Maybe Today, Satan: A Christian Supreme Court, Unbalanced Religious Clauses, and the Rise of The Satanic Temple

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Abstract

The debate surrounding reproductive health rights in the United States reached a fever pitch over the summer of 2022 when the United States Supreme Court overruled *Casey* and *Roe* in a devastating, but not unexpected, opinion. Under this new ultra-religious regime, residents in the United States have limited options for pursuing reproductive healthcare, one of which may be attempting to preserve the right to abortion as a religious ritual like The Satanic Temple is arguing. This Note examines the history of Free Exercise Clause and Establishment Clause jurisprudence and demonstrates a now over-powered Free-Exercise Clause with a distinct favor for Christian values. This Note argues that shifting the legal argument surrounding abortion from a substantive due process analysis to an Establishment Clause analysis will help avoid a slippery slope of Christian enmeshment with the United States government and will preserve a more just approach to reproductive healthcare in the country.

* J.D., University of Iowa College of Law, 2023. I would like to thank JGRJ's editors and student writers for their consistent dedication to our mission and my mentor and friend, David Steckler, for his support. Finally, special thanks to my loving partner and to my children, Isabelle, Bianca, and Quinn, who continue to be my source of motivation and inspiration.

I. INTRODUCTION

Since its ratification in 1791, the First Amendment to the United States Constitution established the theoretical principle commonly described as "separation of church and state."[1] This amendment came after some Framers of the Constitution recognized the danger that state-sponsored religion posed to individual liberties as well as the potential for religious divisiveness in an intrinsically pluralistic nation.[2] While this principle has been flaunted in theory and jealously protected in certain Supreme Court decisions,[3] the

[1] Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (explaining the Court must uphold the "high and impregnable" wall of separation between church and state).

[2] *See generally* JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785) *reprinted in* THE PAPERS OF JAMES MADISON, 1784–1786, at 295–306 (William T. Hutchinson & William M.E. Rachal eds., 1971) (outlining Madison's objections to the establishment of religion by government); Lemon v. Kurtzman, 403 U.S. 602, 622–24 (1971) (stating "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."); Zelman v. Simmons-Harris, 536 U.S. 639, 716–17 (2002) (Souter, J., dissenting) (discussing the potential for religious divisiveness after a majority holding that allowed an Ohio state voucher program to be used at private religious schools).

[3] *See* Lynch v. Donnelly, 465 U.S. 668, 688 (O'Connor, J., concurring) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders . . . ."); Derek H. Davis, *Civil Religion as a Judicial Doctrine*, 40 J. CHURCH & STATE 7, 22 (1998) (describing political scientist Gregg Ivers' observation that accommodationist principles do not "alleviate the pain, reduce the isolation, or eliminate the feeling by persons of different religious beliefs or *no religious beliefs* that they are merely tolerated guests in their own country.") (emphasis added); Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (explaining the Court must uphold the "high and impregnable" wall of separation between church and state). *But see* Locke v. Davey, 540 U.S. 712 (2004) (holding that the state did not violate the Establishment Clause when it prohibited post-graduate theology students from receiving state funded scholarships even though they met the eligibility requirements for the program); Church of the Lukuni Babaku Aya, Inc. v. City of

Establishment Clause[4] of the First Amendment in practice has taken a mysteriously quiet backseat in discussions on the legality of abortion rights or restrictions.[5] A careful reading of the Court's prior reluctance to address the religious undertones of the general abortion argument directly indicates "the Court's underlying concern that neither the judiciary nor the legislature may decide the question of fetal humanity because the question is religious in nature and divides people along religious lines."[6] Despite this prior reluctance to directly address the potential First Amendment issues with abortion restrictions, this Note argues that with the more recent politicized judicial appointments of Supreme Court justices, the Court has accepted a broad spectrum of Christian-favoring legal arguments, thus ultimately supporting anti-choice legislation.

This Note will discuss how the judicial accommodationist interpretation of the Establishment Clause routinely caters to fundamental Christian tenets and has distorted the force of the religious clauses[7] in the First Amendment, thus providing strong precedent on which religious organizations such as The

Hialeah, 508 U.S. 520, 521–22 (1993) (9–0 decision) (striking down an ordinance which prohibited religious animal sacrifices because it violated the Free Exercise Clause); Sherbert v. Verner, 374 U.S. 398, 410 (1963) (holding that the state violated the First Amendment when it disqualified an individual from receiving unemployment benefits because her religion did not permit her to work on Saturdays).

