establishment Clause. As we will see, it resonates in the current Court's opinions with its emphasis on respect for "practices embedded in our society by many years of experience."[59] He cautioned against interpretations that call into question the constitutionality of "national custom[s]" and the "accepted habits of our people."[60] For Justice Reed, "the history of past practices [was] determinative of the meaning of [the] constitutional clause, not a decorous introduction to the study of its text."[61]

The Court's decision in *McCollum* generated a strong public reaction.[62] Four years later, the Court revisited released-time programs in *Zorach v.*

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[49] *Id.* at 247-248.
[50] *Id.* at 248 ("I agree as [state in *Everson*] that none of our governmental entities can 'set up a church.' I agree that they cannot 'aid' all or any religions or prefer one 'over another.' ").
[51] *Id.*
[52] *Id.* at 250 ("Well-recognized and long-established practices support the validity of the Illinois statute here in question."); *see id.* at 249-250 (citing *Everson*, Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930), and Bradfield v. Roberts, 175 U.S. 291 (1899)).
[53] *Id.* at 249.
[54] *Id.* at 253-254.
[55] *Id.* at 254.
[56] Id. at 254.
[57] *Id.* at 254-255.
[58] *Id.* at 255.
[59] *Id.* at 256; *see infra* at notes 167-332 and accompanying text.
[60] *Id.* at 256.
[61] *Id.*
[62] *See* Robert Kramer, *Foreword*, 14 L. AND CONTEMP. PROB. 1 (1949) (noting that debate about *McCollum* "has almost inevitably spread from the justices themselves to all sections of the press, the pulpit, and the general public"); Zorach v. Clauson, 343 U.S. 306, 317 (1952) (Black, J.,

Clauson.[63] In a 6-3 decision, the Court upheld the constitutionality of a New York policy that permitted students to leave school during the day to attend religious education classes operated and funded by a coalition of religious organizations. Under the program, students who did not take advantage of the opportunity to attend religious classes were required to remain in classrooms at school.[64]

The Court distinguished *McCollum* on the ground that the New York policy did not turn classrooms over to religious organizations to provide religious instruction in public school buildings.[65] Justice Douglas, who wrote for the Court, rejected the appellants' claim that the policy effectively coerced students to participate in the religious instruction.[66]

Justice Douglas then addressed concerns that the Court's conclusion departed from the understanding of the Establishment Clause that the Court had articulated in *Everson* and *McCollum*. He acknowledged that the separation between church and state must be "complete and unequivocal" and "absolute."[67] But he asserted, somewhat paradoxically:

> The First Amendment … does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concern or union or dependency one on the other. That is the common sense of the matter. Otherwise, the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly.

Justice Douglas's assertion that the Amendment "studiously defines" the circumstances in which interactions between church and state are problematic is cryptic at best. More important is his reference to common sense, and the implicit assertion that exacting application of the standard in *Everson* would threaten to disrupt long-accepted patterns of cooperative interaction between religion and government.

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dissenting) ("Probably few opinions from this Court in recent years have attracted more attention or stirred wider debate [than *McCollum*]… With equal conviction and sincerity, [some] have thought the *McCollum* decision fundamentally wrong and have pledged continuous warfare against it.").

[63] 343 U.S. 306 (1952).

[64] *Id.* at 308.

[65] *Id.* at 308-309 ("This 'released time' program involves neither religious instruction in public school classrooms nor the expenditure of public funds. All costs, including the application blanks, are paid by the religious organizations. The case is therefore unlike *McCollum* v. *Board of Education*, … which involved a 'released time' program from Illinois. In that case the classrooms were turned over to religious instructors.").

[66] *Id.* at 311 ("No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools. A student need not take religious instruction. He is left to his own desires as to the manner or time of his religious devotions, if any. There is a suggestion that the system involves the use of coercion to get public school students into religious classrooms. There is no evidence in the record before us that supports that conclusion. The present record indeed tells us that the school authorities are neutral in this regard and do no more than release students whose parents so request. If in fact coercion were used, if it were established that any one or more teachers were using their office to persuade or force students to take the religious instruction, a wholly different case would be presented.").

[67] *Id.* at 312.

Indeed, echoing Justice Reed's dissent in *McCollum*, Justice Douglas rehearsed a litany of common church-state interactions whose constitutionality had not been questioned. If the separation principle were applied too aggressively, he reasoned:

> Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths [and] other references to the Almighty … would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."[68]

Yet such practices, Justice Douglas asserted, "run through our laws, our public rituals, our ceremonies."[69]

Justice Douglas did not simply make a practical point about the need to accommodate constitutional principle to established practices. He asserted, "We are a religious people whose institutions presuppose a Supreme Being."[70] The first part of this statement was almost certainly true, at least as a matter of demographics in 1952.[71] But the second part of the statement is wholly inconsistent with the historical evidence on which the Court relied in *Everson*. Madison's Memorial and Remonstrance, for example, specifically rejected the idea that secular government rests in any way on divine authority.[72] More important, although some of the founders relied on natural law in making claims

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[68] *Id.* at 312-313.

[69] *Id.* at 313. Justice Douglas also linked the released-time program to accommodations that schools routinely make for students who have religious obligations that require them to miss school. He suggested that invalidation of the program at issue would call into question the power of public schools to make those routine accommodations. This analogy leaves much to be desired. Accommodations for individual students have essentially no effect on the rest of the students in their classes. When, to take one of Justice Douglas's examples, a "Jewish student asks his teacher for permission to be excused for Yom Kippur," *id.* at 313, the teacher's permission does not in any way inject religious teaching into the classroom. Justice Douglas's proposed analogy—that in these circumstances "the teacher … cooperates in a religious program to the extent of making it possible for her students to participate in it"—bears little resemblance to the released-time program at issue in the case.

[70] *Id.* at 313.

[71] *See* Frank Newport, Five Key Findings on Religion in the U.S., available at https://news.gallup.com/poll/200186/five-key-findings-religion.aspx ("In the late 1940s and 1950s, when Gallup began regularly measuring religious identity, over nine in 10 American adults identified as Christian—either Protestant or Catholic—with most of the rest saying they were Jewish.").

[72] James Madison, Memorial and Remonstrance Against Religious Assessments, available at https://founders.archives.gov/documents/Madison/01-08-02-0163, ¶ 1 ("We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority …."); *id.* at ¶ 8 ("If Religion be not within the cognizance of Civil Government how can its legal establishment be necessary to Civil Government?").

about individual rights, the text of the Constitution expressly defines "We, the People," rather than God, as the source of government authority.[73]

Justice Douglas then suggested that invalidation of the program at issue would effectively "show a callous indifference to religious groups," "preferring those who believe in no religion over those who do believe."[74] When the state "encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs," he continued, "it follows the best of our traditions" by respecting "the religious nature of our people and accommodat[ing] the public service to their spiritual needs."[75]

In this pivotal part of his opinion, Justice Douglas amplified the two core threads of Justice Reed's counter-narrative to *Everson*. First, he suggested that the failure of government to accommodate religion disrespects longstanding practices of harmony between church and state. Second, the opinion reasoned that opposition to such practices inevitably results in a political culture of secularism to the detriment of religious adherents. Justice Douglas wrote:

> [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. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here.[76]

In this passage, Justice Douglas made two important points. First, he suggested that *Everson*'s separation principle, scrupulously applied, evinces hostility to religion. The wall of separation, on this view, functions as a no-trespassing sign directed at believers, a message that people of faith are not welcome.

Second, Justice Douglas subtly modified the neutrality rule used in *Everson*. In *Everson*, neutrality operated as a principle designed to limit the sweep of the no-support rule. Justice Black's opinion for the Court in *Everson* announced a prohibition on government financial support for religious institutions.[77] But the Court also recognized that certain state-provided benefits that flow to the public at large—such as police and fire protection and access to public utilities and rights of way—in practice amount to "support."[78] Yet it would violate the Free

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[73] U.S. CONST., preamble (ordaining and establishing Constitution in the name of "We the People"); *see also* THE DECLARATION OF INDEPENDENCE ¶ 2 ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed ….").

[74] 343 U.S. at 314.

[75] *Id.* at 313-314.

[76] *Id.* at 314.

[77] 330 U.S. at 15-16.

[78] *Id.* at 17-18.

Exercise Clause for the state to deny generally available benefits only to religious institutions.[79] It would obviously be difficult for members of a congregation to worship if their church burned down because the fire department failed to respond to an alarm, and there are few options for private fire protection.[80] To address this paradox, the Court proposed the neutrality principle: the government does not violate the Establishment Clause when it provides these benefits to religious entities along with private institutions and individuals.[81]

On Justice Douglas's account, however, the neutrality principle does much more than guarantee equal access to generally available public benefits. In his telling, the neutrality principle requires government sensitivity to the particular needs of the religious.[82] *Zorach* did not involve generally available benefits and the eligibility of religious institutions for such benefits. Instead, it involved a program specifically designed to privilege the needs of religious students. Justice Douglas asserted that a public school "can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction."[83] But he failed to note that non-religious students remained locked behind those closed doors while their classmates congregated off site.[84]

Justice Douglas's conclusion fused these themes. He purported to accept *McCollum*'s holding, but he asserted that to "expand" it to cover the program at issue would mean that "public institutions can make no adjustments of their

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[79] *Id.* at 16 ("New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.").

[80] *Id.* at 18.

[81] *Id.* (holding that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary"); *id.* (concluding that the challenged program "does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools").

[82] *Compare Zorach*, 343 U.S. at 314 (asserting that the released-time program "respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find 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"), *with Everson*, 330 U.S. at 16 ("[W]e do not mean to intimate that a state could not provide transportation only to children attending public schools ….). The Court's reasoning in *Zorach* foreshadowed the approach later developed in Sherbert v. Verner, 374 U.S. 398 (1963) (holding that the Free Exercise Clause required state to exempt from general law a person whose religious convictions prevented compliance); and Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that Free Exercise Clause required exemption for Amish family from compulsory school laws).

[83] 343 U.S. at 314.

[84] *Zorach*, 343 U.S. at 321 (Frankfurter, J., dissenting) ("The pith of the case is that formalized religious instruction is substituted for other school activity which those who do not participate in the released-time program are compelled to attend. If its doors are closed, they are closed upon those students who do not attend the religious instruction, in order to keep them within the school."); *Zorach*, 343 U.S. at 323-324 (Jackson, J., dissenting) ("Stripped to its essentials, the plan has two stages: first, that the State compel each student to yield a large part of his time for public secular education; and, second, that some of it be 'released' to him on condition that he devote it to sectarian religious purposes.").

schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion."[85] Justice Douglas's opinion in Zorach is a forceful early articulation of the religionist narrative of the Establishment Clause.

It is important to situate the Court's opinion in *Zorach* in its historical context. In 1952, the ideological conflict of the Cold War took center stage. In popular culture and political dialog, the Soviet Union was defined by its atheism. Congress, President Eisenhower, and a wide range of prominent Americans sought to distinguish the American character by asserting its connection to the divine. Two years after the Court's decision in *Zorach*, President Eisenhower signed a bill to add the phrase "one nation under God" to the Pledge of Allegiance.[86] His signing statement began, "From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural school house, the dedication of our nation and our people to the Almighty."[87] In 1956, Congress formally adopted "In God we trust" as the national motto.[88]

This historical background provides context for the Court's declaration that "We are a religious people whose institutions presuppose a Supreme Being."[89] This assertion set the United States apart from Soviet communism—a system avowedly hostile to religion—and reassured the public that the Court's principle of separationism would not result in a nation stripped of religiosity.

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[85] 343 U.S. at 315.

[86] Act of June 14, 1954, Pub. L. No. 396, 68 Stat. 249 (1954).

[87] President Eisenhower's signing statement continued:

> To anyone who truly loves America, nothing could be more inspiring than to contemplate this rededication of our youth, on each school morning, to our country's true meaning. Especially is this meaningful as we regard today's world. Over the globe, mankind has been cruelly torn by violence and brutality and, by the millions, deadened in mind and soul by a materialistic philosophy of life. Man everywhere is appalled by the prospect of atomic war. In this somber setting, this law and its effects today have profound meaning. In this way we are reaffirming the transcendence of religious faith in America's heritage and future; in this way we shall constantly strengthen those spiritual weapons which forever will be our country's most powerful resource, in peace or in war.

President Dwight D. Eisenhower, Statement Upon Signing Act of June 14, 1954. The report of the House Committee responsible for the bill explained:

> At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.

H.R. Rep. No. 83-1693, at 1-2 (1954).

[88] H.R. Res. 396, 84th Cong. (1956) (enacted), codified at 36 U.S.C. § 302 (" 'In God we trust' is the national motto.").

[89] *Zorach*, 343 U.S. at 313.

Justices Black, Frankfurter, and Jackson filed separate dissents. All three agreed that the program at issue in *Zorach* was substantively indistinguishable from the program invalided in *McCollum*.[90]

Justice Black acknowledged the strong public reaction to *McCollum*, noting that "few opinions from this Court in recent years have attracted more attention or stirred wider debate," with critics pledging "continuous warfare against it."[91] But Justice Black concluded that the program at issue in *Zorach* entailed public support for religious instruction, and that alone was sufficient to condemn it.[92]

Justice Black also responded directly to the Court's characterization of the religious nature of the American people. He agreed with the Court's assertion, at least as an historical matter,[93] but reasoned, echoing *Everson*, that it "was precisely because Eighteenth Century Americans were a religious people divided into many fighting sects that we were given the constitutional mandate to keep Church and State completely separate…. Now as then, it is only by wholly isolating the state from the religious sphere and compelling it to be completely neutral, that the freedom of each and every denomination and of all nonbelievers can be maintained."[94] Whereas the Court found the program at issue in *Zorach* neutral with respect to religion (by its inclusion of religious education alongside secular instruction), Justice Black concluded that the program privileged religious students at the expense of non-religious students, and that the Court's validation of the program amounted to "the legal exaltation of the orthodox and [the] derogation of unbelievers."[95]

Justice Jackson responded directly to the Court's suggestion that invalidation of the released-time program would be hostile to religion. "As one whose children, as a matter of free choice, have been sent to privately supported Church schools," he challenged "the Court's suggestion that opposition to this plan can only be antireligious, atheistic, or agnostic."[96] Further, he asserted that his "evangelistic brethren confuse an objection to compulsion with an objection to religion." In his view, it was "possible to hold a faith with enough confidence to believe that what should be rendered to God does not need to be decided

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[90] *Id.* at 316 (Black, J., dissenting) ("I see no significant difference between the invalid Illinois system and that of New York here sustained."); *id.* at 322-323 (Frankfurter, J., dissenting) ("The result in the *McCollum* case was based on principles that received unanimous acceptance by this Court, barring only a single vote. I agree with Mr. Justice Black that those principles are disregarded in reaching the result in this case" (citation omitted)); *id.* at 325 (Jackson, J., dissenting) ("The distinction attempted between [*McCollum*] and this is trivial, almost to the point of cynicism, magnifying its nonessential details and disparaging compulsion which was the underlying reason for invalidity.").

[91] 343 U.S. at 317 (Black, J., dissenting).

[92] *Id.* at 318 ("The state thus makes religious sects beneficiaries of its power to compel children to attend secular schools. Any use of such coercive power by the state to help or hinder some religious sects or to prefer all religious sects over nonbelievers or vice versa is just what I think the First Amendment forbids.").

[93] *Id.* at 318 ("This was at least as true when the First Amendment was adopted; and it was just as true when eight Justices of this Court invalidated the released time system in *McCollum* ….").

[94] *Id.* at 319.

[95] *Id.*

[96] 343 U.S. at 324 (Jackson, J., dissenting).

and collected by Caesar."[97] Justice Jackson concluded by declaring, "The day that this country ceases to be free for irreligion it will cease to be free for religion—except for the sect that can win political power."[98]

McCollum and *Zorach* include the seeds of modern debate over the meaning of the Establishment Clause. The divide, then and now, turns on a choice between dueling historical narratives about the meaning and purpose of the Clause. Until the late twentieth century, the dominant narrative—notwithstanding the Court's opinion in *Zorach*—rested on *Everson*'s historical account of separationism at the founding. This narrative is fundamentally originalist in character, in that it focuses on constitutional meaning at the time of the adoption of the constitutional provision in question.[99] To be sure, Justice Frankfurter's concurring opinion in *McCollum* explained how subsequent history, in the context of public education, reaffirmed the commitment to separationism through the nineteenth century.[100] But the separationist narrative begins as a claim about historical, original meaning.[101]

The competing, religionist narrative, in contrast, rests on a different kind of claim about constitutional meaning. This narrative does not depend on historical understandings at the time of the adoption of the First Amendment, other than in the most general sense. Instead, the religionist narrative emphasizes traditions that began in the wake of the founding, but that did not gain wider traction until the resurgence of religiosity in the nineteenth century.[102] For this reason, the religionist narrative puts equal emphasis on history and

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[97] *Id.* at 324-325.

[98] *Id.* at 325.

[99] *See generally* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599 (2004) (defining originalism as an approach that treats "the discoverable meaning of the Constitution at the time of its initial adoption as authoritative for purposes of constitutional interpretation in the present"); Larry B. Solum. *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in THE CHALLENGE OF ORIGINALISM: ESSAYS IN CONSTITUTIONAL THEORY (Grant Huscroft & Bradley W. Miller, eds.) (explaining that "[c]ontemporary originalist theory has a core of agreement on two propositions:" (1) "the linguistic meaning of each constitutional provision was fixed at the time that provision was adopted"; and (2) "our constitutional practice both is (albeit imperfectly) and should be committed to the principle that the original meaning of the Constitution constrains judicial practice").

[100] *See supra* notes 27-38 and accompanying text.

[101] To be sure, most separationist understandings of the Establishment Clause are not purely originalist. Instead, most separationist views are as much about promoting liberal pluralism as they are about effectuating the original meaning of the Establishment Clause. But like most non-originalist accounts of constitutional meaning, the separationist account is usually anchored in historical understandings, at least at a high level of generality. *See, e.g.,* Sch. Dist. of Abington Twp v. Schempp, 374 U.S. 203, 232-35 (1963) (Brennan, J., concurring) (discussing framing-era understandings of the Establishment Clause, but acknowledging that "an awareness of history and an appreciation of the aims of the Founding Fathers do not always resolve concrete problems…. Our task is to translate the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century") (internal quotation marks omitted). *See generally* IRA C. LUPU & ROBERT W. TUTTLE, SECULAR GOVERNMENT, RELIGIOUS PEOPLE 3-39 (2014); Peter J. Smith, *How Different are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707 (2011).

[102] *See* MARK A. NOLL, AMERICA'S BOOK: THE RISE AND DECLINE OF A BIBLE CIVILIZATION 1794-1911, at 99 (2022).

tradition. Whereas originalist accounts focus, often exclusively, on historical understandings at the time of the framing, the religionist account grants normative weight to practices—mostly practices from the nineteenth and twentieth centuries—that arose subsequent to the founding. To be sure, as we will see, proponents of the religionist narrative often claim that the framers were motivated by their religious beliefs, or that the framers were religious people who would have assumed some level of cooperation between church and state. But the religionist narrative ultimately depends on a claim that longstanding practices deserve constitutional respect.[103]

C. School Prayer, School Funding, and the Persistence of the Separationist Account

Notwithstanding *Zorach*, the separationist narrative of the Establishment Clause dominated in the half-century following the decision, particularly in cases involving schools. In the 1960s, the Court relied on the separationist account in holding that prayer and bible-reading in public schools violates the Establishment Clause. Likewise, in the 1970s and 1980s, the Court relied on the separationist narrative to hold unconstitutional many forms of public funding for religious education. The religionist narrative, however, did not disappear in this period, finding voice primarily in dissenting opinions. As we discuss below, it eventually emerged as the defining narrative in cases about publicly sponsored religious messages.

The Court offered its most robust application of the separationist narrative in *Engel v. Vitale*.[104] *Engel* involved New York's practice of beginning the school day with student recitation of a state-composed non-denominational prayer.[105]

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[103] This is not to say that no accounts of the Establishment Clause that reject separationism are originalist in nature. Justice Thomas, for example, has asserted that the framers understood the Establishment Clause to limit Congress's power to interfere with established state churches; on this view, the Fourteenth Amendment does not incorporate the Establishment Clause, let alone require separation of church and state. *See* American Legion v. American Humanist Ass'n, 139 S.Ct. 2067, 2094-2095 (2019) (Thomas, J., concurring in the judgment) ("The text and history of [the Establishment] Clause suggest that it should not be incorporated against the States."). Then-Justice Rehnquist, in contrast, accepted that the Fourteenth Amendment incorporates the Establishment Clause, Wallace v. Jaffree, 472 U.S. 38, 113 (Rehnquist, J., dissenting), but asserted that the Clause "forbade establishment of a national religion, and forbade preference among religious sects or denominations," *id.* at 106; *accord id.* ("The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in *Everson*."). Justice Rehnquist concluded that, "[a]s its history abundantly shows, … nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means." Although few historians agree with Justice Rehnquist's understanding of the Establishment Clause, his account was originalist in nature. *See id.* at 113 ("The true meaning of the Establishment Clause can only be seen in its history.... The Framers intended the Establishment Clause to prohibit the designation of any church as a 'national' one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others.").

[104] 370 U.S. 421 (1962).

[105] *Id.* at 422-423. The prayer was as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422.