[4] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

[5] Instead, courts historically analyzed the legality of abortion as a right to privacy under a substantive due process framework. *See generally* Roe v. Wade, 410 U.S. 113 (1973) (holding that the Due Process Clause of the Fourteenth Amendment protects the right to abortion from state action under the precedentially established right to privacy), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (upholding *Roe* but replacing *Roe's* viability standard with an undue burden test), *overruled by Dobbs*, 142 S. Ct. at 2242. *But see* Harris v. McRae, 448 U.S. 297, 297 (1980) (holding that states excluding their Hyde Amendment federal funds from paying for abortion-related healthcare did not violate the Establishment Clause). While not the focus of this note, attention must be drawn to the more recent *Dobbs* decision that overruled both *Roe* and *Casey* and their substantive due process approaches to abortion as a privacy right. *See Dobbs*, 142 S. Ct. at 2242 ("We hold that *Roe* and *Casey* must be overruled.").

[6] Justin Murray, *Exposing the Underground Establishment Clause in the Supreme Court's Abortion Cases*, 23 REGENT U. L. REV. 1, 1 (2011) (emphasis added). Mr. Murray attempts to argue that there are secular purposes for abortion restrictions which makes the Establishment Clause arguments against abortion restrictions invalid in an attempt to quell the Court's concern quoted above. Mr. Murray, however, fails to acknowledge that the Establishment Clause arguments are not only against certain religious tenets being forced on citizens by the state, but also arguing against the inhibition of the Free Exercise Clause for other religions that may envelope and even encourage abortion access in their religious tenets. *See* Don Byrd, *More Courts are Being Asked to Consider Whether Abortion Restrictions Violate Religious Freedom*, BJC (Aug. 10, 2022), https://bjconline.org/courts-asked-to-consider-whether-abortion-restrictions-violate-religious-freedom-081022 [https://perma.cc/YN4V-G87M].

[7] U.S. CONST. amend. I ("Congress shall make no law respecting an *establishment of religion*, or prohibiting the *free exercise thereof* . . . .") (emphasis added).

Satanic Temple[8] can rely to protect a pregnant person's right to an abortion. This Note recognizes Christian institutions as the most prevalent in the United States that consistently attempt to legislate their anti-choice religious tenets, although there may be other less represented religions and even non-religious individuals who hold similar values. This Note will discuss how the Christian influence over judicial rulings has contributed to the enmeshment of religious and political affiliation, resulting in the conflation of Christianity, civil religion[9] and dominionism,[10] arguably in conflict with the normative purpose of the First Amendment.[11] This Note will further explain the consequences of this enmeshment, hypothesizing that not only will non-religious people feel forced to submit allegiance to a religious organization, like The Satanic Temple, to exercise basic reproductive rights.[12] but also the very tenets Christians meant to memorialize in legislation and Supreme Court precedent through their aggressive political subjugation of the Establishment Clause will become corrupted and distorted.[13]

This Note will argue that the United States should return to a more judicial separationist interpretation of the Establishment Clause, paired with

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[8] *See generally* The Satanic Temple, https://thesatanictemple.com/pages/about-us [https://perma.cc/9RXV-AH8H] ("The Mission Of The Satanic Temple Is To Encourage Benevolence And Empathy, Reject Tyrannical Authority, Advocate Practical Common Sense, Oppose Injustice, And Undertake Noble Pursuits."). *See also infra* § II(D).

[9] Davis, *supra* note 3, at 11–12 (discussing the origin and definition of civil religion); *see also* Andrew R. Lewis, *Abortion Politics and the Decline of the Separation of Church and State: The Southern Baptist Case*, 7 POL. & RELIGION 521 (2014) (a case study establishing a connection between abortion politics and the dramatic shift from pro-choice to anti-choice within evangelical organizations).

[10] Dominionism is generally defined as "the theocratic idea that regardless of theological camp, means, or timetable, God has called conservative Christians to exercise dominion over society by taking control of political and cultural institutions." Frederick Clarkson, *Dominionism Rising: A Theocratic Movement Hiding in Plain Sight*, POL. RSCH. ASSOCS. (Aug. 18, 2016), https://politicalresearch.org/2016/08/18/dominionism-rising-a-theocratic-movement-hiding-in-plain-sight [https://perma.cc/QJA6-UWLH]. For further treatment of dominionism, see *infra* note 138.

[11] "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed." 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 1789-1791: LEGISLATIVE HISTORIES, AMENDMENTS TO THE CONSTITUTION THROUGH FOREIGN OFFICERS BILL 10 (Charlene Bangs Bickford & Helen E. Veit eds., 1986) [hereinafter DOCUMENTARY HISTORY].

[12] Nicole Goodkind, *Why Satanists May be the Last Hope to Take Down Texas's Abortion Bill*, FORTUNE (Sept. 3, 2021, 5:29 PM), https://fortune.com/2021/09/03/why-satanists-may-be-the-last-hope-to-take-down-texass-abortion-bill [https://perma.cc/9GL2-64E4] ("The temple is attempting to use its status as a religious organization to claim its right to abortion as a faith-based right.").

[13] *See, e.g.*, Frank S. Ravitch, *Be Careful What You Wish for: Why* Hobby Lobby *Weakens Religious Freedom*, BYU L. REV. 55 (2016); Peter Danchin, Hosanna-Tabor *in the Religious Freedom Panopticon*, THE IMMANENT FRAME (Mar. 6, 2012), https://tif.ssrc.org/2012/03/06/hosanna-tabor-in-the-religious-freedom-panopticon [https://perma.cc/Y4VJ-UC7D]. *See also infra* § III.

strong secular respect,[14] which will create space for religious groups to operate without imposition by the legislature and courts while also removing restrictive laws that only cater to certain groups' religious moral values.

II. BACKGROUND

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion . . . ."[15] There have historically been two leading approaches to interpreting the Establishment Clause: separationism and accommodationism.[16] Each approach has variations and subcategories.[17] Truly, "[w]ithout getting into any sort of metaphysical battle, one may assert that there can be degrees of separation (and accommodation)."[18] Both interpretations, however, share basic similarities with their subcategories that support a bilateral analysis, particularly in regards to the Establishment Clause.[19] In contrast with the Free Exercise Clause,[20] where there is more agreement between the two

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[14] For a definition of secular respect, see Jonathan E. Nuechterlein, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 YALE L. REV. 1127, 1134–36 (1990) ("Yet any given accommodation of religion may not have a religious purpose. If someone invites ten people over to dinner and two of them are Hindu, he will probably go out of his way to stock his refrigerator with something besides hamburgers and hot dogs. Yet he does this regardless of, not because of, his own religious beliefs. He does it not because he thinks that his Hindu friends' religious beliefs are true, but simply because accommodating their religious scruples is a respectful thing to do. Label this attitude 'secular respect.'"). Note, however, that Nuecheterlein's moderate approach to secular respect came at a time before such extreme religious accommodation became wholly apparent (or fully accepted) in the United States. For example, Nuechterlein states "[t]he Federal Government . . . exempts the Native American Church from generally applicable laws forbidding peyote use." *Id.* at 1136. Hardly a month after his publication, the United States Supreme Court upheld a state law constructively banning such religious peyote use. *See* Emp. Div. v. Smith, 494 U.S. 872, 872 (1990) (allowing states to deny unemployment benefits to Native Americans fired for practicing their religious peyote consumption).

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

[16] FRANK S. RAVITCH, MASTERS OF ILLUSION: THE SUPREME COURT AND THE RELIGION CLAUSES 72, 87 (2007).

[17] Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489, 533 (2004) ("Writing about principles such as separationism and accommodationism is hard to do without either spending hundreds of pages reinventing the wheel or oversimplifying the concepts.").

[18] RAVITCH, *supra* note 16, at 72.

[19] Some scholars argue for a division of Establishment Clause schools of thought between strict separation, neutrality, and accommodation. *See, e.g.*, Erwin Chemerinsky, *Why Church and State Should be Separate*, 49 WM. & MARY L. REV. 2193, 2196–98 (2008). Still others argue that neutrality is a nonexistent legal fiction. *See, e.g.*, Ravitch, *supra* note 17, at 573. For the sake of this argument, this Note will not delve into the intricacies of neutrality because the present author believes that neutrality is a phenomenon indicative of the theoretical struggles in justifying the movement from separation to accommodation, and not a school of thought unto itself.