Justice Black, writing for the Court, concluded that the government "is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity."[106]

Justice Black's opinion principally relied on history in reaching this conclusion. He first noted that many colonists fled England seeking relief from government-imposed religious orthodoxy, including prescribed forms of prayer.[107] He acknowledged that some of them adopted their own forms of religious orthodoxy in the colonies, establishing official churches and official modes of worship, and that some of these establishments survived the Revolution.[108] But Justice Black asserted that "the successful Revolution against English political domination was shortly followed by intense opposition to the practice of establishing religion by law."[109] Following *Everson*, he pointed to the Virginia debate over state funding of religious education as evidence of "a widespread awareness among many Americans of the dangers of a union of Church and State."[110]

Justice Black again rejected claims that the Court's enforcement of a separation of church and state reflected hostility toward religion. He asserted, to the contrary, that it was precisely the desire to promote the freedom to worship that "caused men to leave the cross-currents of officially established state religions and religious persecution in Europe and come to this country filled with the hope that they could find a place in which they could pray when they pleased to the God of their faith in the language they chose."[111] The Establishment Clause, on this view, was "written to quiet well-justified fears … arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to."[112] Justice Black concluded: "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."[113]

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[106] *Id.* at 430.
[107] *Id.* at 425-427.
[108] *Id.* at 427-428.
[109] *Id.* at 428.
[110] *Id.* at 429.
[111] *Id.* at 434.
[112] *Id.* at 434.
[113] *Id.* at 435. In *School District of Abingdon Township v Schempp*, 374 U.S. 203 (1963), the Court revisited the constitutionality of religious exercises in public school. The Court invalidated the practice in several school districts of beginning the school day with the recitation of passages from the Bible, as well as the practice in some of the districts to recite the Lord's Prayer. *Id.* at 206-212. Justice Clark's opinion for the Court relied principally on *Engel*, *Everson*, and other post-incorporation Religion Clause cases but did not develop the historical arguments on which the Court had relied in those cases. *Id.* at 212-223.

In his concurring opinion, Justice Brennan cautioned against exclusive reliance on history in determining constitutional meaning. He noted that the framers' understandings often are difficult to ascertain and that the world has changed significantly since the time of the framing.

Whereas Justice Black explicitly grounded the decision in *Engel* in the separationist account, the Court's other decisions in the 1960s and 1970s involving schools typically took the separationist premise as a given and rarely revisited the historical evidence on which that premise relies.[114] In funding cases, the separationist narrative became embedded in the doctrine and ultimately operative through tests that the Court devised in a trio of decisions. In *School District of Abingdon Township v Schempp*,[115] which involved prayer and Bible readings in public schools, the Court extensively reviewed its Religion Clause precedents. Based on those decisions, the Court formulated a two-part test: "[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[116] In *Walz v. Tax Commission of New York*,[117] which rejected a challenge to tax exemption for religious institutions, the Court added a third element to the *Schempp* test: the reviewing court "must also be sure that the end result—the effect—is not an excessive government entanglement with religion."[118]

The Court stitched these factors into a familiar three-part test in *Lemon v. Kurtzman*.[119] To survive under Establishment Clause review, the challenged law or policy had to satisfy all three parts of the test: it "must have a secular legislative purpose;" "its principal or primary effect must be one that neither advances nor inhibits religion;" and it "must not foster 'an excessive government entanglement with religion.' "[120] As in *Schempp* and *Walz*, the *Lemon*

374 U.S. at 234-243 (Brennan, J., concurring). He stated, "Whatever Jefferson or Madison would have thought of Bible reading or the recital of the Lord's Prayer in what few public schools existed in their day, our use of the history of their time must limit itself to broad purposes, not specific practices." *Id.* at 241. In his view, the broad purposes of the Establishment Clause condemned the prayers at issue. *Id.*

Justice Stewart dissented. He questioned whether the Fourteenth Amendment incorporated the Establishment Clause, 374 U.S.. at 309-310 (Stewart, J., dissenting), called the wall of separation a "sterile metaphor," *id.* at 309, and asserted that the prohibition on official prayer in public schools disadvantaged religious students in violation of the neutrality principle, *id.* at 313. Notably, Justice Stewart's dissent—unlike his dissent in *Engel*, *see infra* at notes 171-175 and accompanying text—did not meaningfully focus on the history or tradition of the Establishment Clause, other than to note that, "as a matter of history and as a matter of the imperatives of our free society, … religion and government must necessarily interact in countless ways," *id.* at 309.

[114] *See, e.g.*, *Schempp*, 374 U.S. at 216 (relying on *Everson*'s principles); *id.* at 221 (relying on *Engel*); *id.* at 217 ("While none of the parties to either of these cases has questioned these basic conclusions of the Court, both of which have been long established, recognized and consistently reaffirmed, others continue to question their history, logic and efficacy. Such contentions, in the light of the consistent interpretation in cases of this Court, seem entirely untenable and of value only as academic exercises."). *See also infra* at notes 119-122 and accompanying text.

[115] 374 U.S. 203 (1963).

[116] *Id.* at 222. Applying this test, the Court concluded that the "religious character" of the exercises was sufficient to condemn them under the Establishment Clause. *Id.* at 223.

[117] 397 U.S. 664 (1970).

[118] *Id.* at 674.

[119] 403 U.S. 602 (1971). The Court relied on "cumulative criteria developed by the Court over many years." *Id.* at 612.

[120] *Id.* at 612-613 (citing Board of Education v. Allen, 392 U.S. 296 (1968), and quoting Walz, 397 U.S. at 674).

Court focused only briefly on the historical basis for the separationist narrative,[121] choosing instead to rely on the Court's prior decisions.[122]

During the 1970s and 1980s, in the many post-*Lemon* cases involving funding for religious schools, the Court often divided over application of the *Lemon* test. But the Justices rarely questioned the historical basis of the test and the separationist principle that it implemented.[123]

D. Schools and Increasing Skepticism About Separationism

By the 1990s, however, the Court's commitment to the separationist narrative in school funding cases had begun to wane. The shift is vividly

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[121] *See Schempp*, 374 U.S. at 214 ("[T]he views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States."); *id.* at 222 ("The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits."); *Walz*, 397 U.S. at 667-668 ("It is sufficient to note that for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity. In England, and in some Colonies at the time of the separation in 1776, the Church of England was sponsored and supported by the Crown as a state, or established, church; in other countries 'establishment' meant sponsorship by the sovereign of the Lutheran or Catholic Church. The exclusivity of established churches in the 17th and 18th centuries, of course, was often carried to prohibition of other forms of worship."); *Lemon*, 403 U.S. at 612 ("[The First Amendment's] authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be 'no law *respecting* an establishment of religion.' A law may be one 'respecting' the forbidden objective while falling short of its total realization.").

[122] *See Schempp*, 374 U.S. at 214, 216, 221 (relying on *Everson* and *Engel*); *Walz*, 397 U.S. at 667-668 ("Prior opinions of this Court have discussed the development and historical background of the First Amendment in detail. It would therefore serve no useful purpose to review in detail the background of the Establishment and Free Exercise Clauses of the First Amendment or to restate what the Court's opinions have reflected over the years." (citing *Everson* and *Engel*)); *Lemon*, 403 U.S. at 611-612 (relying on *Everson*).

[123] *See, e.g.*, Mueller v. Allen, 463 U.S. 388 (1983) (applying *Lemon* test to conclude that state tax deduction for the cost of sending children to parochial school did not violate the Establishment clause); *id.* at 416-417 (Marshall, J., dissenting) (disagreeing with Court's application of *Lemon* test as violating *Everson*'s no-support principle); Meek v. Pittenger, 421 U.S. 349 (1975) (applying *Lemon* test to conclude that state program providing instructional equipment to religious schools violated the Establishment Clause, but that state loan of textbooks did not); Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986) (applying *Lemon* test to conclude that state vocational rehabilitation assistance program did not violate Establishment Clause as applied to blind person who chose to study at a Christian college to become a pastor). *But see Meek*, 421 U.S. at 395-396 (Rehnquist, J., concurring in part and dissenting in part) ("I am disturbed as much by the overtones of the Court's opinion as by its actual holding. The Court apparently believes that the Establishment Clause of the First Amendment not only mandates religious neutrality on the part of government but also requires that this Court go further and throw its weight on the side of those who believe that our society as a whole should be a purely secular one. Nothing in the First Amendment or in the cases interpreting it requires such an extreme approach to this difficult question …." (citing Zorach v. Clauson, 343 U.S. 306, 313-314 (1952)); *but cf.* Wallace v. Jaffree, 472 U.S. 38, 92-107 (Rehnquist, J., dissenting) (questioning the historical evidence for the separationist view in a case involving a moment of silence in public schools); *id.* at 108-112 (criticizing the *Lemon* test).

illustrated in the Court's treatment of a program that sent public school teachers to private schools to provide secular instruction to students with special needs. Religious school students were eligible to receive benefits under the program. When the Court first addressed a challenge to the program in 1985, in *Aguilar v. Felton*[124] and a companion case,[125] the majority relied on an aggressive application of separationism, enjoining public school teachers from entering religious schools. The Court reasoned that public school teachers, many of whom had previously taught in religious schools, might be tempted to instruct students in religious doctrine.[126] The Court concluded that the state could not cure the problem by adopting a system to monitor the religious content of publicly funded classes in religious schools, moreover, because such a system posed a significant risk of entanglement.[127] To comply with the Court's injunction, school districts rented adjacent buildings, or even placed pre-fabricated trailers next to religious schools, to provide students with needed services.[128]

Twelve years later, the Court dissolved the injunction in *Agostini v. Felton*,[129] concluding that the Establishment Clause did not require the extent of separation demanded by the Court's decision in *Aguilar*. Writing for the Court, Justice O'Connor rejected the *Aguilar* Court's deep skepticism about the conduct of public school teachers in religious schools. The Court abandoned the conclusion that "any public employee who works on the premises of a religious school is presumed to inculcate religion in her work"[130] and that the provision of instruction by public school teachers to students at religious schools necessarily creates a "symbolic union" between church and state.[131] Justice O'Connor's framed her disagreement with *Agostini* solely in doctrinal terms, but her reasoning did not directly challenge the separationist narrative of the Establishment Clause.

Abandonment of the separationist narrative in funding cases, however, came within a hair's breadth of a majority in the Court's 2000 decision in *Mitchell v. Helms*.[132] The case involved the loan of supplementary educational materials, including computers and audio-visual equipment, from school boards to all public and certified private schools, including religious schools, within their districts. Enrollment at participating schools determined the amount of aid that they received.[133] The plaintiffs argued that the materials at issue were unlike loan

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[124] 473 U.S. 402 (1985).
[125] School Dist. Of City of Grand Rapids v. Ball, 473 U.S. 373 (1985).
[126] *Ball*, 473 U.S. at 387 (1985) ("We do not question that the dedicated and professional religious schoolteachers employed by the Community Education program will attempt in good faith to perform their secular mission conscientiously. Nonetheless, there is a substantial risk that, overtly or subtly, the religious message they are expected to convey during the regular schoolday will infuse the supposedly secular classes they teach after school.").
[127] *Aguilar*, 473 U.S. at 409-414.
[128] *See* Agostini v. Felton, 521 U.S. 203, 213 (1997).
[129] 521 U.S. 203 (1997).
[130] 521 U.S. at 222.
[131] *Id.* at 223.
[132] 530 U.S. 793 (2000).
[133] *Id.* at 801-803.

materials previously approved by the Court. In previous cases, the materials at issue—such as books and maps—had a fixed form when loaned, and thus did not pose a significant risk of diversion to religious use. Computers and audio-visual equipment, in contrast, are simply delivery devices for whatever content a school chooses to present—including, in the case of religious schools, content promoting religious indoctrination.[134]

The Court rejected an Establishment Clause challenge to the loan of those materials to religious schools. There was no opinion for a majority; Justice Thomas wrote for a plurality of four Justices.[135] The plurality was untroubled by the fact that the materials could readily be used by religious schools for indoctrination. The plurality reasoned that the eligibility requirements were neutral—religious and non-religious schools could participate—and that the state's support flowed to religious schools only because parents had independently chosen to send their children to those schools.[136] The plurality also rejected a categorical prohibition on aid to religious schools that is divertible to religious use.[137] In addition, the plurality urged abandonment of a doctrinal rule prohibiting aid to pervasively sectarian institutions.[138]

In reaching these conclusions, Justice Thomas directly attacked the separationist principle that had governed decisions for the previous half-century:

> [T]he religious nature of a recipient should not matter to the constitutional analysis, so long as the recipient adequately furthers the government's secular purpose. If a program offers permissible aid to the religious (including the pervasively sectarian), the areligious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be. The pervasively sectarian recipient has not received any special favor, and it is most bizarre that the Court would, as the dissent seemingly does, reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children.[139]

Justice Thomas's focus on hostility to religion and the religious echoes Justice Reed's dissent in *McCollum* and Justice Douglas's opinion in *Zorach*. Although Justice Thomas did not offer an alternative historical narrative, his opinion directly repudiated *Everson*'s separationist narrative.

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[134] *Id.* at 814.

[135] Justice Thomas's opinion was joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Scalia. *Id.* at 800 (plurality opinion).

[136] *Id.* at 815-816 ("If aid to schools, even 'direct aid,' is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support of religion.' (quoting Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481, 489 (1986)).

[137] 530 U.S. at 820 (plurality opinion).

[138] *Id.* at 828 ("[H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow."); *id.* (citing the history of the Blaine Amendment).

[139] *Id.* at 827-828.

Justice O'Connor, joined by Justice Breyer, concurred in the judgment. She criticized the plurality for giving too much weight to neutrality, which in her view should have been only one factor of many,[140] and for its conclusion that "actual diversion of government aid to religious indoctrination is consistent with the Establishment Clause."[141] Justice O'Connor concurred in the result, however, because she concluded that the plaintiffs had not demonstrated that the materials at issue had actually been used for religious indoctrination.[142] But her opinion preserved the core concern of separationism by insisting that anything more than incidental religious use of the materials would have rendered the program unconstitutional. Her opinion reasoned that the program was constitutional because it required the government to provide adequate protective measures to ensure that funding is used exclusively for secular instruction.[143]

Justice Souter, in dissent, expressly defended the separationist narrative. He asserted that the Establishment Clause "bars the use of public funds for religious aid" and explained that the prohibition "is meant to guarantee the right of individual conscience against compulsion, to protect the integrity of religion against the corrosion of secular support, and to preserve the unity of political society against the implied exclusion of the less favored and the antagonism of controversy over public support for religious causes."[144] Justice Souter elaborated on these purposes of the Establishment Clause by citing Madison's Memorial and Remonstrance, Jefferson's bill to establish religious liberty, and the evidence cited in Justice Black's and Justice Rutledge's opinions in *Everson*.[145] He lamented that the "plurality position breaks fundamentally with Establishment Clause principle, and with the methodology painstakingly worked out in support of it."[146]

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[140] 530 U.S. at 837-840 (O'Connor, J., concurring in the judgment).

[141] *Id.* at 840; *see id.* at 840-844.

[142] Following *Agostini*, Justice O'Connor reasoned that courts should not presume that teachers at the religious schools would use the materials for religious indoctrination. *See id.* at 858 (rejecting a presumption of inculcation of religion).

[143] Because Justice O'Connor's opinion concurring in the judgment offered the narrowest ground on which the Court could achieve a majority, its reasoning became the governing rule for cases involving direct government aid to religious institutions. *See* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds ....'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n. 15, (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). Justice O'Connor's approach entails a watered-down form of separationism. It imposes administrative limits on government support for religious practice and indoctrination, such a requirement that aid recipients sign affidavits promising to use the materials only for permitted purposes. But the approach eschews strong prophylactic measures and instead trusts teachers and others at religious institutions to adhere to separationist norms. Along with her opinion in *Agostini*, Justice O'Connor's opinion in *Mitchell* signaled the end of robust limits on the use of public funds for religious purposes. *See generally* LUPU & TUTTLE, *supra* note 101, at 74-112.

[144] 530 U.S. at 868 (Souter, J., dissenting).

[145] *See id.* at 870-872; *see also id.* at 899 ("[T]ogether with James Madison we have consistently understood the Establishment Clause to impose a substantive prohibition against public aid to religion and, hence, to the religious mission of sectarian schools.").

[146] *Id.* at 869.

The same year that the Court decided *Mitchell*, it held unconstitutional a Texas public school's policy that permitted prayers initiated and delivered by students at football games.[147] The Court's decision in *Santa Fe Independent School District v. Doe* appeared to be a victory for advocates of separationism. But the Court's opinion actually marked a significant retreat from the separationist principles that the Court announced in *Engel* and *Schempp*.

The Court's reasoning in *Santa Fe* focused on the question whether the school was responsible for creating a climate in which students would feel pressure to join the majority's prayers. The Court concluded that the policy violated the Establishment Clause because the school effectively coerced non-believing students to participate in the prayer.[148] Although government coercion to engage in worship plainly violates the Religion Clauses, *Engel* made clear that coercion is not a necessary element of an Establishment Clause violation. As the Court explained in *Engel*, the "Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."[149] Instead, it was the mere fact of official prayer that violated the Clause.[150] By focusing exclusively on coercion, the Court in *Santa Fe* implicitly suggested that the pressure to participate was a necessary element of an Establishment Clause claim.[151]

In reaching this conclusion, the Court in *Santa Fe* followed its 1992 decision in *Lee v. Weisman*.[152] *Lee* involved a public school district's policy of inviting clergy to deliver prayers at middle school and high school graduations. In a 5-4 decision, the Court held that the policy violated the Establishment Clause. Justice Kennedy's opinion for the Court acknowledged that students are not required to attend graduation or participate in the prayer. The Court reasoned that attendance was not meaningfully optional, however, and adolescent students would feel significant pressure to participate in the prayer by standing in respectful silence. The Court concluded that the school, which had invited the rabbi, was responsible for the religious experience imposed on all students.

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

148 *Id.* at 301-310 (concluding that the school was responsible for the prayers); *id.* at 310-313 (concluding that many students will feel pressure to participate in the prayers).

149 370 U.S. at 430.

150 *Id.* at 430 ("There can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer."),

151 To be sure, the Court's determination that the state was responsible for the prayer opportunity was significant; the state had worked very hard to avoid such responsibility and make the prayer seem as if it were entirely the students' private speech. *See* 530 U.S. at 308 ("The text and history of this policy, moreover, reinforce our objective student's perception that the prayer is, in actuality, encouraged by the school.") But the Court did not follow *Engel*'s statement that the mere fact of state responsibility alone was sufficient to hold the practice unconstitutional.

152 505 U.S. 577 (1992). *See* Santa Fe Ind. Sch. Dist., 530 U.S. at 301-302 ("Although this case involves student prayer at a different type of school function, our analysis is properly guided by the principles that we endorsed in *Lee*.").

The Court's focus in *Lee* on the state's coercion of religious experience at best ignored, and at worst implicitly rejected, the Court's reasoning in *Engel* and *Schempp*. In dissent, Justice Scalia would have gone even further. He acknowledged that actual coercion—that is, legal obligation "backed by threat of penalty"[153]—would have violated the Establishment Clause. But he rejected the majority's "psycho-journey" into the subjective consciousness of peer pressure as a measure of constitutionally relevant coercion.[154] As we explain below, Justice Scalia asserted that official "acknowledgment" of God does not violate the Establishment Clause because it is consistent with long-standing practice and tradition.[155]

It fell to the concurring Justices to articulate and defend the separationist narrative of the Establishment Clause. Justice Souter's lengthy concurring opinion offered a comprehensive account of the separationist narrative.[156] Justice Souter rejected the Court's implicit suggestion that coercion is a necessary element of an Establishment Clause claim.[157] His opinion provided extensive historical grounds to reject alternative accounts of the Establishment Clause. Justice Souter surveyed the drafting history of the First Amendment to respond to Justice Rehnquist's "non-preferentialist" view of the Establishment Clause,[158] which we also explain in greater detail below.[159] In addition, Justice Souter offered an originalist response to Justice Scalia's understanding of the Clause based on tradition and practice.[160]

Lee and *Santa Fe* are particularly notable because, in the thirty years after *Engel*, the Court had been committed to the separationist narrative in cases that involved religious practice in public schools. For example, no Justice dissented from the Court's 1968 decision in *Epperson v. Arkansas*,[161] which held that Arkansas's law prohibiting the teaching of evolution violated the Establishment Clause. In *Stone v. Graham*,[162] the Court invalidated a Kentucky statute that required the display of the Ten Commandments in every public school

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153 505 U.S. at 642 (Scalia, J., dissenting).
154 *Id.* at 643.
155 *See infra* at notes 244-252 and accompanying text.
156 505 U.S. at 609-631 (Souter, J., concurring). Justice Blackmun also wrote a concurring opinion, which focused on the perils of state endorsement of religion. Although his opinion did not offer a detailed historical defense of the separationist view, the opinion cited Madison's views about limitations on the state. 505 U.S. at 607-608 (Blackmun, J., concurring).
157 505 U.S. at 604 (Souter, J., concurring) ("Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient. Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion. But it is not enough that the government restrain from compelling religious practices: It must not engage in them either."); *accord id.* at 606 ("The mixing of government and religion can be a threat to free government, even if no one is forced to participate."); *id.* at 609 ("[O]ur cases have prohibited government endorsement of religion, its sponsorship, and active involvement in religion, whether or not citizens were coerced to conform.").
158 *Id.* at 612-616.
159 *See infra* at notes 214-227 and accompanying text.
160 505 U.S. at 622-626 (Souter, J., concurring).
161 393 U.S. 97 (1968).
162 449 U.S. 39 (1980).

classroom.[163] In *Wallace v. Jaffree*,[164] the Court struck down an Alabama statute that authorized teachers to hold a moment of silence for "meditation or voluntary prayer." And in *Edwards v. Aguillard*,[165] the Court held unconstitutional a Louisiana law that required "balanced treatment" for evolution and "creation science." To be sure, *Stone*, *Wallace*, and *Edwards* prompted dissents from Justices who opposed the separationist narrative.[166] But the decisions in those cases strongly reaffirmed the separationist understanding of the Establishment Clause.