[20] U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .").

sides,[21] most modern arguments between accommodationists and separationists are focused on the less clear meaning of the Establishment Clause.[22]

A. Separationism and the Establishment Clause

Separationists broadly claim "the Establishment Clause bars the federal government from legislating religion . . . ."[23] They call for a separation between religious organizations and civil authority, be it through legislation or court rulings, reasoning that minimizing government's interaction with religion in a pluralistic nation is the ideal way to foster religious diversity while minimizing religious clashes.[24] Separationists generally believe that the government should pursue only secular ends utilizing only secular means.[25] Separationism, however, is not only a mechanism meant to act on the government. Rather, it functions to separate "the coercive power of government from all questions of religion, so that *no religion* can invoke government's coercive power and *no government* can coerce any religious act or belief."[26]

B. Accommodationism and the Establishment Clause

Accommodationists broadly claim "the Establishment Clause bars only the *preferential* treatment of religious groups."[27] They generally support equal access to public and limited public forums and government-funded programs pair with broad free exercise rights.[28] They believe that government should not be able to dictate what religion one follows, but that it also should not inhibit one's ability to participate in public or political life based on religion.[29] Even in the face of compelling Establishment Clause concerns,

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[21] RAVITCH, *supra* note 16, at 88.

[22] Davis, *supra* note 3, at 8 ("[T]he debate tends to revolve around the Establishment Clause because the key issues focus upon *the degree* of permissible government sponsorship, promotion, advancement, or support of religious activities, and it is accepted by all that the term "establishment" as contained in the Establishment Clause bears most directly upon these issues.") (emphasis added).

[23] Thomas Nathan Peters, *Religion, Establishment, and the Northwest Ordinance: A Closer Look at an Accommodationist Argument*, 89 KY. L. J. 743, 743 & n.1 (2000).

[24] *See* Davis, *supra* note 3, at 8; Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 46 (1997) ("This separation is essential to the religious liberty of the numerically dominant faith, if any, and to the religious liberty of dissenters and nonbelievers.").

[25] LEO PFEFFER, CHURCH, STATE, AND FREEDOM 200 (1967).

[26] Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 319 (1996) (emphasis added).

[27] Peters, s*upra* note 23, at 743, 743–44 n.2 (emphasis added).

[28] RAVITCH, *supra* note 16, at 96. Note that courts primarily analyze forum equal access cases under free speech doctrines rather than religious clause doctrines.

[29] *Id.* at 87.

accommodationists tend to err on the side of supporting religious values over other civil rights.[30]

C. Historical Interplay of Separation and Accommodation

Separationists rely heavily on an originalist theory to support their interpretation of the Establishment Clause[31] but tend to ignore the originalist arguments that also support an accommodationist approach.[32] The same is true in the inverse. While history demonstrates the circulation of both ideas at the time of the United States founding, an overview of Establishment Clause jurisprudence demonstrates an arching shift from separation-leaning to accommodation-leaning doctrine.

1. Founding Fathers' Intentions – An Inconclusive Review

James Madison and Thomas Jefferson were the two main proponents for an Establishment Clause to amend the original United States Constitution, understanding the dangers that the creation of a civil religion posed to a theoretically free and pluralistic society.[33] There are themes in both of their respective writings that tend to support a strict separation interpretation of the Establishment Clause. Jefferson famously stated that "[the American people's] legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus *building a wall of separation between church and State*."[34] Madison, equally eloquent and forceful, stated that ecclesiastical establishments "erect a spiritual tyranny on the ruins of Civil authority; in many instances they have been seen upholding the thrones of political tyranny; in *no instance* have they been seen the

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[30] *See generally* Good News Club v. Milford Ctr. Sch., 533 U.S. 98 (2001) (holding that the Establishment Clause did not justify violating the Free Speech rights of a religious after-school program when the public school refused to allow its use of the "limited public forum" premises for religious instruction); Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (holding that the Ku Klux Klan could erect a cross on the "public forum" city square since Free Speech concerns outweigh the Establishment Clause concerns). *See also* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (explaining that the religious clauses of the First Amendment have been "zealously protected, sometimes even at the expense of other interests of admittedly high social importance.").