E. The Rise of the Religionist Narrative

In the cases that we have discussed so far, the Court either adhered to the separationist narrative or departed from a strict application of its principles without directly challenging its historical basis. But in this era, a growing body of dissents offered a competing, religionist account of the Establishment Clause. As we have seen, Justice Reed was the first on the Court to articulate this view, in his dissent in *McCollum*. He asserted that the Establishment Clause must accommodate "practices embedded in our society by many years of experience."[167] Because, in his view, there was a long tradition of interaction between government and religion, including tax exemption for churches and official acknowledgment of God, the Establishment Clause could not condemn such practices.[168] Four years later, Justice Douglas's opinion in *Zorach* included a forceful articulation of the religionist narrative.[169] In the three decades after *Zorach*, however, the religionist narrative appeared only in dissenting opinions.[170]

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[163] Although *Stone* was a 5-4 decision, three of the Justices dissented on based on procedural grounds. *See id.* at 43 (noting that Chief Justice Burger and Justice Blackmun dissented because they thought that the case warranted "plenary consideration" and that Justice Stewart dissented from the Court's summary reversal of the Kentucky Supreme Court's decision). Only Justice Rehnquist issued a written dissent that criticized the Court's decision on substantive grounds. 449 U.S. at 43-47 (Rehnquist, J., dissenting). We discuss Justice Rehnquist's dissent *infra* at note __.

[164] 472 U.S. 38 (1985).

[165] 482 U.S. 578 (1987).

[166] *See Stone*, 449 U.S. at 45-46 (Rehnquist, J., dissenting) ("The Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin."); *Wallace*, 472 U.S. at 90 (Burger, C.J., dissenting) ("If the government may not accommodate religious needs when it does so in a wholly neutral and noncoercive manner, the 'benevolent neutrality' that we have long considered the correct constitutional standard will quickly translate into the 'callous indifference' that the Court has consistently held the Establishment Clause does not require."); *Wallace*, 472 U.S. at 91 (White, J., dissenting) (acknowledging that "I have been out of step with many of the Court's decisions dealing with this subject matter, and it is thus not surprising that I would support a basic reconsideration of our precedents."); *Wallace*, 472 U.S. at 92 (Rehnquist, J., dissenting) ("It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor [of a wall of separation] for nearly 40 years."); *Edwards*, 482 U.S. at 636-640 (Scalia, J., joined by Chief Justice Rehnquist, dissenting) (urging abandonment of the purpose prong of the *Lemon* test (and with it the capacity of courts to require that legislatures act with a secular purpose)).

[167] People of State of Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71, Champaign County, 333 U.S. 203, 256 (Reed, J., dissenting); *see supra* at notes 42-61 and accompanying text.

[168] 333 U.S. at 249-255 (Reed, J., dissenting).

[169] 343 U.S. 346, 312-315 (1952); *see supra* at notes 63-89 and accompanying text.

[170] There were, however, forceful articulations of the religionist narrative in state court decisions in this era. After oral arguments in *Zorach* but before the Court issued its decision, the Court

In *Engel*, for example, Justice Stewart's dissent was the lone voice for the religionist account.[171] Whereas Justice Black's opinion for the Court offered an originalist understanding of the Establishment Clause to justify the invalidation of recitation of the Regent's Prayer in public schools, Justice Stewart's dissent focused on a different touchstone for constitutional meaning. Rather than emphasizing the framers' understanding of the Establishment Clause,[172] Justice Stewart stressed the "the history of the religious traditions of our people, reflected in countless practices of the institutions and officials of our government."[173] Echoing Justice Reed's dissent in *McCollum* and Justice Douglas's opinion in *Zorach*, Justice Stewart cataloged a list of well-known government practices that acknowledge God or that recognize the religious character of the people.[174] Justice Stewart asserted that these practices, like New York's practice of beginning the school day with voluntary prayer, simply "recognize[d] and [followed] the deeply entrenched and highly cherished spiritual traditions of our Nation."[175]

In the 1960s and 1970s, Justice White, later joined by then-Justice Rehnquist, resisted the Court's limitations on public support for religious schools. They typically couched their resistance, however, in terms of the doctrinal test articulated in *Lemon*. Their dissents often criticized the Court's

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dismissed the appeal in Doremus v. Board of Education, 75 A.2d 880 (N.J. 1950). *See* 342 U.S. 429 (1952). In *Doremus*, the New Jersey Supreme Court rejected an Establishment Clause challenge to a New Jersey statute that required at least five verses from the Old Testament to be read without comment in each public school classroom at the opening of every school day. The Court stated the question presented as follows: "Was it the intent of the First Amendment that the existence of a Supreme Being should be negated and that the governmental recognition of God should be suppressed?" In providing a negative answer, the Court relied on two forms of evidence. First, it reasoned that provisions in the Constitution that appear to acknowledge God or religious commitment, such as the exclusion of Sundays for certain counting requirements and oath requirements, suggest that the framers saw no problem with religion as part of official business. 75 A.2d at 882. Second, the Court pointed to post-ratification practices, such as Thanksgiving proclamations, references to God on currency, and the lyrics of the National Anthem, reveal an affirmative relationship between government and God. *Id.* at 883. The Court also relied on Justice Reed's dissenting opinion in *McCollum*. *Id. See also id.* at 882 (relying on the "temper of the times during which the agitation for and the accomplishment of the amendment was had, the events which led to the adoption of the amendment, the contemporaneous and subsequent interpretation by way of statute and public practice, [and] the very wording of the amendment").

[171] Engel v Vitale, 370 U.S. 421, 444-450 (1962) (Stewart, J., dissenting).

[172] *Id.* at 446 (rejecting the Court's focus on "the history of an established church in sixteenth century England or in eighteenth century America"),

[173] *Id.*

[174] *Id.* at 446-449 (citing the Court's practice of declaring "God save the United States and this Honorable Court;" legislative prayer; Presidential oaths; the lyrics of a verse of the Star Spangled Banner mentioning the motto "In God we Trust;" the reference in the Pledge of Allegiance to God; the National Day of Prayer; and the inclusion of "In God we Trust" on currency); *see id.* at 450 (quoting the *Zorach* Court's assertion that "[w]e are a religious people whose institutions presuppose a Supreme Being").

[175] *Id.* at 450 (stating that the traditions in question "come down to us from those who almost two hundred years ago avowed their 'firm Reliance on the Protection of divine Providence' when they proclaimed the freedom and independence of this brave new world").

application of the *Lemon* test as unprincipled and unpredictable.[176] But they generally accepted *Lemon*'s basic framework and did not seek to develop a comprehensive alternative account of the Establishment Clause.[177]

The Court notably declined to apply the *Lemon* test, however, in a 1983 case that involved government-sponsored religious activity. In *Marsh v. Chambers*, the Court rejected an Establishment Clause challenge to the Nebraska legislature's policy of hiring a chaplain, who offered prayers at the opening of every legislative session.[178] Chief Justice Burger, who had written the opinion in *Lemon*, ignored its three-part test and instead focused exclusively on history and tradition.[179]

His opinion made two distinct, albeit related, types of claims about constitutional meaning. First, Chief Justice Burger asserted that the "opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."[180] He noted that federal courts typically begin their sessions with "God save the United States and this Honorable Court;" and that the Continental Congress, the United States Congress (dating to the First Congress), and most of the state legislatures have opened their sessions with prayer.[181] "In light of the unambiguous and unbroken history of more than 200 years," the Court reasoned, "there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society."[182] This argument assigns considerable weight to longstanding practices, even when they are otherwise in tension with constitutional norms. The Court was unwilling to "cast aside" Nebraska's "practice of over a century, consistent with two centuries of national practice."[183]

Chief Justice Burger acknowledged, however, that "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees."[184] He therefore offered a second argument about constitutional meaning to strengthen the conclusion that the Nebraska legislative chaplaincy did not violate the Establishment Clause. Chief Justice Burger noted that the

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[176] *See, e.g.*, Meek v. Pittenger, 421 U.S. 329 (1975) (Rehnquist, J., dissenting); Comm. for Pub. Ed. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (White, J., dissenting).

[177] Justice Rehnquist did, however, start to develop an alternative account of the Establishment Clause in this era in cases that involved government-sponsored religious activity. *See, e.g.*, Stone v. Graham, 449 U.S. 39, 45-46 (1980) (Rehnquist, J., dissenting) ("The Establishment Clause does not require that the public sector be insulated from all things which may have a religious significance or origin. This Court has recognized that 'religion has been closely identified with our history and government' and that '[the] history of man is inseparable from the history of religion.' ") (citations omitted).

[178] 463 U.S. 783 (1983).

[179] *Id.* at 786-792. The Court did not cite *Lemon*, other than to note that the court of appeals applied its three-part test in holding that the challenged practice violated the Establishment Clause. *Id.* at 786 (citing Chambers v. Marsh, 675 F.2d 228, 234-235 (8th Cir.)).

[180] 463 U.S. at 786.

[181] *Id.* at 786-788.

[182] *Id.* at 792.

[183] *Id.* at 790; *accord id.* at 795 (relying on an "unbroken practice for two centuries in the National Congress and for more than a century in Nebraska and in many other states").

[184] *Id.* at 790.

First Congress authorized the appointment and payment of legislative chaplains three days before approving the language of the First Amendment.[185] He continued:

> [T]here is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent.[186]

Chief Justice Burger here made an originalist claim about the meaning of the Establishment Clause as applied to legislative chaplaincy.

To be sure, the claim is a type of historical argument that most modern originalists disfavor. Rather than focus on the objective original public meaning of the Constitution's text, Chief Justice Burger relied on the Framers' subjective understandings and expectations about how the text would apply. As he explained:

> It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.[187]

Even though most originalists today are skeptical of claims about the framers' subjective intentions[188] or the original expected application[189] of the

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[185] *Id.* at 787-788.

[186] *Id.* at 790; *see also id.* at 788 ("[T]he men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment"); *id.* at 790 ("It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.").

[187] *Id.* at 790.

[188] *See, e.g.*, Justice Antonin Scalia, Address Before the Attorney General's Conference on Economic Liberties in Washington, D.C. (June 14, 1986), in OFFICE OF LEGAL POLICY, U.S. DEPT. OF JUSTICE, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 101, 106 (1987) (urging a "campaign to change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning"); *see generally* Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 720-724 (2011) (describing the shift among originalists from a focus on subjective intentions to objective meaning).

[189] *See, e.g.*, Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383, 384 (2007) ("While there does exist a live intramural disagreement among originalists concerning whether to abide by the originally intended meaning of the framers (or ratifiers) of constitutional text or the text's original public meaning, almost nobody espouses fidelity to the originally expected applications."); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 433 (2007) (distinguishing between "original expected application" and "original meaning"); Mark Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569 (1998) (distinguishing between meaning and applications); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORD. L. REV. 1269, 1284 (1997) ("[N]o reputable originalist, with the possible exception of Raoul Berger, takes the view that the Framers' 'assumptions and expectations about the correct application" of their principles is controlling."); Larry Solum, "Original Expected Applications Redux," available at https://balkin.blogspot.com/2023/01/original-expected-applications-redux.html (January 27, 2023) ("Because expectations about application are strong evidence of original meaning, taking a

Constitution, Chief Justice Burger's argument falls comfortably inside the originalist tradition.[190]

Importantly, however, the originalist claim was a narrow one that did not necessarily challenge the separationist account of the Establishment Clause. Chief Justice Burger's opinion was plausibly read to assert that legislative chaplaincy and prayer essentially function as an exception to the general rule that prohibits state funding of, or engagement in, religious activity. On this view, separationism is the governing principle, but legislative prayer is grandfathered into application of the Establishment Clause.[191] It is presumably for this reason that Chief Justice Burger noted that "historical patterns cannot justify contemporary violations of constitutional guarantees."[192]

Yet one could also read the opinion in *Marsh* as a challenge to separationism. The Court not only permitted an explicitly religious practice in the course of official government business, but the Court also invoked a familiar trope of the religionist narrative. Chief Justice Burger asserted:

> To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. As Justice Douglas observed, "[we] are a religious people whose institutions presuppose a Supreme Being."[193]

As we explain below, subsequent opinions disagreed about which of these understandings of *Marsh*—the modest, "grandfather" account or instead the religionist account—should control.[194]

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shortcut (skipping the meaning step and going directly to the legal conclusion) may seem reasonable…. But taking shortcuts is not good originalism.").

[190] Justice Scalia famously offered an argument based on original expected applications in arguing that capital punishment is constitutional. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 46 (Amy Gutman ed., 1997) ("No fewer than three of the Justices with whom I have served have maintained that the death penalty is unconstitutional, even though its use is explicitly contemplated in the Constitution."); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1988) (same). Raoul Berger, Robert Bork, and Edwin Meese, who were among the first to argue for the modern form of originalism, defended an approach that anchored constitutional meaning in the framers' subjective intentions, *see* Colby, *supra* note 188, at 720, and in any event the evidence that might cast light on original meaning often overlaps substantially with evidence of original intent, *see* Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 662 (2009) (stating that "the original understanding of a clause's ratifiers is often conflated with the 'original public meaning' of the clause's text" but that "the term originalism is capacious enough to embrace both theories").

[191] *See, e.g.*, McCreary County, Ky v. American Civil Liberties Union of Ky, 545 U.S. 844, 859 n.10 (2005) ("At least since *Everson*, it has been clear that Establishment Clause doctrine lacks the comfort of categorical absolutes. In special instances we have found good reason to hold governmental action legitimate even where its manifest purpose was presumably religious. See, *e.g., Marsh v. Chambers* (upholding legislative prayer despite its religious nature). No such reasons present themselves here.").

[192] 463 U.S. at 790.

[193] *Id.* at 792 (quoting Zorach v. Clauson, 343 U.S. 306, 313 (1952)). We discuss the various meanings of "acknowledgment" *infra* at notes 271-279 and accompanying text.

[194] *See infra* at notes 236-241 & 282-284 and accompanying text.

One year after *Marsh*, the Court held in *Lynch v. Donnelly* that a city's Christmas display, which featured a nativity scene along with other, more secular symbols of the holiday season, did not violate the Establishment Clause.[195] Chief Justice Burger again wrote for the Court. He began by acknowledging the separationist metaphor of a "wall" between church and state, but asserted that "the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."[196] Citing *Zorach*, Chief Justice Burger argued that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."[197]

The Court's promiscuous use, at the outset of the opinion, of the term "accommodation" signaled a shift away from separationist principles. Accommodation is a concept that properly belongs to Free Exercise doctrine; the question is whether the government has an obligation to alter its policies to exempt persons for whom compliance would be incompatible with their faith. In the separationist view, accommodation is relevant to Establishment Clause doctrine only in determining whether the grant of such exemptions impermissibly favors a religious person over the interests of those who do not share that person's faith.[198] *Lynch*, however, did not involve a believer's request for an exemption from government policies; instead, it concerned a religious display sponsored by the government. To the Court, "accommodation" evinced a general attitude that government solicitude toward religion does not generate Establishment Clause concerns. Indeed, the Court stated that such solicitude is not merely permissible, but desirable. For the Court, respecting "the religious nature of our people" reflects "the best of our traditions."[199]

It is one thing to assert that the government is permitted to alter its policies to allow a person of a minority faith to participate fully in civic activities, such as when the military authorized exemptions from general requirements for personnel with faith-based objections.[200] It is another to suggest that the government may use public facilities to promote the majority's religious celebrations based on solicitude for the majority's Free Exercise interests.[201] Yet the Court asserted that failure to so "accommodate" would evince "hostility" to religion.[202]

Chief Justice Burger then blurred the two strands of the *Marsh* opinion by recounting the originalist story of federal legislative chaplaincy and then

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[195] 465 U.S. 668 (1984).
[196] *Id.* at 673.
[197] *Id.*
[198] *See, e.g.*, LUPU & TUTTLE, *supra* note 101, at 216-219.
[199] *Id.* at 678 (quoting *Zorach*, 343 U.S. at 314).
[200] Department of Defense Instruction 1300.17 (Sept. 1, 2020), available at https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130017p.pdf (last visited July 31, 2023).
[201] *See* Ira C. Lupu & Robert W. Tuttle, *The Cross at College: Accommodation and Acknowledgment of Religion at Public Universities*, 16 WM. & MARY BILL OF RIGHTS J. 939, 974-975 (2008).
[202] *See Lynch*, 465 U.S. at 673 (stating that "such hostility would bring us into 'war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.'" (quoting *McCollum*, 333 U.S. at 211-212)).

immediately asserting that "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."[203] The Court declared that "[o]ur history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders."[204]

Unlike the claim about the First Congress's decision to hire a chaplain, virtually all the Court's examples of practices that invoked "Divine guidance" post-date the framing. They thus are relevant to an argument based on tradition, rather than one grounded in original meaning.[205] The Court cited Thanksgiving Proclamations, the closing of federal offices on Christmas, "In God We Trust" on currency, "One Nation under God" in the pledge, and Presidential Proclamations of a National Day of Prayer.[206] (Chief Justice Burger also mentioned the frieze in the Supreme Court, which features a depiction of Moses, and—somewhat inexplicably—displays of religious-themed Renaissance-era art at federally subsidized museums.[207]) The Court explicitly declared that traditional practices have normative significance under the Establishment Clause; the Court "refused 'to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as *illuminated by history*.' "[208]

Notwithstanding the Court's significant turn towards the religionist narrative in *Lynch*, the Court's resolution of the specific question presented in the case suggested some hesitation about full embrace of that narrative. The Court held that the city's display—including the crèche—simply depicted the historical origins of a popular holiday. Rather than embrace the religious character of the display, the Court downplayed it by describing the crèche as "one passive symbol" among others that celebrate the holiday season.[209]

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[203] 465 U.S. at 674. The Court declared, "Seldom in our opinions was this more affirmatively expressed than in Justice Douglas' opinion for the Court" in *Zorach*. Lynch, 465 U.S. at 674-675. The Court quoted *Zorach*'s statement that "We are a religious people whose institutions presuppose a Supreme Being." 465 U.S. at 675.

[204] *Id.* at 675.

[205] To be sure, evidence of post-ratification traditions can plausibly reflect original meaning, to the extent that it demonstrates a continuity in understandings about constitutional meaning. But matters are more complicated in disputes over the meaning of the Establishment Clause because of important cultural changes that affected perceptions of the appropriate relationship between church and state. *See infra* at notes 366 & 399-400 and accompanying text.

[206] *Lynch*, 465 U.S. at 675-676.

[207] *Id.* at 677.

[208] *Id.* at 678 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 671 (1970)).

[209] *See id.* at 686 ("To forbid the use of this one passive symbol—the creche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains, would be a stilted overreaction contrary to our history and to our holdings.").

Justice O'Connor wrote a concurring opinion. She would have reformulated the *Lemon* test to focus on whether the government's conduct was designed to endorse, or had the effect of endorsing, the beliefs and practices of a particular faith. She concluded that a reasonable observer would not perceive a message of endorsement of religion in the city's holiday display. 465 U.S. at 687-694 (O'Connor, J. concurring). Justice O'Connor's view did not fit squarely in the separationist tradition. Her concern was not one about the specific powers of the state, but rather

One year after *Lynch*, the Court decided *Wallace v. Jaffree*,[210] which addressed the constitutionality of an Alabama statute that authorized public school teachers to hold a minute of silence for "meditation or voluntary prayer."[211] Consistent with its cases about religion in public schools, in which the separationist narrative proved more resilient, the Court invalidated the provision of the statute at issue.[212] Applying the *Lemon* test, the Court reasoned that the Alabama legislature lacked a secular purpose in authorizing a moment of silence.[213]

Justice Rehnquist's dissent attacked the separationist account head on. He began by rejecting Jefferson's metaphor of the wall of separation, which he called "misleading" and the basis for a "mistaken understanding of constitutional history."[214] Justice Rehnquist advanced what came to be known as the "non-preferentialist" understanding of the Establishment Clause, one that sits comfortably within the religionist narrative. In his view:

> The Framers intended the Establishment Clause to prohibit the designation of any church as a 'national' one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. Given the 'incorporation' of the Establishment Clause as against the States via the Fourteenth Amendment in *Everson*, States are prohibited as well from establishing a religion or discriminating between sects. As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit

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the people's experience of the state's attitude towards religion. This understanding parallels the Court's later shift, in Lee v. Weisman, *see infra* at notes __ and accompanying text, to a focus on subtle coercion. In both accounts, there are important limitations on the state's ability to interact with religion, but the focus is on the subjective experience of the people rather than an objective line between religion and the state.

Justice Brennan, joined by Justice Marshall, Blackmun, and Stevens, dissented. 465 U.S. at 694-726 (Brennan, J., dissenting). His opinion advanced the separationist narrative. Applying the *Lemon* test, he would have concluded that the display, which included one of the most recognizable symbols of Christianity, lacked a secular purpose and had the primary effect of advancing religion. He also concluded that the display might foster divisiveness. *Id.* at 698-704.

[210] 472 U.S. 38 (1985).