[31] For more treatment of the modern separationist fallacy of relying wholly on an originalist argument for justifying their stance, see RAVITCH, *supra* note 16, at 72–84. *See also* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980) (discussing the limitations of attempting to uncover Founders' intentions with general Constitutional interpretation issues).

[32] RAVITCH, *supra* note 16, at 74.

[33] *See generally* John Morton Cummings, Jr., *The State, The Stork, and the Wall: The Establishment Clause and Statutory Abortion Regulation*, 39 CATH. U. L. REV. 1191, 1194–95 (1990) (discussing Madison and Jefferson's approaches to church and state separation issues).

[34] Reynolds v. United States, 98 U.S. 145, 164 (1878) (emphasis added).

guardians of the liberties of the people."[35] In fact, the first version of the religious clauses, drafted and presented to the House of Representatives in 1789 by Madison himself,[36] contained stronger and less ambiguous language than our current religious clauses: "[T]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed."[37]

The Founders' strong beliefs about separation of church and state, however, did not come from a place of animosity towards religion. Rather, they saw the separation as much a protective measure for religious liberties as a way to keep religious influence out of government actions.[38] Many delegates at the political conventions after the American Revolution "feared that commingling government with religion would cause corruption amongst churches and religious organizations, [while] others feared that religion would undermine effective government leadership."[39] They had observed and experienced the impacts of the Church of England's influence on English law, including the discriminatory effects on minority religious groups.[40] Understanding that the United States would be an "asylum to the persecuted and oppressed of every Nation and Religion,"[41] both Jefferson and Madison believed that less civil interaction with religion would support religious diversity and limit religious divisiveness. Madison in particular observed that:

> [I]t will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous

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[35] Walz v. Tax Comm'n., 397 U.S. 664, 724 (1790) (Douglas, J., dissenting, Appendix II) (quoting 2 THE WRITINGS OF JAMES MADISON 183–191 (Gaillard Hunt ed., 1901)) (emphasis added).

[36] Peters, *supra* note 23, at 775.

[37] *Id.* (citing DOCUMENTARY HISTORY, *supra* note 11, at 10).

[38] RAVITCH, *supra* note 16, at 81–82.

[39] Michael J. Borger, *The Wholesale Exclusion of Religion from Public Benefits Programs: Why the First Amendment Religion Clauses Must Take a Backseat to Equal Protection*, 33 TOURO L. REV. 633, 641 (2017).

[40] *See generally* Andrew Lynch, *The Constitutional Significance of the Church of England*, *in* LAW AND RELIGION: GOD, THE STATE AND THE COMMON LAW 168 (Peter Radan et al. eds., 2005) (describing the development of civil religion in England through which the Church of England maintained control over almost all aspects of the citizenry's lives).

[41] Walz v. Tax Comm'n, 397 U.S. 664, 724 (1970) (Douglas, J., dissenting, Appendix II) (quoting 2 THE WRITINGS OF JAMES MADISON 183–191 (Gaillard Hunt ed., 1901)).

> policy, wherever it has been tried, has been found to assuage the disease.[42]

However, Jefferson and Madison were but two of many involved in framing and ratifying the Constitution and the Bill of Rights and we cannot make "assumptions about the framers as though they were a unified group with unified motives."[43]

What we now consider an accommodationist approach to church and state issues began with groups known as evangelical dissenters operating in the United States in the late eighteenth century.[44] The evangelical dissenters generally fought against any establishment of a national religion although, as is so often true, there were many subcategories that made similar demands but often with differing motivations.[45] Although a nuanced difference, the evangelical dissenters' antiestablishment demands put restraints only on the government's interaction with religious groups in contrast to strict separationists who supported placing restrictions on both civil and religious institutions' interactions with each other.[46]

Even more telling, or more confusing as the case may be, is a full analysis of the words and actions of Jefferson and Madison. In 1785, Jefferson drafted, and Madison subsequently introduced in the Virginia Assembly, a bill that punished "sabbath breaking" with a fine for each offense.[47] Jefferson and Madison also worked together on various bills that called for government-appointed days of public fasting and thanksgiving.[48] Further, many state constitutional conventions at the time echoed a non-preferential approach to religious liberty,[49] supporting the accommodationist idea that during the time of the founding, the general consensus surrounding religious liberties was less strict separation and more accommodation. Taken with the overtly religious and oft-cited Thanksgiving Proclamation of George

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[42] *Id.* at 725.

[43] RAVITCH, *supra* note 16, at 6.

[44] PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 94–95 (2004).

[45] *See generally id.* at 89–107 (discussing the diverse history and development of evangelical dissenters).

[46] *Id.* at 94–95.

[47] Robert L. Cord, *Church-State Separation: Restoring the "No Preference" Doctrine of the First Amendment*, 9 HARV. J.L. & PUB. POL'Y 129, 135 (1986); *see also* A Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers, 18 June 1779, *in* 2 THE PAPERS OF THOMAS JEFFERSON, 1777–1779, at 555 (Julian P. Boyd et al. eds., 1950) ("[I]f any person on Sunday shall himself be found labouring at his own or any other trade or calling, or shall employ his apprentices, servants or slaves in labour, or other business, except it be in the ordinary household offices of daily necessity, or other work of necessity or charity, he shall forfeit the sum of ten shillings for every such offence . . . .").

[48] Cord, *supra* note 47, at 135*; see also* THE PAPERS OF THOMAS JEFFERSON, *supra* note 47, at 556.

[49] Cord, *supra* note 47, at 136–39.

Washington,[50] the First Congress' implementation of a legislative prayer, and the early appointment of congressional chaplains,[51] it becomes clear that the originalist argument can corroborate both sides of this interpretation-heavy argument.[52] Ultimately, the originalist theory behind accommodation or separation devolves into a barrage of "competing quotations that each side cites to support its position."[53]

2. Early Separationist Establishment Clause Jurisprudence

Settled not so neatly on this historical foundation is the landmark and controversial case, *Everson v. Board of Education*, which marks the beginning of modern Establishment Clause jurisprudence.[54] In *Everson*, the Supreme Court held constitutional a New Jersey statute that allowed cities to apply tax funds to bus fare reimbursements even for parents whose children attend parochial schools.[55] However, this ruling is surprisingly padded in separationist-themed language. Justice Black, for the majority, nodded back at Jefferson by ending his opinion with "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here."[56] *Everson* presents the fascinating juxtaposition of strong separationist rhetoric paired with an accommodationist holding under the guise of a neutral approach to the Establishment Clause.[57] Justice Jackson, in his dissent, observes this phenomenon by stating that the majority "fail[ed] to apply the principles it avows . . . ."[58] Justice Rutledge, joined by Justices Frankfurter, Jackson, and

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[50] *See* George Washington, Thanksgiving Proclamation of 1789 (Oct. 3, 1789), *reprinted in* GEORGE WASHINGTON'S MOUNT VERNON, https://www.mountvernon.org/education/primary-source-collections/primary-sources-2/article/thanksgiving-proclamation-of-1789/ [https://perma.cc/XK5E-H24D].

[51] McCreary Cnty. v. ACLU, 545 U.S. 844, 895–96 (2005) (Scalia, J., dissenting).

[52] Kenneth Lasson, *Free Exercise in the Free State: Maryland's Role in the Development of First Amendment Jurisprudence*, 18 U. BALT. L. REV. 81, 85 (1988) ("Good historical arguments can be mounted to support *either* view — that the Founding Fathers favored strict separation or that they favored [accommodationist] non-preferential encouragement. There were eloquent spokesmen for each position, and the language ultimately adopted in the First Amendment allows for both interpretations.").

[53] Chemerinsky, *supra* note 19, at 2196.

[54] Everson v. Bd. of Educ., 330 U.S. 1, 14–16 (1947). Two prior cases deserve mentioning but are not generally considered as integral or as doctrinally important as *Everson*. *See* Bradfield v. Roberts, 175 U.S. 291, 291 (1899) (holding government funding for secular organizations constitutional even if they are run by religious members); Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370, 370 (1930) (holding laws allowing tax-funded free books for school children constitutional, including children attending private, sectarian, religious, and non-public schools).

[55] *Everson*, 330 U.S. at 17–18.

[56] *Id.* at 18.

[57] *Id.* at 1; RAVITCH, *supra* note 16, at 72–73.

[58] *Everson*, 330 U.S. at 25–29 (Jackson, J., dissenting).