[211] *Id.* at 40. A provision of the statute adopted in 1982 also authorized teachers to lead students in a prayer to "Almighty God … the Creator and Supreme Judge of the world." *Id.* The lower courts invalidated this provision, and the Supreme Court summarily affirmed their determination. Wallace v. Jaffree, 466 U.S. 924 (1984).

[212] *Wallace*, 472 U.S. at 61.

[213] *Id.* at 60-61 ("The legislature enacted [the provision at issue] for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each schoolday.").

[214] 472 U.S. 38, 92 (Rehnquist, J. dissenting). Justice Rehnquist discounted Jefferson's letter to Danbury Baptist Association, in which Jefferson famously used the metaphor, on two grounds. First, he noted that Jefferson was in France at the time of the drafting and ratification of the First Amendment. *Id.* ("Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment."). Second, he asserted that the metaphor itself did not reflect contemporary understandings of the permissible relationship between church and state. *Id.* at 92-93, 97-99.

> Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means.[215]

Justice Rehnquist's account emphasized evidence of original meaning. He dedicated significant attention to the drafting history of the Establishment Clause.[216] In particular, he rejected the *Everson* Court's characterization of Madison as a proponent of the separationist understanding. Instead, relying on colloquies on the House floor, Justice Rehnquist asserted that Madison "saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects," but "did not see it as requiring neutrality on the part of government between religion and irreligion."[217]

Consistent with this focus on original meaning, Justice Rehnquist also cited two pieces of evidence roughly contemporaneous with the adoption of the First Amendment. He noted that the First Congress in 1789 reenacted the Northwest Ordinance, which provided that "[religion], morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[218] He also emphasized Congress's invitation to President Washington to deliver a Thanksgiving Proclamation and Washington's affirmative response.[219]

Like other articulations of the religionist narrative, Justice Rehnquist relied on some evidence of post-ratification understandings of the appropriate relationship between church and state. Other than his cite to congressional appropriations in the late nineteenth century for the religious education of American Indians,[220] however, the authority on which he relied was nineteenth-century scholarly interpretations of original meaning. He cited Joseph Story's and Thomas Cooley's views about the meaning of the Establishment Clause.[221]

Justice Rehnquist's dissent in *Wallace* is distinctive among religionist accounts of the Establishment Clause because it presents a primarily originalist interpretation. Whereas other articulations of the religionist narrative focused, and generally continue to focus, on longstanding practices that post-date the ratification of the First Amendment, Justice Rehnquist stressed the framers' intentions.[222] Justice Rehnquist thus did not explicitly accord tradition normative force.

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[215] *Id.* at 113.
[216] *Id.* at 93-103.
[217] *Id.* at 98.
[218] *Id.* at 100 (quoting The Northwest Ordinance, 1 Stat. 50, 52).
[219] 472 U.S. at 100-101. Justice Rehnquist quoted Washington's proclamation, which offered gratitude to "that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be," for the blessings of divine providence and prayers that those blessings would continue. *Id.* at 102-103 (quoting 1 J. Richardson, Messages and Papers of the Presidents, 1789-1897, p. 64 (1897)).
[220] 472 U.S. at 103-104 (citing Act of June 7, 1897, 30 Stat. 62, 79).
[221] 472 U.S. at 104-105 (Story); *id.* at 105-106 (Cooley).
[222] *See id.* at 113 ("The true meaning of the Establishment Clause can only be seen in its history. As drafters of our Bill of Rights, the Framers inscribed the principles that control today. Any deviation from their intentions frustrates the permanence of that Charter and will only lead to the

Few subsequent proponents of the religionist narrative have adopted Justice Rehnquist's historical account. First, Justice Rehnquist's assertions about the original meaning relied heavily on his understanding of Madison's views about the proper relationship between church and state.[223] Contemporary originalist theory, however, generally rejects reliance on the subjective understandings of the framers.[224] In any event, Madison's views about the meaning of the Establishment Clause are the subject of significant scholarly debate, which has reached no stable conclusion but at a minimum does not offer clear support for Justice Rehnquist's interpretation.

Second, Justice Rehnquist's account gives significant weight to the views of two nineteenth-century interpreters of ratification-era understandings. Commentaries by Joseph Story and Thomas Cooley were certainly important sources for nineteenth-century judges and lawyers. But their commentaries were heavily influenced by a significant increase in Protestant religiosity during the nineteenth century. In particular, both made normative claims about the importance of Christianity for the common law. Justice Rehnquist cited, with apparent approval, Story's view that the "real object of the [First Amendment] was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government."[225] Cooley's attitude toward religion was more instrumental,[226] but it shared Story's basic view that Christianity, and specifically Protestantism, is an essential part of a healthy republican polity.[227]

Unlike the Court's opinions in *Marsh* and *Lynch*, which were tentative in their challenges to the separationist account,[228] Justice Rehnquist's dissent in *Wallace* showed no such hesitation. His dissent vigorously attacked the historical

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type of unprincipled decisionmaking that has plagued our Establishment Clause cases since *Everson*."); *accord id.* (focusing on what the "Framers intended").

[223] *Id.* at 92-95.

[224] *See, e.g.*, Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORD. L. REV. 411, 412 (2013) ("[T]he New Originalism is about identifying the original public meaning of the Constitution and not the original Framers' intent.").

[225] 472 U.S. at 104-105 (quoting STORY'S COMMENTARIES ON THE CONSTITUTION 630-632 (5th ed. 1891)); *see also* 472 U.S. at 104 (asserting that the general "sentiment in America was, that Christianity ought to receive encouragement from the State so far as was not incompatible with the private rights of conscience and the freedom of religious worship") (quoting STORY'S COMMENTARIES, *supra*, at 630).

[226] THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 471 (1868) ("[P]ublic recognition of religious worship, however, is not based entirely, perhaps not even mainly, upon a sense of what is due to the Supreme Being himself as the author of all good and of all law; but the same reasons of state policy which induce the government to aid institutions of charity and seminaries of instruction will incline it also to foster religious worship and religious institutions, as conservators of the public morals and valuable, if not indispensable, assistants to the preservation of the public order.").

[227] *Id.* ("[T]he same reasons of state policy which induce the government to aid institutions of charity and seminaries of instruction will also incline it to foster religious worship and religious institutions, as conservators of the public morals, and valuable, if not indispensable assistants to the preservation of the public order.").

[228] *See supra* at notes 179-209 and accompanying text.

foundations of separationism, and it sparked more confident resistance to the dominant narrative in opinions that followed.[229]

Consider Justice Kennedy's separate opinion in *County of Allegheny v. ACLU*.[230] The case involved two holiday displays on government property. The Court, in a sharply divided decision, held that the display of a nativity scene in a courthouse stairwell, without any accompanying secular symbols of the holiday, violated the Establishment Clause.[231] Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Scalia, dissented from this holding.[232]

Justice Kennedy asserted that the Establishment Clause must be read in a manner that is consistent with "longstanding traditions."[233] Here, Justice Kennedy followed the line of opinions, starting with Justice Reed's dissent in *McCollum*, that assign normative weight to post-ratification practices and traditions, rather than Justice Rehnquist's originalist approach. In Justice Kennedy's view, "the relevance of history is not confined to the inquiry into whether the challenged practice itself is a part of our accepted traditions dating back to the Founding." Instead, he recited the usual litany of post-ratification government practices that acknowledged religion.[234] Justice Kennedy criticized the prevailing separationist standard, which would either "invalidate scores of traditional practices recognizing the place religion holds in our culture" or "be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past."[235]

In making these arguments, Justice Kennedy sought to reframe the Court's opinion in *Marsh*. As we noted above, on one reading, *Marsh* was a narrow decision that accepted the separationist premise but treated legislative prayer as an exception because of its historical provenance, dating to the time of the framing. In Justice Kennedy's view, however,

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[229] As we explain *infra*, however, subsequent articulations of the religionist account have not tended to embrace the specific originalist grounds of Justice Rehnquist's dissent.

[230] County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989).

[231] *Id.* at 601-602. The Court rejected an Establishment Clause challenge to an outdoor display that featured a menorah, a Christmas tree, and a sign with a secular message about liberty. *Id.* at 620. There was no opinion for a majority of the Court. Even the Justices who joined the judgment holding that the display of the crèche was unconstitutional did not fully agree on the relevant standard. *Compare* 492 U.S. at 598-601 (opinion of Blackmun. J.) (reasoning that the crèche conveyed a religious message), *with* 492 U.S. 650-651 (Stevens, J., concurring in part and dissenting in part) (applying a "strong presumption against the display of religious symbols on public property").

[232] 492 U.S. at 655 (Kennedy, J., concurring in the judgment and dissenting in part)

[233] *Id.* at 670 ("A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause."); *see id.* at 669 ("I take it as settled law that, whatever standard the Court applies to Establishment Clause claims, it must at least suggest results consistent with our precedents and the historical practices that, by tradition, have informed our First Amendment jurisprudence.").

[234] *Id.* at 671-673. Justice Kennedy cited Presidential Thanksgiving proclamations, the practice of opening Supreme Court sessions with "God Save the United States and this honorable Court," Congress's provision for a National Day of Prayer, the reference to God in the flag salute, the inclusion of the motto "In God We Trust" on currency, and the practice of legislative prayer, among other practices.

[235] *Id.* at 674.

> *Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings. Whatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion.[236]

On this view, to be consistent with the Establishment Clause, a practice need not have its origins in the founding era. So understood, *Marsh* fully supports the religionist narrative and its treatment of practices and traditions that post-date the ratification era.

Justice Kennedy's dissent returned to the themes that animated previous articulations of the religionist narrative, in a direct and forceful way.[237] He not only demanded solicitude for historical practices and traditions, but also stressed that religion is part of our cultural heritage.[238] For this reason, Justice Kennedy argued, the Court must treat with sensitivity official practices that acknowledge God or religion.[239] On this view, were the Court to impose stricter rules on such practices, it would wrongly suggest the Court's disapproval of religion. Justice Kennedy recognized modest limits on the government's authority to acknowledge religion,[240] but he concluded that the practices at issue did not transgress those limits.[241]

Three years later, in *Lee v. Weisman*,[242] Justice Kennedy's opinion for the Court applied those limits to a public school graduation prayer and held the practice unconstitutional.[243] Justice Scalia rejected the Court's conclusion that the prayer coerced participation by non-believing students.[244] Justice Scalia argued that, absent coercion, the Court should respect longstanding traditions and practices of official acknowledgment of religion.

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[236] *Id.* at 670.

[237] *See, e.g.*, *id.* at 658 (citing Zorach v. Clauson, 343 U.S. 306 (1952).

[238] *See* 472 U.S. at 657 (Kennedy, J., concurring in the judgment in part and dissenting in part) ("Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage.").

[239] *Id.* at 657 ("Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society. Any approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious. A categorical approach would install federal courts as jealous guardians of an absolute 'wall of separation,' sending a clear message of disapproval.").

[240] Justice Kennedy recognized two potential limits on the government's authority to acknowledge religion: the government cannot coerce participation in religious experience or "give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.' " *Id.* at 659. *See also id.* at 662 ("Absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal.").

[241] *Id.* at 664.

[242] 505 U.S. 577 (1992).

[243] *Id.* at 587.

[244] 505 U.S.. at 636-639 (Scalia, J., dissenting).

Justice Scalia asserted that the Constitution "must have deep foundations in the historic practices of our people."[245] His dissent, however, was not primarily an originalist account of the meaning of the Establishment Clause. Although he began by asserting that the meaning of Clause must be rooted in understandings at the time of the framing,[246] his opinion quickly shifted to a focus on practices that post-date the framing era. Justice Scalia's argument proceeded as follows: there is evidence of official acknowledgment of the divine roughly contemporaneous with the framing;[247] there are longstanding practices that arose decades after the framing and that involve official acknowledgment of the divine;[248] therefore, the longstanding practices must be constitutional. Justice Scalia thus treated all official, public acknowledgment of God as interchangeable. Prayer at a public school graduation, to Justice Scalia, was indistinguishable from prayer at other official events.

In addition to his emphasis on traditional practices, Justice Scalia also reiterated a theme that dates at least to Justice Stewart's dissent in *Engel*.[249] Justice Scalia argued that the Court's sensitivity to the needs of non-believers deprived believers of the opportunity to engage in communal prayer at an important event. He asserted:

> The reader has been told much in this case about the personal interest of Mr. Weisman and his daughter, and very little about the personal interests on the other side. They are not inconsequential. Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one's room. For most believers it is not that, and has never been. Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals, because they believe in the "protection of divine Providence," as the Declaration of Independence put it, not just for individuals but for societies; because they believe God to be, as Washington's first Thanksgiving Proclamation put it, the "Great Lord and Ruler of Nations"[250]

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[245] *Id.* at 632. *See also id.* at 631-632 ("In holding that the Establishment Clause prohibits invocations and benedictions at public school graduation ceremonies, the Court—with nary a mention that it is doing so—lays waste a tradition that is as old as public school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally.").

[246] *Id.* at 632. *See also id.* at 632-633 ("[T]he existence from the beginning of the Nation's life of a practice, [while] not conclusive of its constitutionality . . .[,] is a fact of considerable import in the interpretation of the Establishment Clause") (internal quotation marks omitted).

[247] *Id.* at 633 ("From our Nation's origin, prayer has been a prominent part of governmental ceremonies and proclamations."). Justice Scalia cited the Declaration of Independence; the inaugural addresses of Presidents Washington, Jefferson, and Madison (as well as those of later Presidents); Presidential Thanksgiving proclamations; legislative prayer; and the Court's practice of opening sessions with "God save this honorable Court." *Id.* at 633-635.

[248] *Id.* at 633 ("The history and tradition of our Nation are replete with public ceremonies featuring prayers of thanksgiving and petition."). *See also id.* at 635-636 ("In addition to this general tradition of prayer at public ceremonies, there exists a more specific tradition of invocations and benedictions at public school graduation exercises") (citing an 1868 ceremony in Connecticut).

[249] Engel v. Vitale, 370 U.S. 421, 445 (1962) (Stewart, J., dissenting).

[250] *Id.* at 645.

Justice Scalia insisted that the Religion Clauses demand respect for the religious experience of the majority.[251] He made clear that the Clauses do not simply offer protection for non-believers. Instead, Justice Scalia asserted that, to "deprive our society of [the] important unifying mechanism [of public, common prayer], in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law."[252]

In the decade after the Court's decision in *Lee*, proponents on the Court of the religionist narrative began to gain control over the disposition of cases.[253] In 2005, the Court decided two cases about the constitutionality of official displays of the Ten Commandments. In *McCreary County v. ACLU*,[254] the Court held that a display in a Kentucky courthouse violated the Establishment Clause; in *Van Orden v. Perry*,[255] the Court held that a display on the grounds of the Texas State Capitol did not violate the Clause. Several of the opinions advanced the religionist narrative, though the opinions varied from modest assertions to quite robust claims about the role of religion in government.

Chief Justice Rehnquist articulated a more modest version of the religionist narrative in his opinion for a plurality in *Van Orden*. His opinion offered a vision of the relationship between religion and government as one that balances the interests of believers and non-believers.[256] He recognized the "responsibility to

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[251] *See id.* at 646 ("[The Founders] knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration—no, an affection—for one another than voluntarily joining in prayer together, to the God whom they all worship and seek.").

[252] *Id.* at 646.

[253] *See, e.g.*, Agostini v. Felton, 521 U.S. 203 (1997); Mitchell v. Helms, 530 U.S. 793 (2000); *supra* at notes 129-146 and accompanying text.

In Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004), the Court declined to resolve the merits of an Establishment Clause challenge to the use of the phrase "one Nation under God" in the Pledge of Allegiance. *See id.* 17-18 (holding that the plaintiffs lacked standing). Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas wrote separate opinions concurring in the judgment. All three would have found standing and addressed the merits. Chief Justice Rehnquist asserted that the phrase in the Pledge "seems, as a historical matter, to sum up the attitude of the Nation's leaders, and to manifest itself in many of our public observances." 542 U.S. at 26 (Rehnquist, C.J., concurring in the judgment). He cited the familiar litany of public practices that acknowledge God and argued that "[a]ll of these events strongly suggest that our national culture allows public recognition of our Nation's religious history and character." *Id.* at 30. Justice O'Connor asserted that the reference in the Pledge, like the other practices to which Chief Justice Rehnquist referred, "are more properly understood as employing the [language of religious belief] for essentially secular purposes." 542 U.S. at 35 (O'Connor, J., concurring in the judgment). In her view, these practices "commemorate the role of religion in our history" and "solemniz[e] public occasions." *Id.* at 35-36. Justice O'Connor referred to these practices as "ceremonial deism" and reasoned that their "history, character, and context prevent them from being constitutional violations." *Id.* at 37. Building on his suggestion in *Zelman v. Simmons-Harris*, 536 U.S. 639, 678 (2002), Justice Thomas would have held that the Fourteenth Amendment does not incorporate the Establishment Clause. 542 U.S. at 49-53 (Thomas, J., concurring in the judgment).

[254] 545 U.S. 844 (2005).

[255] 545 U.S. 677 (2005).

[256] *See id.* at 686 ("Our analysis is driven both by the nature of the monument and by our Nation's history."). For Chief Justice Rehnquist, the contemporary religious character of the monument must be balanced against the Ten Commandments' significance for American political culture and history. *See id.* at 687 (recognizing the role of religion in our Nation's heritage).

maintain a division between church and state," but asserted that the Establishment Clause should not "evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage."[257]

In explaining this view, Chief Justice Rehnquist cited the familiar litany of past and current practices that acknowledge religion or God.[258] In contrast with his originalist focus in *Wallace*, Chief Justice Rehnquist in *Van Orden* adopted the more orthodox religionist narrative, based primarily on traditional practices that post-dated the founding. He paid significant attention to the frequent use of religious imagery in federal buildings, including the Supreme Court's frieze and its depiction of Moses as a lawgiver.[259]

Justice Scalia would have gone further. His brief concurring opinion in *Van Orden* and extensive dissent in *McCreary County* went well beyond his dissent in *Lee*. He summarized his views in his opinion in *Van Orden*:

> I would [adopt] an Establishment Clause jurisprudence that is in accord with our Nation's past and present practices, and that can be consistently applied—the central relevant feature of which is that there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.[260]

Justice Scalia elaborated on his understanding of governmental acknowledgment of religion in his dissent in *McCreary County*.[261] In *McCreary County*, the Court, applying the *Lemon* test, held 5-4 that a courthouse display of the Ten Commandments lacked a legitimate secular purpose.[262] In dissent, Justice Scalia attacked the separationist premise, dismissing the historical evidence on which it is based as irrelevant[263] or unrepresentative of framing-era views.[264]

Justice Scalia offered two types of claims to support the strong version of the religionist narrative, although he blurred the difference between the two. He started by making an originalist claim about the constitutional validity of official acknowledgment of God and religion. Referring to the "beliefs of the [framing] period," he asserted that "[t]hose who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality."[265] To support his argument, he

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[257] *Id.* at 683-684.
[258] *Id.* at 686-687.
[259] *Id.* at 688-689. Although Chief Justice Rehnquist defended the constitutionality of governmental displays that recognize God, he also reasoned that the display, when viewed in context, had independent secular significance and "represent[ed] the several strands in the State's political and legal history." *Id.* at 691-692.
[260] *Van Orden*, 545 U.S. at 692 (Scalia, J., concurring).
[261] *McCreary County*, 545 U.S. at 886 (Scalia, J., dissenting).
[262] 545 U.S. at 881.
[263] 545 U.S. at 896 (Scalia, J., dissenting) (asserting that the Memorial and Remonstrance dealt only with forced support of religion).
[264] *Id.* at 889 ("Nothing stands behind the Court's assertion that governmental affirmation of the society's belief in God is unconstitutional except the Court's own say-so, citing as support only the unsubstantiated say-so of earlier Courts going back no further than the mid-20th century.").
[265] *Id.* at 887.

cited Washington's Thanksgiving Proclamation, Washington and Jefferson's inaugural addresses, John Adams's writing, and the Declaration of Independence.[266]

Although this evidence was roughly contemporaneous with the framing, Justice Scalia quickly shifted his focus to practices that arose much later, such as the references to God on currency and in the Pledge.[267] He repeatedly suggested that a series of practices, most of which arose in the nineteenth or twentieth century, constitute a tradition of permitting official acknowledgement of God.[268] For example, in mocking the majority's assertion that the state must be neutral between religion and non-religion, Justice Scalia wrote, "Who says so? … Surely not the history and traditions that reflect our society's constant understanding of those words."[269]

In Justice Scalia's view, moreover, these traditions not only permit generic acknowledgment of religion, but also support official preference for one or more faiths over others. In rejecting the view that the government cannot prefer one religion to another, at least when what is at issue is "public acknowledgment of the Creator," Justice Scalia asserted:

> If religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all. One cannot say the word "God," or "the Almighty," one cannot offer public supplication or thanksgiving, without contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs. With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.[270]

This assertion goes well beyond the religionist account reflected in Chief Justice Rehnquist's plurality opinion in *Van Orden*, which imagined a non-sectarian invocation of God.