Burton, penned a separate dissent that followed a strong originalist justification for strict separation noting that "[they] cannot believe . . . the great author of those words [of the First Amendment], or the men who made them law, could have joined in this decision."[59]

Following closely after *Everson* came *McCollum v. Board of Education*, where the dissenting justices in *Everson* wrote for the majority following an originalist approach and reaffirming their support of strict separation.[60] In *McCollum*, the Supreme Court held unconstitutional the Illinois State Board of Education's practice of allowing religious groups to teach religious courses in public schools.[61] Writing in dissent, Justice Reed outlined another historical analysis, not wholly unlike Justice Rutledge's dissent in *Everson*, but came to the conclusion that history supports an accommodationist approach to the Establishment Clause rather than separationist.[62] This lack of consensus in these Supreme Court cases on whether an originalist approach would support a separationist or accommodationist interpretation of the religious clauses is consistent with the assertion above in Section II(C)(1) that there is not a conclusive approach here based solely on originalism.

Engel v. Vitale was one of the final cases to adhere to a purely separationist interpretation of the Establishment Clause.[63] This case was temporally intermingled with cases following more of an accommodationist approach, signaling the beginning of the Supreme Court's general shift from separation to accommodation.[64] The Court in *Engel* held unconstitutional a practice of allowing prayer in public school even though non-religious students were excused from participating in the prayer.[65] Justice Black, also the author of the *Everson* opinion, wrote for the majority and again echoed his originalist approach to Establishment Clause interpretation:

> [The Founding Fathers] knew . . . that [the First Amendment] was written to quiet well-justified fears which nearly all of them felt [arose] out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that

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[59] *Id.* at 28–63 (Rutledge, J., dissenting).

[60] Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 231 (1948) ("Separation means separation, not something less.").

[61] *Id.* at 212–13.

[62] *Id.* at 238 (Reed, J., dissenting).

[63] *See* Engel v. Vitale, 370 U.S. 421, 435 (1962) (holding "that each separate government in this country should stay out of the business of writing or sanctioning official prayers . . . .").

[64] JOHN M. SWOMLEY, RELIGIOUS LIBERTY AND THE SECULAR STATE: THE CONSTITUTIONAL CONTEXT 78 (1987).

[65] *Engel*, 370 U.S. at 424–25.

> government wanted them to speak and to pray only to the God that government wanted them to pray to.[66]

Justice Douglas, in his concurrence, took a much narrower approach, noting that the recitation of a short prayer did not rise to the level of proselytizing that was found unconstitutional in *McCollum*.[67] Rather the issue in his mind was "whether New York oversteps the bounds when it finances a religious exercise."[68] Justice Douglas also admitted his conclusion that tax funds should not be used to finance religious practices is in conflict with the holding in *Everson*, but he reasoned that *Everson* is out of line with how the Establishment Clause should be applied.[69] Although he concurred with the majority holding, Justice Douglas' conclusion foreshadowed the coming tumultuous decades of religious clause jurisprudence.

3. Shift to Accommodationist Establishment Clause Jurisprudence

Almost immediately after strict separation took hold of the Supreme Court, accommodationist interpretation began creeping into majority opinions.[70] In *Zorach v. Clauson*, the Court held constitutional the practice of releasing students from public schools to attend an hour-long religious class at a separate location.[71] Justice Douglas softened his prior strict separation rhetoric in the majority opinion, and distinguished *Zorach* from *McCollum*, ultimately holding that the state can "cooperate[] with religious authorities by adjusting the schedule of public events to sectarian needs . . . ."[72] Justice Douglas explained that state cooperation with religious leaders "follows the best of our traditions . . . [f]or it then respects the religious nature of our people and *accommodates* the public service to their spiritual needs."[73] *Zorach* demonstrates an interesting shift from an originalist reasoning to a history and tradition reasoning, arguably because the Court realized how weak the originalist argument was compared with a history and tradition line of inquiry that allowed Justices to still craft their accommodationist outcomes.[74]

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[66] *Id.* at 435.

[67] *Id.* at 439 (Douglas, J., concurring).

[68] *Id.*

[69] *Id.* at 443.

[70] *See, e.g.*, Zorach v. Clauson, 343 U.S. 306 (1952); McGowan v. Maryland, 366 U.S. 420 (1961); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963).