Justice Scalia's version of the religionist narrative differs from prior articulations of the narrative in another important way. The state's authority to "acknowledge" religion or God has been a central component of the narrative, but the term "acknowledgment" has a capacious meaning with an intentional ambiguity. As one of us has previously explained, the term has at least three possible meanings in this context.[271]

First, the term acknowledgement may simply refer to official recognition of an historical fact. For example, the state might choose to designate a church or other religious space as an historical landmark because of its significance to

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[266] *Id.* at 887-888.
[267] *Id.* at 888-889.
[268] *Id.* at 889.
[269] *Id.* at 889; *see also id.* at 906 ("Acknowledgment of the contribution that religion has made to our Nation's legal and governmental heritage partakes of a centuries-old tradition….").
[270] *Id.* at 893.
[271] Lupu & Tuttle, *supra* note 201, at 939, 980-993.

the history of the community.[272] Similarly, public schools may use textbooks that explain that Puritan settlers in Massachusetts emigrated to the new world in order to be free of religious persecution by the Church of England. Lupu and Tuttle refer to this usage as "historical acknowledgment."[273]

Second, the term acknowledgment may indicate government recognition of and respect for cultural practices among members of the political community. For example, Presidents routinely issue statements celebrating religious holidays with significance for particular faith communities. These statements do not commit the government to any relationship with those faiths and do not entail official worship; instead, the statements celebrate the religious diversity of the nation and recognize the distinctive contributions of each faith. Lupu and Tuttle refer to this usage as "cultural acknowledgment."[274]

Third, the term acknowledgment may refer to governmental veneration of the divine. For example, the inclusion of the phrase "In God We Trust" on the currency would seem to commit the government to faith in God. In so doing, the government both attributes a particular status to God and implicitly asserts a specific relationship between the political community and the divine. That relationship is inevitably one of subordination to God. The community, including the government, confesses its belief in the divine and trust in divine providence. Lupu and Tuttle refer to this usage as "reverential acknowledgment."[275]

In the Ten Commandment cases, Chief Justice Rehnquist purported to treat the displays as forms of historical acknowledgment.[276] Although he recognized that the Decalogue had obvious religious content, he asserted that displays of the Ten Commandments emphasize their historical significance for our legal system. He stated, "Moses was a lawgiver as well as a religious leader. And the Ten Commandments have an undeniable historical meaning …. Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."[277]

Justice Scalia, in contrast, spoke in terms of reverential acknowledgment. He did not merely assert that displays of the Decalogue function as a visual history lesson. Instead, he emphasized the government's authority to treat the Commandments as a proper object of "venerat[ion]"[278]—that is, to make affirmative representations about the divine and to engage in particular kinds of worship of the divine. Unlike many prior uses of the term "acknowledgement," Justice Scalia's opinions in the Ten Commandments cases were clear in their usage of the term. Rather than advance the modest claim that the government

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[272] For example, the government might designate as a historic landmark the Catholic missions along California coast, the first Jewish synagogue in the United States, or a place viewed as holy by American Indians.
[273] Lupu & Tuttle, *supra* note 201, at 982-986.
[274] *Id.* at 989-993.
[275] *Id.* at 986-989.
[276] *Van Orden*, 545 U.S. at 688 ("[A]cknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America")
[277] *Id.* at 690.
[278] *Van Orden*, 545 U.S. at 692 (Scalia, J., concurring).

may simply recognize the religious beliefs within the political community, Justice Scalia asserted that the government may permissibly declare religious beliefs as its own.[279]

To be sure, Justice Scalia's account was not inconsistent with Chief Justice Rehnquist's version of the religionist narrative. Instead, Justice Scalia's account simply made explicit what had always been implicit in traditionalist claims about public acknowledgment of God. Prior articulations of the religionist account tended to avoid any suggestion that the religion or God acknowledged by the state referred to a specific faith or deity. But this avoidance obscured an important truth about the claimed tradition. The nineteenth-century core of this tradition was inseparable from the Protestant Christian understanding of God spread through the various religious revivals of that era. Justice Scalia's assertion simply makes this plain.

Justice Scalia, again citing the religionist tradition, was also explicit about the beneficiaries of Establishment Clause protection:

> [I]n the context of public acknowledgments of God there are legitimate competing interests: On the one hand, the interest of [the] minority in not feeling "excluded"; but on the other, the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication as a people, and with respect to our national endeavors. Our national tradition has resolved that conflict in favor of the majority.[280]

Subsequent Supreme Court opinions have not yet embraced Justice Scalia's version of the religionist narrative, but they have entrenched the narrative at the core of Establishment Clause doctrine. In *Town of Greece v. Galloway*,[281] the Court rejected a challenge to a town's practice of beginning council meetings with prayer offered by an honorary council chaplain. Because the case involved legislative prayer, the Court's decision in *Marsh* played a dominant role. The parties sharply disagreed about the meaning and scope of the decision.

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[279] *Id.* (asserting that the government may permissibly "venerate[e]" the Ten Commandments); *McCreary County*, 545 U.S. at 894 (Scalia, J., dissenting) (defending the government's practice "[p]ublicly honoring the Ten Commandments"); *id.* at 900 (defending "the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication *as a people,* and with respect to our national endeavors").

Justice Thomas in *Van Orden* urged an explicitly originalist approach to the Establishment Clause, although no other Justice joined his opinion. He again urged the Court to conclude that the Fourteenth Amendment does not incorporate the Establishment Clause. 545 U.S. at 693 (Thomas, J., concurring). He also argued that, at a minimum, the original meaning of "establishment" required government coercion of non-adherents. He concluded that the display had no coercive effect. *Id.* at 693-698. Justice Breyer was the fifth vote for holding that the Texas display was constitutional. He focused on the vintage of and lack of prior controversy over the display, but he did not advance the religionist narrative in his opinion. To the contrary, he based his concurrence on an account of separationism that emphasizes the risk of religious divisiveness. 545 U.S. at 700-704 (Breyer, J., concurring in the judgment).

[280] *McCreary County*, 545 U.S. at 900 (Scalia, J., dissenting). This claim echoes Justice Stewart's assertion in the school prayer cases about the interests of the majority in shared public prayer. *See* Engel v Vitale, 370 U.S. 421, 445 (1962) (Stewart, J., dissenting) ("I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation.").

[281] 572 U.S. 565 (2014).

Following his opinion in *Allegheny*, Justice Kennedy's opinion for the Court rejected the assertion that *Marsh* effectively operates as a grandfather clause for otherwise unconstitutional practices. Instead, he asserted, *Marsh* teaches that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.' "[282]

Justice Kennedy echoed both claims of the *Marsh* majority about the normative basis for the constitutional standard. He stated, "Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change."[283] In other words, Justice Kennedy focused both on original meaning and the continuity of traditional practices. The operative test, on this view, was "whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures."[284]

Although original meaning offered the Court some basis for concluding that legislative prayer is not categorically unconstitutional, Justice Kennedy looked to tradition in rejecting the dissent's argument that legislative prayer must be non-sectarian in content.[285] In the Court's view, "[o]ur tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith."[286] Justice Kennedy's account of legislative prayer, however, did not embrace Justice Scalia's claim about the state's authority to engage in reverential acknowledgment.[287] Justice Kennedy instead returned to the ambiguous combination of historical and cultural acknowledgment as the basis for the religionist tradition.[288]

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[282] *Id.* at 576.

[283] *Id.* at 577

[284] *Id.*

[285] *Id.* at 583 ("The tradition reflected in *Marsh* permits chaplains to ask their own God for blessings of peace, justice, and freedom that find appreciation among people of all faiths. That a prayer is given in the name of Jesus, Allah, or Jehovah, or that it makes passing reference to religious doctrines, does not remove it from that tradition."); *id.* at 590 (plurality opinion) ("Courts remain free to review the pattern of prayers over time to determine whether they comport with the tradition of solemn, respectful prayer approved in *Marsh* ….").

Justice Kennedy agreed with Justice Scalia that such a requirement is inconsistent with the Establishment Clause. Their reasons, however, were different. Justice Scalia thought that our traditions embrace reverence for the Judeo-Christian God. *McCreary County*, 545 U.S. at 893 (Scalia, J., dissenting). Justice Kennedy, in contrast, worried that a requirement that legislative prayer be non-sectarian would inevitably force the government to make judgments about the religious content of the prayers—judgments that the government is incompetent to make. *Town of Greece*, 572 U.S. at 581.

[286] 572 U.S. at 584.

[287] *Id.* at 591 (plurality opinion) ("Ceremonial prayer is but a recognition that, since this Nation was founded and until the present day, many Americans deem that their own existence must be understood by precepts far beyond the authority of government to alter or define and that willing participation in civic affairs can be consistent with a brief acknowledgment of their belief in a higher power, always with due respect for those who adhere to other beliefs. The prayer in this case has a permissible ceremonial purpose.").

[288] *See* 572 U.S. at 582-583 ("The relevant constraint derives from its place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage. Prayer that is solemn and respectful in tone, that invites lawmakers to

The Court affirmed the *Town of Greece* Court's understanding of *Marsh*, and its normative standard of history and tradition, in *American Legion v. American Humanist Association*.[289] The Court rejected a challenge to the display of a large Latin Cross on public land in the middle of a traffic circle. In an opinion by Justice Alito, the Court abandoned the *Lemon* test as the standard for cases involving public displays.[290] In its place, the Court declared that Establishment Clause review must focus on "historical practices and understandings."[291]

Justice Alito's analysis was not originalist in character. His opinion only fleetingly noted views of the framers about legislative prayer and government speech that acknowledges a deity, and then offered a plainly ahistorical standard for the validity of public displays:

> The practice begun by the First Congress stands out as an example of respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans. Where categories of monuments, symbols, and practices with a longstanding history follow in that tradition, they are likewise constitutional.[292]

Whatever the virtue of a standard that requires displays to be inclusive, it is one that is profoundly inconsistent with traditional practices.[293]

As did Justice Kennedy in *Town of Greece*, Justice Alito spoke in the language of historical and cultural acknowledgment.[294] His opinion did not explicitly endorse Justice Scalia's idea of reverential acknowledgment. Yet Justice Alito's assertion that the cross reflects a common cultural heritage simply does not ring true—at least for those who do not embrace the Christian message of the Latin Cross. Justice Alito either was tone deaf about his claims of a common understanding or instead was implicitly advancing the idea of reverential acknowledgment. Indeed, although the Cross is part of a memorial for those

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reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function.").

[289] 139 S.Ct. 2067 (2019).

[290] *Id.* at 2081-2082 ("[T]he *Lemon* test presents particularly daunting problems in cases, including the one now before us, that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations. Together, these considerations counsel against efforts to evaluate such cases under *Lemon* and toward application of a presumption of constitutionality for longstanding monuments, symbols, and practices.").

[291] *Id.* at 2087 (quoting *Town of Greece*, 572 U.S. at 576).

[292] *Id.* at 2089.

[293] Perhaps for this reason, the concurring Justices disputed whether the Court had adopted a pure history and tradition test. *Compare* 139 S.Ct. at 2091 (Breyer, J., concurring) ("Nor do I understand the Court's opinion today to adopt a 'history and tradition test' that would permit any newly constructed religious memorial on public land."), *with* 139 S.Ct. at 2092 (Kavanaugh, J., concurring) ("[T]he Court today applies a history and tradition test."); *id.* at 2093 ("[E]ach category of Establishment Clause cases has its own principles based on history, tradition, and precedent."). Justice Thomas wrote separately to reiterate his view that the Fourteenth Amendment does not incorporate the Establishment Clause. 139 S.Ct. at 2095 (Thomas, J., concurring in the judgment). Justice Gorsuch wrote separately to urge a more searching standard for standing in Establishment Clause cases. 139 S.Ct. at 2098 (Gorsuch, J., concurring in the judgment).

[294] 139 S.Ct. at 2083 ("As our society becomes more and more religiously diverse, a community may preserve such monuments, symbols, and practices for the sake of their historical significance or their place in a common cultural heritage.").

who died in war, the memorial does not emphasize their valor.[295] Instead, the centrality of the Cross in the memorial signifies that the political community links the sacrifice of the soldiers with Christian understandings of hope and redemption. Unlike a cross on a fallen soldier's tombstone, which indicates the soldier's faith, the Bladensburg Cross declares the community's view that sacrifice for the nation earns divine blessing. On this understanding, the Cross serves the function of reverential, rather than historical or cultural, acknowledgment.

The Court's most recent Religion Clause cases implicitly accept the religionist narrative as the operative understanding of the Establishment Clause and appear to proceed on the assumption that it requires no defense or elaboration. For example, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[296] the Court held that the Free Exercise Clause barred exclusion of religious institutions from state funding programs. The state had determined that a church school was ineligible for public funding for playground renovations, arguing that its refusal was required by the state constitution's anti-establishment provision. The Supreme Court was dismissive of the state's constitutional concern, declaring that "the Department offers nothing more than Missouri's policy preference for skating as far as possible from religious establishment concerns. In the face of the clear infringement on free exercise before us, that interest cannot qualify as compelling."[297]

Similarly, in *Espinoza v. Montana Dept. of Revenue*,[298] the Court held that a state's refusal to extend a scholarship program to religious schools violated the Free Exercise Clause. As in *Trinity Lutheran*, the state defended the exclusion on the ground that it was required by its constitution's anti-establishment provision. The state also argued that its program differed from the one at issue in *Trinity Lutheran* because the funds would be used for religious education, whereas the funds at issue in *Trinity Lutheran* were for the secular purpose of playground resurfacing.[299]

In making this argument, the state relied on the Court's prior decision in *Locke v. Davey*.[300] In *Locke*, the Court had rejected a Free Exercise challenge to a state's rule that prevented the use of public scholarship funds for the study of "devotional theology." The rule was rooted in the state constitution's anti-establishment provision, which barred state support for the training of clergy. The Court held that the state had a "historic and substantial" interest in avoiding

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[295] The vast majority of World War I monuments in the United States display a soldier going into battle. The Bladensburg monument is one of the very few that use the Latin Cross as the centerpiece of the memorial. *See American Legion*, 139 S.Ct. at 2111 (Ginsburg, J. dissenting) (noting that only 4% of World War I monuments in the United States feature a Latin Cross).

[296] 137 S.Ct. 2012 (2017).

[297] *Id.* at 2024. The state had not argued that providing funding to the church school would have violated the federal Establishment Clause. At the time of the litigation, Missouri's Attorney General was Josh Hawley, whose argument in defense of the state's program was tepid at best.

[298] 140 S.Ct. 2246 (2020).

[299] *See Trinity Lutheran*, 137 S.Ct. at 2024 n. 3 ("This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.").

[300] 540 U.S. 712 (2004).

establishment of religion, advanced by a prohibition on the use of public funds to support the ministry.[301]

In *Espinoza*, the Court distinguished *Locke* on the ground that "no comparable 'historic and substantial' tradition supports Montana's decision to disqualify religious schools from government aid."[302] The Court reasoned that, quite to the contrary, state funding of religious schools had a deep historical pedigree. Although the Court sought to anchor this claim in original meaning,[303] it cited evidence only from the nineteenth century[304]—and even then, the Court dismissed significant counter-examples from the same era. Indeed, the Court rejected the significance of the nineteenth-century movement to fund "Common Schools," and deny funding to all "sectarian" schools, that dominated educational policy in nineteenth-century America. The movement led, among other things, to the adoption in many states of constitutional provisions prohibiting aid to religious schools. The Court declared, however, that the "no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause."[305]

The Court refused to treat the Common Schools movement as evidence of a "historic and substantial" tradition for two reasons. First, the Court asserted that, as a mid- to late-nineteenth century movement, it did not "by itself establish an *early* American tradition,"[306] though the Court offered no metric for determining the relative priority of a particular tradition. In any event, the Common Schools movement, including its opposition to public aid for sectarian schools, has a longer historical pedigree than the Court acknowledged.[307]

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[301] *Id.* at 725. The Court reasoned that "the subject of religion is one in which both the United States and state constitutions embody distinct views—in favor of free exercise, but opposed to establishment—that find no counterpart with respect to other callings or professions. That a State would deal differently with religious education for the ministry than with education for other callings is a product of these views, not evidence of hostility toward religion." *Id.* at 721; *accord id.* at 725. The Court noted that "[s]ince the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion," *id.* at 722, and that "[m]ost States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry," *id.* at 723; *accord id.* ("That early state constitutions saw no problem in explicitly excluding only the ministry from receiving state dollars reinforces our conclusion that religious instruction is of a different ilk."). The Court's decision was 7-2. In dissent, Justice Scalia argued that the historic prohibitions on funding involved specific taxes imposed for the benefit of religion, rather than the inclusion of religious institutions in general funding programs. 540 U.S. at 727-728 (Scalia, J., dissenting) ("That history involved not the inclusion of religious ministers in public benefits programs like the one at issue here, but laws that singled them out for financial aid.").

[302] 140 S.Ct. at 2257.

[303] *Id.* at 2258 ("In the founding era and the early 19th century, governments provided financial support to private schools, including denominational ones.").

[304] *Id.* at 2258.

[305] *Id.* at 2259.

[306] *Id.* at 2259 (emphasis added).

[307] In dissent, Justice Sotomayor questioned the majority's reliance on mid-nineteenth century evidence for its assertion that there is a relevant tradition of state support for religious schools while dismissing contrary evidence from the era. 140 S.Ct. at 2297 (Sotomayor, J., dissenting) ("[T]he Court discounts anything beyond the 1850s as failing to "establish an early American tradition," while itself relying on examples from around that time ….."). The Court responded by

Second, the Court reasoned that the movement was irreparably tainted by anti-Catholic animus.[308] Justice Alito's concurrence focused entirely on this claim.[309]

By 2022, when the Court decided *Carson v. Makin*,[310] the Court saw little reason to provide a detailed account of the religionist narrative. The Court held that a Maine program that allowed parents in rural school districts to use public funds to pay for private education impermissibly excluded religious schools that included a devotional component in their curricula.[311] The state defended the program on anti-establishment grounds, but the Court again concluded that an "interest in separating church and state 'more fiercely' than the Federal Constitution . . . 'cannot qualify as compelling' in the face of the infringement of free exercise."[312]

The state also relied on *Locke*, but the Court again asserted that no historic or substantial tradition supported the state's prohibition.[313] The Court also effectively confined *Locke* to its facts.[314] In addition, although the Court in *Trinity Lutheran* and *Espinoza* had stressed that those cases involved discrimination based on religious status, rather than the religious use of public funds that was at issue in *Locke*,[315] the Court in *Carson* rejected the distinction without explanation or discussion.[316] After *Carson*, state anti-establishment concerns about the provision of public funds for explicitly religious uses, such as instruction in the faith, no longer warrant distinctive treatment. The principle

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asserting that "such evidence may reinforce an early practice but cannot create one," suggesting that the Common Schools tradition arose too late in time to carry normative force. 140 S.Ct. at 2259.

[308] *Id.* at 2259 ("[I]t was an open secret that 'sectarian' was code for 'Catholic.' The Blaine Amendment was 'born of bigotry' and 'arose at a time of pervasive hostility to the Catholic Church and to Catholics in general'; many of its state counterparts have a similarly 'shameful pedigree.' ") (citations omitted).

[309] 140 S.Ct. at 2267-2274 (Alito, J., concurring). Justice Sotomayor's dissent attempted to revive the Court's prior separationist understanding of the Establishment Clause. 140 S.Ct. at 2296-2297 (Sotomayor, J., dissenting). Justice Thomas wrote separately to assert, among other things, that the Court's prior "separationist interpretation" of the Clause "has itself sometimes bordered on religious hostility." 140 S.Ct. at 2266 (Thomas, J., concurring).

[310] 142 S.Ct. 1987 (2022).

[311] *Id.* at 2002.

[312] *Id.* at 1998. Citing *Zelman*, the Court reasoned that "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause." *Id.* at 1997-998. As a consequence, "Maine's decision to continue excluding religious schools from its tuition assistance program after *Zelman* thus promotes stricter separation of church and state than the Federal Constitution requires." *Id.*

[313] *Id.* at 2002.

[314] *Id.* ("*Locke* cannot be read beyond its narrow focus on vocational religious degrees to generally authorize the State to exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits.").

[315] *See Trinity Lutheran*, 137 S.Ct. at 2024 n. 3 ("This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."); *Espinoza*, 140 S.Ct. at 2256 ("This case also turns expressly on religious status and not religious use."); *see also id.* at 2257 (asserting that in Locke, the plaintiff "was denied a scholarship because of what he proposed to do—use the funds to prepare for the ministry.").

[316] *Id.* at 1997 ("The 'unremarkable' principles applied in *Trinity Lutheran* and *Espinoza* suffice to resolve this case.").

for state funding of religion that governed for the last two decades, which derived from Justice O'Connor's separate opinion in *Mitchell* and required the government to avoid direct funding of specifically religious uses, no longer appears to be operative.

In *Kennedy v. Bremerton School District*,[317] the Court again took the religionist narrative as a given. The Court held that a school district's suspension of a football coach who had prayed on the field at the conclusion of games violated the coach's Free Exercise rights. The school district argued that its action was necessary to avoid a violation of both the federal and state Establishment Clauses.[318] Justice Gorsuch, writing for the majority, concluded that there was no Establishment Clause violation, and thus that the school district could not satisfy strict scrutiny.

Justice Gorsuch reached this conclusion for two reasons. First, he concluded that the coach's prayer was private and personal, and thus was not an official act subject to Establishment Clause limitation. Second and more broadly, Justice Gorsuch asserted that the school district's disestablishment concern was misplaced. The district argued that a reasonable observer witnessing the coach's actions could conclude that the school had endorsed religion. Justice Gorsuch rejected this standard, and the *Lemon* test from which it derived, for implementing the Establishment Clause. He declared that "the shortcomings associated with this ambitious, abstract, and ahistorical approach to the Establishment Clause became so apparent that this Court long ago abandoned *Lemon* and its endorsement test offshoot."[319]

Justice Gorsuch then reiterated the standard reflected in other cases advancing the religionist narrative: "In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.' "[320] Justice Gorsuch sought to anchor the religionist account in original meaning, rather than simply in post-ratification tradition. He declared that the "line that courts and governments must draw between the permissible and the impermissible has to 'accord with history and faithfully reflect the understanding of the Founding Fathers,' "[321] and that an "analysis focused on original meaning and history … has long represented the rule rather than some exception within the Court's Establishment Clause jurisprudence."[322]

Justice Gorsuch's claim that the religionist narrative has an originalist pedigree represents a significant shift from most articulations of the narrative. As we have seen, most accounts of the religionist narrative have been based on

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[317] 142 S.Ct. 2407 (2022).
[318] *Id.* at 2426.
[319] *Id.* at 2427 (internal quotation marks omitted). Justice Gorsuch's assertion is certainly subject to debate. In *Marsh* and *Town of Greece*, the Court declined to apply the *Lemon* test in cases involving legislative prayer. In *American Legion*, the Court abandoned the *Lemon* test in cases involving public displays and symbols. But no case before *Kennedy* had suggested that *Lemon* no longer applied in cases that involved religious exercises in public schools.
[320] *Id.* at 2428 (quoting *Town of Greece*, 572 U.S. at 576).
[321] *Id.* at 2428 (quoting *Town of Greece*, 572 U. S., at 577 (internal quotation marks omitted)).
[322] *Id.* at 2428 (internal quotation marks omitted).

longstanding practices and traditions, nearly all of which post-date the founding era. To be sure, Justices Rehnquist and Scalia had attempted to advance originalist justifications for the narrative. But no Justice followed Justice Rehnquist's claims based on the drafting history of the First Amendment, and Justice Scalia's account, in his dissents in *Lee* and *McCreary County*, elided the distinction between founding-era and post-ratification evidence. In *Kennedy*, Justice Gorsuch made a purely methodological claim and simply assumed that history supports a vision of the Establishment Clause that permits prayer by school officials in public settings.

When it came to the application of the Establishment Clause test, Justice Gorsuch, like Justice Scalia before him, blurred the distinction between original meaning and subsequent tradition. In concluding that the coach's prayer did not force students to participate, Justice Gorsuch asserted that original meaning is the proper touchstone for defining coercion.[323] When he rejected the school district's assertion that prayer by a school employee at an official school event should be deemed official prayer, in contrast, Justice Gorsuch referred to a "long constitutional tradition under which learning how to tolerate diverse expressive activities has always been 'part of learning how to live in a pluralistic society.' " He offered no evidence to support the existence of such a tradition at the time of the founding (or even later), and instead cited *Zorach*—the seminal case for the tradition-based religionist narrative—for the proposition that "no historically sound understanding of the Establishment Clause [begins] to 'make it necessary for government to be hostile to religion' in this way."[324]

In a separate opinion in *Shurtleff v. City of Boston*,[325] Justice Gorsuch offered a richer defense of the claim that the religionist view is anchored in the original meaning. The case involved the city's policy of occasionally flying flags of private groups in front of a government building. A Christian group sued after the city denied it permission to fly a flag with religious symbols, and the city defended by relying on the Establishment Clause. The Court held that the city's frequent permission for groups to use the flagpole had created a public forum for private speech. Because the Christian group's flag would thus have been private speech, there could be no Establishment Clause violation.[326]

In a concurring opinion, Justice Gorsuch addressed the city's Establishment Clause defense.[327] He blamed the *Lemon* test, which he called an "anomaly and a mistake," for creating confusion about the scope of the Clause's limitations on government action.[328] Justice Gorsuch criticized the test as an "ahistoric alternative" to the approach that the Court had followed in *Everson*, which "looked primarily to historical practices and analogues to guide its

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[323] *Id.* at 2429.
[324] *Id.* at 2431 (quoting *Zorach*, 343 U.S. at 314).
[325] 142 S.Ct. 1583 (2022).
[326] *Id.* at 1593 (rejecting the City's argument that the speech on the flag was attributable to the government, and thus that display of the petitioner's flag might violate the Establishment Clause).
[327] 142 S.Ct. at 1603 (Gorsuch, J., concurring in the judgment).
[328] *Id.* at 1606.

analysis."[329] He praised the Court's focus in more recent Establishment Clause cases on "historical practices and understandings."[330]

Justice Gorsuch then began to sketch an originalist foundation for a religionist understanding of the Establishment Clause. Relying on the work of Michael McConnell, Justice Gorsuch urged attention to the historical "hallmarks" of establishment to determine the original meaning of the clause. Those hallmarks, according to McConnell, primarily entailed coercive actions that either required participation in or support of the established church, or restricted the rights of disfavored religious communities to practice their faith.[331] These historically based hallmarks, Justice Gorsuch reasoned, make clear that government displays of religious symbols or acknowledgment of the divine do not constitute impermissible establishment.[332]

Unlike most prior proponents of the religionist account, Justice Gorsuch seems interested in grounding the view in the original meaning. But in adopting McConnell's account, Justice Gorsuch repeats that account's shortcomings, as well.

McConnell opened with a general statement about the constitutional mandate of non-establishment that strikes us as quite reasonable. He explained:

> An establishment is the promotion and inculcation of a common set of beliefs through governmental authority. An establishment may be narrow (focused on a particular set of beliefs) or broad (encompassing a certain range of opinion); it may be more or less coercive; and it may be tolerant or intolerant of other views.[333]

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[329] *Id.*

[330] *Id.* at 1607-1608 (quoting American Legion v. American Humanist Ass'n, 139 S.Ct. 2067 (2019) (in turn quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014))).

[331] Shurtleff, 142 S.Ct.. at 1609 (Gorsuch, J., concurring in the judgment). Justice Gorsuch described the hallmarks this way:

> First, the government exerted control over the doctrine and personnel of the established church. Second, the government mandated attendance in the established church and punished people for failing to participate. Third, the government punished dissenting churches and individuals for their religious exercise. Fourth, the government restricted political participation by dissenters. Fifth, the government provided financial support for the established church, often in a way that preferred the established denomination over other churches. And sixth, the government used the established church to carry out certain civil functions, often by giving the established church monopoly over a specific function. Most of these hallmarks reflect forms of "coerc[ion]" regarding "religion or its exercise."

Id. (citing Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2131-2181 (2003)).

[332] *Shurtleff*, 142 S.Ct. at 1610 (Gorsuch, J., concurring in the judgment) ("As a close look at these hallmarks and our history reveals, '[n]o one at the time of the founding is recorded as arguing that the use of religious symbols in public contexts was a form of religious establishment.' " (quoting Michael W. McConnell, *No More (Old) Symbol Cases*, 2019 CATO SUP. CT. REV. 91, 107 (2019))). *See also Shurtleff*, 142 S.Ct. at 1610 (Gorsuch, J., concurring in the judgment) ("For most of its existence, this country had an 'unbroken history of official acknowledgment by all three branches of government of the role of religion in American life.' " (quoting *Lynch*, 465 U.S. at 674)); *id.* ("The simple truth is that no historically sensitive understanding of the Establishment Clause can be reconciled with a rule requiring governments to 'roa[m] the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine.' " (quoting *American Legion*, 139 S.Ct. at 2084-2085)).

[333] McConnell, *supra* note 331, at 2131.

This framing of non-establishment is appropriately broad in scope. It can be read to embrace government funding for religious education and government promotion of religious messages, through official prayer and permanent displays with religious significance. So understood, McConnell's framing can also be read to capture the core problem of a symbolic union between religion and civil government. If religion captures civil government, then neither religion nor civil government will flourish. This framing provides a sensible basis for assessing contemporary arrangements between religion and civil government.

But immediately after this characterization of establishment, McConnell began to develop a test for the constitutionality of modern practices that is substantially more narrow. McConnell limited his focus to the practice of established churches, not to the more general question of the relationship between religion and the state.[334] In so doing, McConnell restricted the historical set of practices—specifically, the hallmarks of actual established churches in the seventeenth and eighteenth centuries—that are relevant to modern understandings of the Establishment Clause. McConnell characterized those attributes of established churches as necessary elements of a present Establishment Clause violation.[335]

This approach has two significant problems. First, by limiting the test for an impermissible establishment to features of established churches, McConnell ignores a wide range of practices that entail, to use McConnell's language, "the promotion and inculcation of a common set of beliefs through governmental authority."[336] The Establishment Clause, after all, does not prohibit merely one or more established churches; it prohibits laws "respecting an establishment of religion."[337] McConnell's approach seems designed to permit practices that unite religion and civil government without the actual creation of a state church.

Second, McConnell's approach suffers from a methodological flaw. McConnell reasons that a present practice is constitutionally problematic only if it carries the hallmarks of an eighteenth-century established church. On this view, if a present practice would not constitute an established church at the time of the founding, McConnell assumes that it is permissible under the Clause today. More generally, McConnell's approach assumes that if something does not have a precise historical analog in the past, then it cannot be unconstitutional in the present. A particularly stark example can be found in government-erected religious monuments. There were no such monuments at the time of the framing or in the years immediately following ratification. Because such monuments were not a hallmark of established churches in the past, government display of such monuments in the present, in McConnell's view, could not violate the Establishment Clause. Justice Gorsuch specifically relied on this claim in his opinion in *Shurtleff*, asserting that "[n]o one at the time of the founding is recorded as arguing that the use of religious symbols in public

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[334] *Id.* at 2131-2181.
[335] *Id.* at 2205-2206 (urging a focus on "the actual experiences that lay behind the decision to deny the government authority to erect or maintain an establishment of religion").
[336] *Id.* at 2131.
[337] U.S. CONST., amend. I.

contexts was a form of religious establishment."[338] But the absence of such monuments in the past tells us nothing about whether members of the framing generation would have viewed them as impermissible. In fact, one could draw precisely the opposite inference, as the Court did in the context of the Second Amendment in *Bruen*.

Given the strong turn to the religionist account, the Court seems likely to permit (or even require) the government to fund indoctrination and proselytizing by religious schools and organizations and to expand the government's power to express religious messages in a variety of contexts, including the public schools. For example, Oklahoma has provided public funds to a religious charter school.[339] Similarly, Texas is poised to require the display of the Ten Commandments in all public school classrooms, notwithstanding the Court's decision in *Stone v. Graham*, and to allow public schools to set aside time during the school day for prayer and Bible reading, notwithstanding the Court's decisions in *Engel* and *Schempp*.[340] These measures obviously assume that the Establishment Clause no longer embraces the separationist account.

II. EVALUATING THE COMPETING NARRATIVES

What accounts for the demise of the separationist account and the ascendency of the religionist account? The most obvious answer is politics and personnel. But reasoned decision-making requires reasons, and so we consider the Court's analysis on its own terms.

A. Originalism

In most contexts in which conservatives and progressives disagree about constitutional meaning, the conservatives tend to rely on originalist accounts, whereas the progressives appeal to evolving societal values. As we have seen, however, the Establishment Clause is different. Progressive proponents of the separationist narrative advance an originalist theory of constitutional interpretation. To be sure, they also rely, albeit implicitly, on the political theory of liberal pluralism. As we discuss in more detail below, this view holds that, given a political community composed of people with widely divergent religious views, the best solution to political conflicts involving religion is to separate the state from involvement with religion. This approach prevents the state from becoming an object for political competition and keeps the state—and any majority that gains power—from assuming the role of religious authority. The theory of liberal pluralism itself is not a modern innovation. It was central to the thinking of many prominent figures in the founding era, including James Madison.

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[338] *Shurtleff*, 142 S.Ct. at 1610 (Gorsuch, J., concurring in the judgment).

[339] See https://www.nytimes.com/2023/06/05/us/oklahoma-first-religious-charter-school-in-the-us.html (last visited on July 31, 2023).

[340] See https://www.nbcnews.com/politics/politics-news/ten-commandments-required-public-schools-texas-bill-rcna80936 (last visited on July 31, 2023). Although the state Senate passed the bill, the legislative session ended before proponents in the state House could ensure action on the bill.

Conservative proponents of the religionist narrative, in contrast, have (at least until recently) relied less on original meaning and more on post-ratification history, practice, and tradition. The first wave of opinions advancing the religionist narrative tended to concede the normative authority of separationism but sought to preserve a place for certain practices that involved official expression of religious messages. This view accorded significant weight to the existence of past practices that seem inconsistent with separationism but nevertheless were commonly used, especially during the nineteenth century.

The Court's more recent cases suggest an effort to reconcile the religionist narrative with the original meaning of the Establishment Clause. But those efforts have tended to use the language of originalism without providing any significant evidence from the founding era. As Randy Barnett and Lawrence Solum, who are both prominent defenders of originalism, argue, the Court's most recent Establishment Clause decisions are "not analytically precise about the roles that history and tradition play in the Court's reasoning" and lack specific historical evidence.[341] Equally important, as we have explained, almost all the evidence that the Court has cited to support the religionist narrative is post-ratification, often by a half-century or more. Such evidence—as the Court's most devout originalists have asserted—is not typically a sufficient basis for an originalist claim.[342]

B. Tradition

If the Court is not offering an originalist account, then what is the basis for the normative authority of the religionist narrative? The Court's answer, in opinions dating from Justice Reed's dissent in *McCollum* through the Court's most recent Establishment Clause decisions, has been tradition. As we have seen, invocations of the religionist narrative have repeatedly cited a litany of practices, from the nineteenth and twentieth centuries, that involve acknowledgment of the divine by public officials. To be sure, assertions of the narrative tend to ignore or dismiss historical evidence that undermines the account, such as the proliferation of state constitutional provisions that prohibited public support for religious education. We address the problem of selectivity below. But even if the history were uncontested, proponents of the religionist account would still need to offer a justification for the normative status of tradition. Why should tradition provide its own justification for continuity?

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[341] Randy E. Barnett and Lawrence B. Solum, *Originalism After* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. L. REV. [DRAFT at 38-41] (2023) (discussing Kennedy v. City of Bremerton and Town of Greece v. Galloway).

[342] *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 614 (2008) (Scalia, J.) (asserting that, because post-Civil War discussions of the right to keep and bear arms "took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources"); New York State Rifle & Pistol Ass'n., Inc. v. Bruen, 142 S.Ct. 2111, 2137 (2022) (Thomas, J.) (rejecting government's reliance on evidence from the nineteenth and twentieth centuries as evidence of constitutional meaning and asserting that, "to the extent later history contradicts what the text says, the text controls").

Proponents of the religionist account have been silent on this fundamental question. Indeed, the Court's reliance on tradition simply highlights the problem of normativity rather than offering a solution for it.

This is not to say that it is impossible to develop a theory of constitutional meaning that accords substantial weight to tradition. A Burkean conservative, for example, would begin from the premise that "the past has an authority of its own which, however circumscribed, is inherent and direct rather than derivative."[343] But even Burkean conservatives recognize the possibility of evolutionary change, with the corollary that tradition is not unimpeachable.[344]

If tradition is not automatically dispositive even to a Burkean conservative, then we must have some metric to decide when a tradition merits deference. As courts decide whether tradition should govern the resolution of a current Establishment Clause dispute, they should consider at least two factors. First, courts should ask whether the practices at issue in fact received widespread approval across historical, geographic, and partisan lines. There is a difference between a widely held understanding that provoked little or no dissent over a period of many years, on the one hand, and the fleeting victories of those on one side of a contentious debate, on the other.

The religionist narrative resembles the latter more than the former. It is a highly curated version of history that highlights only those practices in which a public official mentions the divine. The narrative ignores contrary practices and legal developments. To take just one of many examples, the religionist narrative has a difficult time explaining the widespread opposition, in the early- to mid-nineteenth century, to closing post offices on Sundays.[345] The same impulse that drove this opposition—framed in the language of church-state separation—led to the end of all formal establishments of religion, the abolition of blasphemy laws, and the elimination of religious restrictions on holding public office, among other important developments. The existence of a parallel, competing tradition of separationism significantly undermines any claim of the religionist narrative to normative status based simply on historical pedigree.

Second, courts should consider the fit or relevance of the tradition to the challenged modern practice. For example, a tradition of official acknowledgment of the divine in speeches and proclamations tells us something important, for one committed to the Burkean view, about the current constitutional status of, say, presidential Thanksgiving proclamations. But it tells us much less about the propriety of permanent religious displays sponsored by the government, let alone government funding of religious instruction or worship.

Mark DeGirolami has proposed consideration of these factors and others in offering a more comprehensive defense of tradition as the basis for

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[343] Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1047 (1990).

[344] *See, e.g.*, Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 653-656 (1994); *see also id.* at 689 (noting that Burke emphasized tradition and incremental change).

[345] *See* STEVEN K. GREEN, SEPARATING CHURCH AND STATE: A HISTORY 115-116 (2022).

constitutional meaning.[346] DeGirolami distinguishes traditionalism from principle-driven theories of constitutional interpretation. On his view, traditionalism is "defined by two key elements: (1) concrete practices, rather than principles, ideas, judicial precedents, and so on, as the determinants of constitutional meaning and law; and (2) the endurance of those practices as a composite of their age, longevity, and density, evidence for which includes the practice's use before, during, and after enactment of a constitutional provision."[347] He offers two principal justifications for judicial reliance on tradition: the Burkean fear that disruption of settled practices will destroy social cohesion and lead to worse alternatives;[348] and the belief that continuity offers the opportunity to learn and practice the "excellence[s]" maintained by tradition that promote individual and collective virtues.[349]

In our view, these are insufficient justifications for according tradition normative constitutional status. First, our legal culture and practices do not automatically accord constitutional weight to tradition. Instead, constitutional interpretation has often explicitly disavowed entrenched traditions. Our current constitutional understandings condemn segregated schools, prohibitions on interracial marriage, sex discrimination, and bans on subversive speech. If tradition deserves normative weight, then those practices would still be permitted. The mere fact that something is a tradition is not ordinarily sufficient to give it constitutional status.[350]

Second, although adherence to traditional practices is sometimes justified by reliance interests, that concern does not apply in this context. In private law, deference to traditional practices protects the reliance interests that parties have in existing legal doctrines. Courts frequently try to protect such reliance even when significantly changing common-law rules of property or contract. When it comes to Establishment Clause rules, however, private parties' reliance interest merit far less respect. Indeed, we find little reason to protect the reliance of private parties on a particular interpretation of the Establishment Clause.[351]

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[346] Mark O. DeGirolami, *Traditionalism Rising*, __ J. OF CONTEMP. LEGAL ISSUES __ (2023).

[347] *Id.* at 6 [draft].

[348] *Id.* at 34 ("It is the fear of realizing those worse alternative possibilities, together with the fear of the corrosion of lived experience in favor of a kind of doctrinarism unleashed by principled interpretation, that motivates traditionalism").

[349] *Id.* at 35 ("[P]ractices are the ways in which we instantiate human excellence…."); *id.* at 37 ("What these practices and their limits in law evince is an ongoing historical argument—a tradition in the MacIntyrean sense— about the nature of excellence in government (or 'good government'), conducted concretely in uncountable contexts, in which what the virtue of justice requires is worked out iteratively over long periods of behavior and regulation of that behavior.").

[350] This is not to say that tradition is irrelevant in constitutional decision-making. We determine the scope of the President's authority, for example, in part by asking what powers prior Presidents have sought to assert. *See* Dames & Moore v. Regan, 435 U.S. 654 (1981). But we usually require something more than the mere existence of a tradition before we confer constitutional status on a practice.

[351] The only obvious exception is the reliance on parents who have chosen to send children to private religious schools in part because the tuition is subsidized. Those parents would incur substantial costs if a program of taxpayer support for religious schools were declared unconstitutional. *Cf.* Lemon v. Kurtzman, 411 U.S. 192 (1973) (allowing payout of remaining contract with schools affected by decision in Lemon v. Kurtzman, 403 U.S. 602 (1971), even though the Court had declared such payments unconstitutional).

Evolving understandings of the Clause principally affect the government's relationship with religion and religious institutions, rather than the rights of individual citizens. Far from deserving constitutional respect, deference to the traditions that constitute the religionist narrative raises concern about the capture of government by the community that now claims injury to its settled expectation of official endorsement of its preferred religion.

Third, the traditionalist approach valorizes the past without telling us which parts are worth preserving and which ought to be discarded. In DeGirolami's account, traditionalism "takes two types of concrete practices as determinative of meaning and law: the practices of the political organs of government, including state and local governments; and the practices of individual citizens or groups of citizens."[352] Given the breadth of this definition, it is difficult to discern which past practices are not worthy of protection.

To be sure, DeGirolami offers some criteria for determining which practices deserve fidelity in the present. He proposes that courts consider the "endurance," "longevity," and "density"—respectively, antiquity, continuity, and popularity[353]—of the practices. These criteria, however, are quite malleable. Nothing in the theory tells us how old, how continuous, and how widespread a practice must be to merit respect as a normative practice.

More important, DeGirolami seems to ignore the role that contemporary interpreters play in reconstituting the past when they seek to address present issues. To DeGirolami, the past appears to be something that we can access without the intermediation of present preferences or biases. But when we look at the past, we do not "discover" traditions the way that paleontologists unearth fossils or physicists identify new sub-atomic particles. The objects in the past are simply events, instances, or practices; we create traditions by deciding that some of those "facts" deserve to be gathered into an historical narrative that enjoys normative force in the present.

We inevitably approach the past with questions shaped by present concerns.[354] What we find in the past depends on the questions that we want the past to answer—and, usually, the answers that we want to find in the past. When we construct a tradition, we select from among a diversity of practices and events in the past. By according significance to some practices rather than others, the interpreter creates a narrative that brings coherence to what is otherwise complex, noisy, and chaotic.

This process of narrative construction need not be instrumental or even conscious. But the choices themselves are often contestable. The same historical record might permit the creation of an alternative narrative that generates a wholly different set of norms for the present. In making choices about which practices should constitute our shared narrative, we must pay attention to the

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[352] DeGirolami, *supra* note 346, at 6-7.

[353] *Id.* at 7-8.

[354] *See, e.g.*, HAYDEN WHITE, THE CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION (1987); HANS-GEORG GADAMER, TRUTH AND METHOD (2d rev. ed. 1989).

values and interests served by those choices—and more particularly, the ways that those choices reinforce structures of power and subordination.

For example, although DeGirolami praises the Court's recent constitutional decisions that treat tradition as normative, his traditionalist approach could just as easily describe—and justify—the "Lost Cause" myth of the Confederacy. The Lost Cause myth seeks to rewrite the history of the antebellum period and the Civil War to rehabilitate the post-war image of the South. It celebrates the courage of Confederate soldiers, decries the suffering inflicted on the South by Northern troops, paints slave-holders as benevolent figures and slaves as contented, and minimizes or ignores the role of slavery as a cause of the Civil War.[355] The myth served as the foundation for Jim Crow laws and the reassertion of white supremacy in the South.

Southerners created the Lost Cause myth through a concerted series of writings, public displays, and mandatory inclusion in public school curricula. In so doing, they combed through history to find events and practices that they could stitch together to create a narrative designed to embody a set of communal values. To be sure, those who created the Lost Cause myth cruelly distorted history in order to create their narrative, and did so to advance malevolent ends. But this is always a risk when we delegate to a defined set of elite figures the power to create a narrative that formulates community norms.

As the Lost Cause example demonstrates, there is no guarantee that practices protected by the traditionalist approach will be normatively good. DeGirolami draws on Alistair MacIntyre's writing to argue that traditionalism allows the community to identify "excellences" of the past that deserve to be maintained (by law) in the present.[356] However, DeGirolami offers no reason to believe that the practices lifted up and maintained by traditionalism will advance anything other than the interests of those in power.[357] After all, the practices that constitute a tradition almost inevitably reflect the preferences of those who enjoyed power and prestige in the past. Equally important, the decision in the present about which practices to elevate to the status of tradition is likely to be made by those who benefit from the society structured by the tradition in question.

The traditionalist approach pretends to a certain objectivity in discovering practices and values of the past. But this objectivity is an illusion. A tradition is a created artifact, rather than a relic with self-evident importance for the present. Consciously or not, we select the practices that constitute a tradition based on their compatibility with our present normative commitments, both public and personal.

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[355] *See* EDWARD A. POLLARD, THE LOST CAUSE REGAINED (1868).

[356] DeGirolami, *supra* note 346, at 35-39.

[357] *See* Andrew Koppelman, *The Use and Abuse of Tradition: A comment on DeGirolami's Traditionalism Rising*, __ J. OF CONTEMPORARY LEGAL ISSUES [draft at 11] (2023) ("Any provision that aims to break with deeply entrenched wrongs of the past, particularly wrongs with powerful beneficiaries, predictably will not be instantly effective. The toxic tradition it aims to end will persist, sometimes for decades, in the teeth of the textual prohibition. That persistence can then be offered as a reason to read the text as consistent with those conditions ….").

To evaluate the status of a claimed tradition, we need to unearth and evaluate those commitments. This is especially important when there are competing claims about the practices that deserve to be given normative status. We do not reject the possibility that historical inquiry can generate relatively clear answers to present questions. But when the historical record is thick with competing practices and values, any claim of a single tradition arising from that record must be the product of a normative choice based on principles that are extrinsic to that record. In those cases, the debate should shift from historical inquiry to the relative merits of the principles that govern the choice.

C. History

What does the historical record tell us about the relative strength of the competing narratives? We think that the framing-era history provides considerably more support for the separationist narrative. For present purposes, we are agnostic about whether framing-era history is always authoritative in determining constitutional meaning. But virtually all theories of constitutional meaning concede that framing-era history is at least relevant to questions present meaning.

This is not the place for a thorough accounting of the history; scores of books and articles have been written on this question. Our consideration will be necessarily brief. We defend our claim about the relative strength of the separationist narrative based principally on eighteenth-century history, and also explain how the religionist narrative came to dominate American culture during the nineteenth century.

1. Separationism

The people who advanced the separationist view[358] in the colonies in the eighteenth century feared domination and oppression by a state-enforced religious authority. This concern was far from hypothetical. 100 years earlier, England was consumed by a civil war fought in significant part over religious beliefs, practices, and organization. This war took a greater proportional toll on the population in England than any other war in which the country has been involved, before or since. The conflict ultimately led to a reassertion of the exclusive authority of the Church of England.[359]

A certain irony colored the colonists' reaction to the wars of religion. On the one hand, the experience of those wars highlighted concerns about the scope of state power over religious entities. On the other hand, political and religious leaders in both northern and southern colonies continued to enforce

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[358] Some who have challenged the pre-ratification presence of separationism have questioned the limited use of the phrase "separation of church and state" in that era. But as Steven Green has explained, people widely used synonyms for that phrase. GREEN, *supra* note 345, at 12-13 & n.46. Those who discount the significance of separationism in the eighteenth century by focusing on the phrase miss virtually all the relevant history that reveals the roots of what we now refer to as the separationist tradition.

[359] During the Interregnum, which lasted from 1649 to 1660, Puritans and other Protestant religious dissenters were permitted to worship openly, although Anglicans and Catholics were subject to significant limits on their freedom to worship. The restoration of King Charles II ended this period of toleration for certain Protestant dissenters.

forms of religious establishments and orthodoxy.[360] Their exercise of this authority was generated primarily out of response to the First Great Awakening and the rapid increase in the number of people who refused to participate in the state-backed forms of worship and instead desired to form their own religious communities with others who had experienced evangelical conversion in the awakening.

The response of the established or dominant churches frequently involved repression. In New England, towns excluded these newly formed religious communities from forming within their boundaries and refused to extend the same form of taxpayer support that they provided to the established church. In the south, Virginia was especially hostile to missionaries of the First Great Awakening[361] and punished those who did not conform to Anglican requirements for preaching and church attendance. The state jailed dissenting ministers for failing to refusing to obtain licenses to preach from the state, a practice that shaped James Madison's thinking about the relationship between church and state.

One of the factors that made this concern concrete for colonists was the continuing efforts to place an Anglican bishop in the new world, and in particular in Boston. The New England Congregationalists worried that a bishop would limit their establishments of religion and enforce Anglicanism in their colonies. In the south, the vestries[362] feared that a bishop would take away the power that these lay leaders had exercised over the church. Although Anglicanism was dominant in the southern colonies, especially Virginia, local church leaders had become accustomed to exercising control over the church and its ministers. The bishop controversy involved not only questions of church order, but also the possibility of increased control of the colonies by the British government.

It was against this background that the theological and philosophical objections to the close bond between government and religion arose. The theological argument for separationism required limits on the power of secular government to determine religious truth and the reservation of that power to religious individuals and communities. Drawing on the language of the First Great Awakening, separationism understood religion as authentic only if

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[360] There were established churches in some of the New England colonies, but they were not Anglican. Massachusetts, for example, established what became the Congregationalist "Standing Order" and refused to permit an Episcopal minister until forced to do so by Parliament at the end of the seventeenth century. In many southern states, in contrast, the Anglican church was dominant, most prominently in Virginia, but faced opposition from a range of Protestant dissenters. (The mid-Atlantic colonies, heavily influenced by Pennsylvania, did not generally have established churches, though several counties in New York did.) *See* McConnell, *supra* note 331, at 2116-2131.

[361] The First Great Awakening was a religious revival movement characterized by itinerant preachers who painted vivid portraits of hell in order to push people to repent and to authentically experience forgiveness. *See* MARK A. NOLL, THE RISE OF EVANGELICALISM: THE AGE OF EDWARDS, WHITEFIELD AND THE WESLEYS 76-135 (2003).

[362] Vestries were lay leaders of congregations, who tended to be the most prominent people in their communities. *See generally* Borden W. Painter, Jr., *The Vestry in Colonial New England*, 44 HIST. MAG. OF THE PROT. EPISC. CHURCH 381 (1978).

experienced and chosen by individuals. On this view, the state cannot enforce a piety that individuals do not already hold.

The philosophical basis of separationism arose in large part in response to the religious strife in England and on the continent. Political philosophers looked to separationism as a way of establishing civil peace in political communities composed of multiple faiths. Proponents of this view understood well that when the state usurps religious power, it turns religion into an instrument of the state and its political objectives. When the state claims religious authority for itself, it turns both its political objectives and the broader duty of obedience to the state into matters of faith—that is, as matters that are beyond ordinary political critique.[363]

Madison's Memorial and Remonstrance eloquently stated these related threads of the separationist view. He opened the document by arguing that civil government, in all its manifestations, has no authority over religion:

> The preservation of a free Government requires not merely, that the metes and bounds which separate each department of power be invariably maintained; but more especially that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants.[364]

Madison then turned to the most succinct statement of his opposition to any form of religious establishment:

> [T]he Bill implies either that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: the second an unhallowed perversion of the means of salvation.[365]

In other words, when the government chooses to supports religion, the government inevitably either asserts the power to decide religious truth—because it must decide which religious entities are deserving of public support—or uses the peoples' religious commitment as an instrument for achieving political ends. In Madison's view, these outcomes are equally problematic.

Justice Black's opinion in *Everson* relied on the way that this history played out in Virginia. Some critics have suggested that Virginia was an outlier in terms of its concerns about state involvement with religion. But separationism also took concrete form in other states in the years leading up to ratification of the Constitution. Pennsylvania, for example, adopted limits on public funding of institutions of religious worship or instruction. These limits had even more influence on early state constitutions than did Virginia's celebrated debate over taxation for the support of ministers. Both the Pennsylvania and Virginia

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[363] *See* LUPU & TUTTLE, *supra* note 101, at 24-29; Green, *supra* note 345, at 26-28 (discussing views of Locke, Montesquieu, and Hume).

[364] James Madison, Memorial and Remonstrance Against Religious Assessments, *supra* note 72, ¶ 2.

[365] *Id.* ¶ 5.

experiences provide crucial background for understanding the Establishment Clause.

We do not dismiss the significance of religion in eighteenth-century America, or the extent to which the language of religion—and particularly the Bible—emerged in public discourse. As Mark Noll has written, the Bible was by far the most influential book in eighteenth and nineteenth-century America. People knew its stories and the cadences of the Protestant King James version of the Bible. But that place of religion does not negate separationism. Separationism does not presume, or even aim toward, the secularization of civil society. Instead, separationism has co-existed with a broadly religious American populace, one in which the Bible represented the most important text for most people. The question is not the piety of the people; it is the government's role in stimulating, promoting, and maintaining that piety, and the relative suspicion that separationists had for any strong measures that would involve the state in the inculcation of religion.

As we explain below, religionism became dominant in the nineteenth century, but it did not erase the political significance and influence of separationism. Instead, separationism remained a potent political idea that led to important limits on official support and promotion of particular religious faiths. For example, many states adopted bans on public funding of religious schools. Contrary to the arguments of many who have advanced the religionist narrative, these bans did not originally or exclusively reflect bias against Catholic immigrants. Instead, they also reflected separationist opposition to the use of state funds for religious indoctrination and support for the promotion of republican values in state-funded schools.[366]

2. Religionism

Religionism also has a rich historical basis. As we have argued, however, it only gained political dominance because of widespread evangelical revival in the nineteenth century, well after the ratification of the Constitution and the First Amendment.

To be sure, religionism can trace some of its roots to Puritan Calvinism of the seventeenth and eighteenth centuries, which emphasized God's providential role, and especially the connection between God and America. In particular, this theological account understood a special relationship, or "Covenant," between God and America, through which a pious and moral citizenry gives honor to God, who in turn blesses their political community. On this view, God's blessing might even have been unique to America as the new promised land. This form of Protestantism strongly influenced the development of the established Congregational churches in the New England colonies.[367]

The Massachusetts constitution hints at this view of the relationship between religion and the political order. The 1780 document includes mandatory support for an approved pastor and religious institution in each

[366] *See* GREEN, *supra* note 345, at 106-108.
[367] *See generally* GEORGE MCKENNA, THE PURITAN ORIGINS OF AMERICAN PATRIOTISM (2007).

town. The justification for this requirement focused primarily on the relationship between religious belief and moral order. Theophilus Parsons drafted these provisions of the state constitution. As Chief Justice of the Massachusetts Supreme Court, he later explained that the requirement was based on the view that the citizenry's fear of eternal punishment for violation of divine law is an essential part of maintaining good public order.[368] For the same reason, the state's constitution also required office holders to take an oath declaring their belief "in the Christian religion," in which they had to declare "a firm persuasion of its truth."[369]

Despite the close relationship between religion and government in the New England colonies,[370] the separationist impulse led to a very different understanding of that relationship in other colonies during the second half of the eighteenth century. In fact, it was not long after ratification of the First Amendment that separationism also took hold in New England. Although many of the New England states maintained established churches at the time of the framing, all those states had disestablished their churches by the early 1830s.

This shift in thinking about the relationship between religion and the state coincided with a set of important changes in American religious practices and understandings. Although there were multiple strands of religious expansion in the first part of the nineteenth century, the best known of these is the Second Great Awakening. The Second Great Awakening was characterized by religious dynamism, an emphasis on voluntary choice in personal salvation, and the desire to bring about the religious transformation of American culture.[371] The movement was marked by mass revivals designed to bring individuals to a crisis of faith, and then turn them toward a personal commitment to Jesus as their savior. It also involved very significant growth in denominations, such as Methodists and Baptists, that had been outsiders in the late eighteenth century. These denominations and others formed a network receptive to the new (or renewed) believers energized by the meetings. Unlike the First Great Awakening, the revival movement pushed adherents toward reformation not only of themselves but also their society, with the ultimate goal of creating a Godly community. The Second Great Awakening also led to the creation of inter-denominational institutions designed to promote the spread of

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[368] Barnes v. First Parish of Falmouth, 6 Mass. 401, 406 (1810) (explaining that the established religion promoted civil order by "furnish[ing] the most efficacious sanctions, by bringing to light a future state of retribution").

[369] MASS. CONST. of 1780, ch. 6, art. I.

[370] Even in New England, there was at least a rhetorical tradition of separation, even if in practice it was sometimes ignored. *See* GREEN, *supra* note 345, at 22-23. And in Rhode Island, separationism was an organizing principle of government. *See* JAMES H. HUTSON, CHURCH AND STATE IN AMERICA: THE FIRST TWO CENTURIES 22-24 (2008).

[371] *See* GREEN, *supra* note 345, at 89-90. The First Great Awakening did not involve many of these features. It tended to focus on the individual, as opposed to societal, implications of the individual conversion experience. Although it gave rise to faith communities that would dominate the nineteenth century religious landscape, such as the Methodists and Baptists, it did not aspire to transform political communities. *See* JOHN WOLFFE, THE EXPANSION OF EVANGELICALISM: THE AGE OF WILBERFORCE, MORE, CHALMERS, AND FINNEY 159-192 (2007).

Christianity, both abroad and in the United States.[372] These institutions entities focused on publishing bibles and religious tracts, supporting missionaries at home and abroad, and advocating for social changes, including temperance and abolition. In the first half of the nineteenth century, the Second Great Awakening led to significant growth in evangelical Protestant Christianity.

By the middle of the nineteenth century, the dominant culture was much more openly religious than it had been at the beginning of the century. The movement's efforts at national transformation necessarily envisioned an important role for government, both in assisting the promulgation of basic Protestant norms and in officially identifying the culture as Protestant. Indeed, the Second Great Awakening had political implications, though the implications were largely limited to two contexts. First, there was a marked increase in official declarations of community belief in the divine. For example, after 1820, many states added language to the preambles of their constitutions that expressly referred to God.[373] Second, those who founded and promoted common (or public) schools often required readings from the King James Version of the Bible, accompanied by prayer, at the beginning of each school day.[374]

The religionist movements that dominated American culture during the first part of the nineteenth century split in the late-nineteenth and early-twentieth centuries into fundamentalism, which largely separated itself from politics, and the "Social Gospel," which adopted a liberal vision of Christianity to advance a progressive idealism.[375] But the Cold War brought these strands back together, if only tentatively, in opposition to communist atheism. The religionists once again promoted the idea of a special relationship between God

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[372] *See* NOLL, *supra* note 102, at 140-152 (discussing the Board for Foreign Missions, the Tract Society, the American Bible Society, and others).
the Missionary Society, and the Board for Domestic Missions).

[373] *See* Peter J. Smith & Robert W. Tuttle, *God and State Preambles*, 100 MARQUETTE L. REV. 757 (2017). The Iowa Constitution's preamble, adopted in 1846, is typical:

> We the People of the State of Iowa, grateful to the Supreme Being for the blessings hitherto enjoyed, and feeling our dependence on Him for a continuation of those blessings, do ordain and establish a free and independent government . . . .

IOWA CONST., pmbl. There was also a significant increase in the middle of the nineteenth century in the number of political figures and legal scholars who emphasized the importance of Protestant Christianity, both its role in promoting good citizens and in establishing for the nation a right relationship with the divine. *See, e.g.*, 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1867("[I]n a republic, there would seem to be a peculiar propriety in viewing the Christian religion, as the great basis, on which it must rest for its support and permanence, if it be, what it has ever been deemed by its truest friends to be, the religion of liberty."). When Justice Story wrote in the 1830s that Christianity is "part of the common law," Joseph Story, *Christianity a Part of the Common Law*, THE AMERICAN JURIST AND LAW MAGAZINE 346 (1833), available at https://www.classicapologetics.com/s/Story.AmJurist.1833.ComLaw.pdf, he was expressing the spirit of his age in assuming that the nation shared a Protestant self-understanding generated by this revival.

[374] Although these practices were generally mandatory, supporters did not see a conflict with their commitment to religious voluntarism. Teachers were usually prohibited from commenting on the Bible passages, which supporters believed would leave interpretation of the passages to the students (with the guidance of their families and religious communities). Exposure to the Bible, they believed, would foster good morals, and thus good citizenship, among the students. *See* NOLL, *supra* note 102, at 293-305.

[375] *Id.* at 542-544.

and America, which included the obligation to honor God as a nation rather than as a matter for the consciences of individual citizens and religious communities. In response, in the 1950s Congress adopted "In God We Trust" as the national motto—and required its placement on all currency—and added a reference to God to the pledge of allegiance.

As we have shown, the Court has embraced the religionist narrative of the understanding of the proper relationship between religion and the state. We take issue with this conclusion on several grounds.

The religionist account is not the best way to make sense of pre-ratification and framing-era history. Although that history is complex, separationism's core idea that religion and civil government ought to occupy distinct spheres better accounts for the political rhetoric and practice in that era than does the religionist account's emphasis on a special relationship between God and the nascent American nation. To the extent that framing-era history ordinarily carries great weight in determining constitutional meaning, the religionist account thus has a weaker claim to reflect original public meaning.

The religionist narrative instead is based predominantly on the rapid spread of evangelical Protestantism in the first half of the nineteenth century. By relying on nineteenth-century history, the Court is looking at a very different understanding of religion, and its relationship to civil government, than the one that predominated in the founding era. We do not reject the significance of post-ratification developments in determining constitutional meaning.[376] But in its focus on "history and tradition," the Court has obfuscated the difference between original meaning and evolving societal views. Indeed, the Court's most recent decisions that advance the religionist narrative assert a consistent, unified understanding of the Establishment Clause that traces to the founding era. Whatever weight nineteenth-century history deserves in constitutional interpretation, it is simply wrong to suggest in this case that such history is representative of views widely held at the framing.

Proponents of the religionist narrative have also suggested that tradition alone is a sufficient basis for their understanding of the meaning of the Establishment Clause. The Court's focus on tradition, however, suffers from several problems.

First, even assuming that tradition alone is a sufficient normative basis for constitutional meaning, proponents of the religionist account have not demonstrated that the practices on which they rely in fact represent a societal consensus about the proper relationship between religion and civil government. The Court's consideration of past practices is highly selective; proponents of the religionist view primarily rely on official proclamations that had no operative legal force while ignoring developments, such as the widespread adoption of state provisions to limit the funding of religion and religious education, that suggest a very different understanding of church-state relations. In addition, the practices that religionists cite—even when viewed in isolation—are easily

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[376] This is in sharp contrast to the view of constitutional interpretation held by several of the Justices who have advanced the religionist narrative. *See supra* at note 342 and accompanying text.

distinguishable from the practices typically at issue in modern disputes. Statements by government officials of personal faith or encouraging piety do not tell us very much about whether the government has an obligation to fund religious education or physical improvements at a church, or the authority to erect monuments with clear religious symbolism.

The so-called "Protestant establishment" of the nineteenth century did not displace separationism.[377] Quite to the contrary, there was broad support for limits on state funding of religious education. Indeed, religionists embraced these limits. One of the core commitments of the Protestantism establishment was an institutional separation with respect to faith-specific religious education. As the Court's current proponents of the religionist narrative repeatedly point out, this separation blocked funding of Roman Catholic schools. But it prevented funding of denomination-specific Protestant schools, as well.[378] Nor was public commitment to separationism limited in this era to the context of education.[379]

Second and more fundamental, tradition alone is an insufficient basis for determining constitutional meaning.[380] To be sure, a set of historical practices that are not inconsistent with generally accepted constitutional principles can be convincing evidence of the constitutionality of those or similar practices. But this analysis requires articulation of the constitutional principles at stake in a particular matter.[381] Thus, in assessing both whether a set of practices constitute a tradition and whether the tradition deserves normative status, interpreters should attend to the principles advanced by the tradition.

In conflicts over the meaning of the Establishment Clause, the dueling accounts advance competing principles. We should evaluate those accounts based on those principles. Unfortunately, the principles are rarely made transparent in decisions that advance the accounts. To assess the relative strengths of these accounts, we must articulate the rival underlying principles.

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377 *See* GREEN, *supra* note 345, at 105 ("Religious historians have long documented how an informal "Protestant establishment" existed in nineteenth century America, one in which a Protestant ethos held sway over the nation's culture and institutions, including its public schools.").

378 To be sure, the Protestant Establishment assumed that "non-denominational" common schools would be sufficiently ecumenical to allow Bible reading as a means of moral instruction. Strict adherence to traditional practices thus might justify prayer and Bible reading in public schools today. But as we explained *supra* at note 350 and accompanying text, tradition alone is rarely a sufficient basis for constitutional meaning—especially when it conflicts with other core constitutional commitments.

379 *See* Reynolds v. United States, 98 U.S. 145 (1878) (addressing "whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land").

380 *See supra* notes 350-357 and accompanying text.

381 DeGirolami proposes exactly the opposite approach—that interpreters should ignore principle-driven theories and instead rely on the lessons of tradition. *See* DeGirolami, *supra* note 346 at [draft 28]. But as we have explained, determining which historical events or practices in fact constitute a tradition requires, implicitly or explicitly, consideration of the principles that the interpreter seeks to advance. We do not believe it is possible for an interpreter to ignore principle when deciding which practices to privilege. Because that selection is not self-evident, something else must guide the choice. *See supra* at notes 354-357 and accompanying text.

D. Principle

1. Separationism

Separationism is a political philosophy that developed in response to the wars of religion during the sixteenth and seventeenth centuries. It is based on the premise that there is a distinction between the proper realm of civil authority—the secular—and religion authority—the sacred. Separationism does not deny that individuals and religious communities might believe that the religious sphere pervades all human life. But separationism asks the political community, in the name of good civil ordering, to recognize that the secular realm should be free from disputes over ultimate meaning or truth.

On this view, religion is a matter for individual choice, free of state control. Religious communities are equal and have the capacity to carry out their religious missions. Those missions, however, must not attempt to usurp the power of secular civil government. Likewise, separationism contends that the government should not usurp the power to determine religious truth.

The core commitments of separationism offer the promise of certain salutary ends. One of those ends is equal respect and status for all faiths. If no one faith or group of faith communities can control the political realm, then minority faith communities are at significantly less risk of repression. As a corollary, if religious groups are prevented from capturing the instruments of political power, then religious groups will have much less incentive to struggle for control over the political realm. On this view, separationism protects civil government from the corrupting influence of religion.

Separationism seeks to protect not only the institutions of civil government, but also religious communities. As some religious traditions hold, if the state has a close relationship with one or more faith communities, then the state will use those faiths to promote the state's interests. In doing so, the state will enlarge its power by giving the state an aura of the transcendent and simultaneously deforming the religious communities that enabled and legitimized the state's exercise of power. On this account, separationism protects religion from the corrupting influence of the state.

In modern terms, separationism's core principles overlap substantially with the theory of liberal pluralism. Liberal pluralism teaches that we can have a community of people who hold competing visions of ultimate truth. But they can still be in a political community with each other because those deeply felt truths do not dominate the political space. This requires some idea of separation between the deeply felt truths and ordinary political discourse. Liberal pluralism does not require that individuals abandon their religious beliefs in the political realm. But it does require the polity to give secular reasons for any political decision. And it requires that political decisions have adequate secular justifications. Finally, liberal pluralism contends that it is the best alternative for governance of a religiously heterogeneous political community. In light of religious pluralism, the only alternative is a battle for dominance between incommensurable accounts of truth. Such a battle can end only with domination by one part of the political community and alienation of the others.

On the Court, the separationist narrative has taken several forms. Justice Black advanced an originalist version separationism grounded entirely in the framers' understanding of the Establishment Clause. Justice Brennan's version of separationism, in contrast, considered original meaning only at a high level of generality. He arrived at separationism through concerns about pluralism and the need to avoid social conflict arising out of competing religious commitments.[382] Justice Breyer's more tentative commitment to separationism arose from a similar set of concerns. Relatedly, Justice O'Connor offered an approach that focused on the individual's experience of alienation when confronted with state-sponsored religious messages.[383]

2. Religionism

Religionism was the dominant conception of the relationship between political authority and religion for most of human history. It is a social artifact that appears to be as ancient as organized society. Historically, political rule and religious authority combined in many different forms, from the idea that the ruler is a deity, to the concept of divine right of monarchs, to the medieval Roman Catholic Church's expectation that government would assist the Church in whatever way was needed to further the faith. As we use the term, religionism entails a merger, or at least close coordination, between the political and the religious domains.

The American version of religionism has its roots in the Protestant Reformation, particularly in the Calvinist branch of that movement. John Calvin and those influenced by his work promoted a form of Protestant Christianity that acknowledged a distinction between the institutions of church and state, but encouraged the state to embrace, teach, and enforce correct religious doctrine.[384] This form of Calvinism played a significant role in the early experience of New England, with both church and state committing to a joint goal of creating a holy community. This aspect of Calvinism—although not all aspects of Puritan Calvinism—spread throughout the United States as part of the Second Great Awakening. As we noted above, the Second Great Awakening emphasized the religious transformation of the political sphere, in addition to individual salvation.

The movement, which gained widespread force in the nineteenth century, envisioned a Protestant Christian America. Its account of a Protestant Christian America had both individual and political aspects. First, it taught that human flourishing depends on a personal and communal relationship with God. Second, it asserted that civil authority has the responsibility and competence to promote such relationships. This idea arises from Calvinist notions of a "covenant" between God and the political community. On this view, God rewards the nation if its people act in accordance with divine commandments, including the obligation to honor God. The nation, through both religious

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[382] *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 802-808 (1983) (Brennan, J., dissenting).

[383] *See* Lynch v. Donnelly, 465 U.S. 668, 687-694 (1984) (O'Connor, J., concurring). Justice O'Connor's endorsement test turned out to be an easy target for religionists who sought to undermine separationism and the Court's separationist precedents.

[384] *See* GREEN, *supra* note 345, at 20-21.

institutions and political authority, thus has a significant interest in promoting devotion to God and Protestant morality. Good government and religiosity, on this view, are intertwined.

This view about the relationship between religion and civil authority persisted through the nineteenth and twentieth centuries and has continued into the twenty-first. In the 1830s, Justice Story described the United States as Christian country and wrote that the state has a "duty of supporting religion, and especially the Christian religion."[385] The Civil War prompted a close relationship between religious institutions and the national government. Religious organizations provided care for wounded soldiers and distributed religious literature to the whole Union army.

This religious impulse led a Pennsylvania pastor to request that "In God We Trust" be added to the coinage.[386] The federal government granted the request in 1864.[387] In the years following the Civil War, Congress considered (but ultimately rejected) several proposed amendments to the Constitution to declare the United States a Christian nation.[388] In the late-nineteenth and early-twentieth centuries, there was a split between religious fundamentalists and religious modernists. The modernists, through the Social Gospel movement, continued the call for close cooperation between church and state. They emphasized the obligation of the state to promote religious ideals, in service of aid to workers and the indigent.

In the middle of the twentieth century, fear of godless Soviet communism led to a renewed emphasis on the religious identity of the nation and its people.

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[385] *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1867-1870 (1833).

[386] *See* U.S. Department of the Treasury, History of "In God We Trust," available at https://web.archive.org/web/20160417102334/https://www.treasury.gov/about/education/Pages/in-god-we-trust.aspx.

[387] In 1863, the Secretary of the Treasury approved a design for one-cent, two-cent, and three-cent coins that included the reference to God. Congress subsequently authorized the Secretary to include the motto on the coins. *See* An Act in Amendment of an Act entitled An Act Relating to Foreign Coins and the Coinage of Cents at the Mint of the United States, 13 Stat. 54 (April 22, 1864) (authorizing mintage of one- and two-cent coins and providing that the "shape, mottoes, and of devices said coins shall be fixed by the director of the mint, with the approval of the Secretary of the Treasury"); An Act to Authorize the Coinage of Three-Cent Pieces, 13 Stat. 517 (March 3, 1865) (same for three-cent coins).

[388] The National Reform Association in 1864 sought to change the preamble to reflect the nation's acknowledgment of God and Jesus Christ as authority over all creation. The proposal would have amended the preamble to read:

> We, the people of the United States, humbly acknowledging Almighty God as the source of all authority and power in civil government, the Lord Jesus Christ as the Ruler among the nations, his revealed will as the supreme law of the land, in order to constitute a Christian government, and in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the inalienable rights and the blessings of life, liberty, and the pursuit of happiness to ourselves, our posterity, and all the people, do ordain and establish this Constitution for the United States of America.

A House committee voted against the proposal in 1874, but it was reintroduced several times in the nineteenth century. Later, when anti-communist sentiment was on the rise, religionists again proposed a similar amendment, which again failed.

During the 1950s, Congress approved the addition to the Pledge of Allegiance of language acknowledging God. Congress also formally adopted "In God We Trust" as the national motto and ordered it printed on paper money in addition to coins. Efforts to amend the Constitution to declare the United States a Christian nation arose again in this era, and yet again following the Court's school-prayer decisions.[389]

To be sure, religionism has evolved over time. First, whereas the Second Great Awakening's conception of a Christian America was explicitly limited to evangelical Protestants, over time the religionist impulse became slightly more ecumenical. This is especially evident during the 1950s, when proponents of a religious America embraced the idea of a Judeo-Christian tradition, in which Jews and Catholics could share.[390] Thus, Ronald Reagan, who identified the United States as a "shining city on a hill," could appeal to a variety of faiths in support of that covenantal vision.

Second, whereas religionism in the nineteenth century usually entailed a positive assertion about the relationship between God and the community, religionism in the twentieth century was often preoccupied with the fear that government would adopt secularism as its official "religion," thereby denying what they believe to be the special relationship between God and America. But the fear that secularism would displace religion ultimately derived from the same basic set of positive commitments. Because a secularist political community cannot fulfill its covenantal duties, secularism must be resisted.

Religionism today appears to hold that full membership in the polity requires a willingness to participate in shared communal reverence for a God who has promised to protect and allow those people who are reverent and obedient to flourish. Those who are unwilling to participate will be tolerated by the political community, but they hold no power to block state involvement with religion.

The religionist narrative advanced over the years by various Justices has not been monolithic. As we explained above, some Justices accepted separationism as a general principle, but asserted that the political community should have the authority to encourage and facilitate the people's expression of reverence for the divine.[391] Others have rejected separationism and urged a more robust account of the state's power to promote the majority religion.[392] But at their core, the various religionist accounts advanced on the Court contemplate a close connection between the state and the polity's dominant faith.

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[389] *See supra* note 388.

[390] *See* WILL HERBERG, PROTESTANT, CATHOLIC, JEW (1955); *cf.* McCreary County, 545 U.S. at 894 (Scalia, J., dissenting).

[391] *See, e.g., McCollum*, 333 U.S. at 238-256 (Reed, J., dissenting); *Newdow*, 524 U.S. at 35 (O'Connor, J., concurring in the judgment).

[392] *See McCreary County*, 545 U.S. at 894 (Scalia, J., dissenting); *cf. Newdow*, 524 U.S. at 49-51 (Thomas, J., concurring in the judgment) (asserting that the Court should revisit its conclusion that the Fourteenth Amendment incorporates the Establishment Clause).

From our close survey of the opinions advancing the religionist narrative, two key principles emerge. First, there ought to be a cooperative relationship between government and religion. Unlike separationists, who seek to draw a line to separate the two spheres, religionists rarely if ever try to determine where such a line, if any, exists.

Second, when the government delivers religious messages, the government cannot treat all religions equally or include all religious voices. As Justice Scalia asserted in *McCreary County*, the government's speech inevitably will reflect the language and imagery of the preferred faith tradition. In an important sense, Justice Scalia was simply acknowledging what already should have been apparent: Protestant efforts to include "non-sectarian prayer" in common schools in the nineteenth and twentieth centuries reflected the theology of Protestant Christianity, rather than some generic view of religion. In Justice Scalia's view, there is nothing constitutionally problematic about the state invoking the language of a particular religious tradition. Very few proponents of the religionist account have expressly acknowledged this reality, but Justice Scalia seemed clearly correct that it is an inevitable consequence of the government's choice to speak in a religious voice.

3. Evaluating the Narratives' Competing Principles

We believe that the religionist vision is inconsistent with fundamental constitutional values. At its core, the religionist narrative presumes and encourages a close relationship between the state and religion. In practice, this close relationship effectively excludes all but the dominant understanding of religion, and the movement for a Christian America depends on that assumption. When the state erects religious monuments,[393] funds religious education,[394] or (as we fear will soon be permissible once again) leads prayer in schools,[395] the state privileges those whose religious beliefs enable them to receive the state's messages.

This is wholly inconsistent with the constitutional structure, which states that authority comes from the people rather than God.[396] We reject the view that divine law has a place in civil law. The ordinary methods of determining the content of the law provide no way to reconcile disparate understandings of divine law, let alone conflicting personal revelations. There is no way to determine the truthfulness of such claims. Religious communities might assert the ability to decide which claims deserve respect, but it is not a power that the government can or should enjoy. If a source of authority is unquestioned or unquestionable, then there is no basis for publicly justifying the content or meaning of that authority. Law based on divine revelation lacks the public reasons necessary for legitimate governance and self-rule. Those who are non-adherents are not offered relevant secular reasons for adopting a particular course of action.

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393 *See* American Legion v. American Humanist Ass'n, 139 S.Ct. 2067 (2019).
394 *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Carson as Next Friend of O.C. v. Makin, 142 S.Ct. 1987 (2022).
395 *Cf.* Kennedy v. Bremerton Sch. Dist., 142 S.Ct. 2407 (2022).
396 *See* U.S. CONST., pmbl (ordaining the Constitution in the name of "We the People").

A government that derives authority from religion is not a government of the people, because only some of the people have access to the normative sources that guide the government. When Texas asserts that the Ten Commandments are the basis of our law, for example, it effectively asserts that the content of the law is available only to those who accept the revealed truths of particular religious traditions. Authentic explication of the Decalogue's meaning and application depends on the interpreter's access and commitment to revealed truths.[397]

Perhaps such an assertion would seem less concerning in an entirely religiously homogeneous polity. But, of course, no such polity exists. And it certainly does not exist in the United States or within any of the individual states. The government and the Court have at times appealed to a shared Judeo-Christian religious tradition,[398] but that tradition—at least when used to justify a close bond between government and religion—excludes many of our people. The religionist narrative seeks to equate the "We" in "In God We Trust" with the "We" in "We the People." But they are not the same, either as a demographic[399] or a normative matter.

If anything, demographic changes in the United States have increasingly threatened to relegate religionists to minority status. The Court's reliance on the religionist narrative thus has the practical effect of enabling those who reject the idea of a secular state—and the policy choices of those committed to that ideal—to gain in the courtroom what they cannot win in legislative or administrative processes. It is little surprise that the current battleground in litigation over the Religion Clauses concerns the right of socially conservative Christians to exemptions from non-discrimination law.

This is most apparent in the rise of Free Exercise law and the demise of Establishment Clause doctrine.[400] In the last two decades, the Court has consistently elevated free exercise interests over concerns about non-establishment. The Court has done so both through expansive interpretation of statutory law—in particular the Religious Land Use and Institutionalized Persons Act[401] and the Religious Freedom Restoration Act[402]—and the Free Exercise Clause.[403] The Court's most recent cases ensure that religion is distinctively privileged through legal protections, entitled to equal funding by the state, and, in the case of the dominant faith, deserving of special promotion by the state.

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397 The Ten Commandments declare that their authority depends on a relationship with the divine. *See* THE BIBLE (KING JAMES VERSION) ("Thou shalt have no other Gods before me.").

398 The national motto ("In God we trust") does not specifically identify a deity of one particular faith tradition. *See also McCreary County*, 545 U.S. at 894 (Scalia, J., dissenting) (referring to the "three most popular religions in the United States, Christianity, Judaism, and Islam").

399 *See generally* RYAN P. BURGE, THE NONES: WHERE THEY CAME FROM, WHO THEY ARE, AND WHERE THEY ARE GOING (2021) (polling on religious beliefs across generations).

400 Ira C. Lupu & Robert W. Tuttle, *The Remains of the Establishment Clause*, 74 HASTINGS L.J. __ (2023).

401 42 U.S.C. § 2000cc *et seq.*; *see* Holt v. Hobbs, 574 U.S. 352 (2015).

402 42 U.S.C. § 2000bb *et seq.*; *see* Gonzales v. O Centra Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

403 *See supra* at notes 296-316 and accompanying text.

III. CONCLUSION

The Court's shift in Establishment Clause cases coincides with a broader move in other constitutional contexts to decision-making based on vague notions of history and tradition. The Court has invoked history and tradition to impose severe limits on the power of government to regulate firearms.[404] The Court has done the same to empower the government to impose severe limits on reproductive freedom.[405] In none of these cases, however, has the Court attempted to defend reliance on tradition as a normative method for determining constitutional meaning.

To be sure, deference to existing practices is a defining feature of the common-law tradition. The Court's respect for long-standing practices in constitutional decision-making is thus not surprising. But anyone with a passing knowledge of American constitutional history understands that the mere existence of such practices does not automatically resolve constitutional questions today.

The decision whether to accord past practices normative force turns out to be surprisingly complicated. First, to treat tradition as dispositive, there must actually be an identifiable, widely shared set of practices that constitute a tradition. Those practices must have sufficient breadth and richness to allow the Court to draw analogies to modern practices that arise in quite different contexts. In Establishment Clause jurisprudence, the Court invokes a long history of ephemeral religious statements by public officials to justify permanent declarations of the government's special relationship with the divine.

Second, a set of common historical practices and widely shared commitments alone do not necessarily amount to a tradition in the sense that the Court uses the term. Traditions are created, not found. The modern interpreter does not simply encounter a tradition as a received object. Instead, the interpreter constitutes the tradition by choosing which elements of the past fit the particular narrative to which the interpreter is already committed. The interpreter might well believe that the narrative best captures the past, but we cannot ignore the role of the interpreter in transforming a set of historical events into a coherent narrative.

In addition, the construction of a tradition is complicated by the existence of historical practices that support competing coherent narratives. In such cases, the interpreter must decide how to deal with these conflicting ways of seeing the past. That decision inevitably turns at least in part on the interpreter's prior normative commitments. As a consequence, to determine the normative force that any claimed tradition should enjoy, we must evaluate the principles that animate the rival traditions.

We are committed to the liberal pluralist project. We believe that government promotion of a religious identity inevitably results in oppression of those who do not share the favored faith. Proponents of the religionist narrative

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[404] New York State Rifle & Pistol Ass'n v. Bruen, 142 S.Ct. 2411 (2022).
[405] Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228 (2022).

appear to be committed to a very different understanding of the relationship between religion and civil government. In their view, government should be responsive to the religious beliefs of the majority and facilitate the public promotion of such beliefs.

In the Court's telling, this conception of the relationship between religion and civil government serves the interests of all believers. But it is impossible to ignore that the space opened by the Court's decisions is being rapidly filled by a newly muscular form of Christian nationalism. This movement unabashedly seeks to conform civil law to its conception of divine law, reflected most prominently in the Ten Commandments. For proponents of Christian nationalism, the Free Exercise Clause protects their right to use state power to restore a covenantal relationship between God and America in which God blesses the nation because it honors God and observes God's law. Advocates of this view have contrived legal disputes with the hope and expectation that the religionist majority on the Court will advance their project. The Court has complied.[406]

Christian nationalism's judicial gains have coincided with a significant decline in those who identify as religiously observant Christians. In this sense, their movement is a rearguard action to maintain their historically privileged place in the American political community. In places where they still exercise political power, they have sought to use the power to the state to advance their conception of divine law, in public schools and elsewhere. In places where they are in the minority, they have sought—and increasingly have received—judicial exemptions from legal requirements that they believe contradict divine law.

The Court's choice to elevate free exercise interests over non-establishment concerns has exacerbated this deep clash over religion in American culture. The separationist tradition arose precisely in response to the threat posed by such inter-religious conflicts.[407] To be sure, whereas the conflicts in James Madison's era were between different Christian denominations, conflicts today often are between those who claim religious authority, on the one hand, and a wide diversity of people—some religious and some not—who do not share that same set of convictions, on the other. But the same potential for civil strife inheres in both types of conflicts.

The Court's turn to religionism has facilitated the reemergence of the mythology of a Christian America. Indeed, the religionist narrative itself—with its casual acceptance of "In God We Trust" and other forms of civil deism—significantly overlaps with that myth. This poses a serious threat to our political order. The only remedy is a return to the core separationist idea that religion

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406 *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 142 S.Ct. 2407 (2022); 303 Creative LLC v. Elenis, 143 S.Ct. 2298 (2023).

407 *See* James Madison, Memorial and Remonstrance ¶ 11. *See also Van Orden*, 545 U.S. at (Breyer, J., concurring in the judgment) (asserting that the Religion Clauses "seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike."); *see generally* JURGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE (1991).

and civil government have distinct roles, and civil government is not an instrument for the promotion of one or many faiths.