[71] *Zorach*, 343 U.S. at 315.

[72] *Id.* at 314.

[73] *Id.* (emphasis added).

[74] Edward A. Fallone, *On Originalism and the First Amendment*, MARQ. U. L. SCH. FAC. BLOG (Dec. 18, 2018), https://law.marquette.edu/facultyblog/2018/12/on-originalism-and-the-first-amendment [https://perma.cc/5J8J-D3R4] ("[T]he manner in which the U.S. Supreme Court has interpreted the First Amendment demonstrates what happens when the interpretive

In a stunning blow to non-religious individuals and minority religious groups for whom Sunday is not a "day of rest", the Court in *McGowan v. Maryland* held that criminal statutes known as Sunday Closing Laws[75] did not violate the Establishment Clause.[76] Justice Warren applied a rational basis standard of review, reasoning for the majority that despite the Christian history behind Sunday as a day of rest, the state could have secular interests in stopping labor and commerce on that day including allowing "people [to] recover from the labors of the week just passed and [to] physically and mentally prepare for the week's work to come."[77] This deferential standard of review set the groundwork for the next few decades of Establishment Clause jurisprudence and is echoed in the current doctrinal test applied to Establishment Clause cases.[78]

a. Establishment Clause test development

In *School District of Abington Township v. Schempp*, a Pennsylvania school district sought to enjoin enforcement of a Pennsylvania law that required public school students to read from the Christian bible at the beginning of each school day.[79] The Supreme Court found, in a rare instance of practical clarity, that these in-school devotional exercises were coercive and violated the Establishment Clause even with the parental ability to opt children out of such devotions.[80] Despite this opinion supporting a separationist approach in this particular case, the Court formulated a test that departed from *Everson* dicta[81] so dramatically that it helped the Supreme Court shape, support, and advance accommodationist holdings in later decisions.[82] The *Schempp* test stated "that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[83] The Court used this accommodationist

theory of originalism is applied in a way designed to achieve *preferred cultural objectives*.") (emphasis added).

[75] The statute generally prohibited "the Sunday sale of all merchandise except the retail sale of tobacco products, confectioneries, milk, bread, fruits, gasoline, oils, greases, drugs and medicines, and newspapers and periodicals." McGowan v. Maryland, 366 U.S. 420, 422–23 (1961). *But see* Lasson, *supra* note 52, at 99–100 (explaining that the Maryland legislature eventually repealed these Sunday Closing laws in most counties and in the counties in which they remained, exceptions were added that "allow[] individuals who observe the Sabbath from sundown Friday to sundown Saturday [like observant Jews and Seventh Day Adventists], and who actually refrain from secular business and labor during that period, to work on Sunday").

[76] *McGowan*, 366 U.S. at 452–53.

[77] *Id.* at 434.

[78] *See infra* § II(C)(3)(a) (discussing the development of the *Lemon* test).

[79] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 205 (1963).

[80] *Id.* at 224–25.

[81] SWOMLEY, *supra* note 64, at 79.

[82] *Id.*

[83] *Schempp*, 374 U.S. at 222.

Schempp test five years later in *Board of Education v. Allen* to validate a law that provided secular textbooks to parochial schools with the Court reasoning that the state had a secular interest in supporting the literacy and education of all its inhabitants.[84]

Building on the *Schempp* test, the Court in *Walz v. Tax Commission of New York* and *Lemon v. Kurtzman* respectively added and confirmed another factor that supported the accommodationist effect of the *Schempp* test: to be constitutional, a "statute must not foster 'an excessive government entanglement with religion.'"[85] Applied in *Tilton v. Richardson*,[86] this test opened the door to deeper accommodationist justifications by holding tax-funded construction grants to colleges constitutional, some of which were church-related institutions.[87] Justice Burger, writing for the majority, echoed *Everson*'s guise of neutrality but found that "nonideological" grants do not constitute "excessive government entanglement."[88] Justice Douglas, in his partial dissent, returned in part to an originalist argument, exclaiming that the Court departed radically from Madison's intentions.[89] He paired his originalism with the pragmatic observation that "[t]he mounting wealth of the churches makes ironic their incessant demands on the public treasury."[90]

Finally, the Court, building on the cases discussed above, clearly outlined a three-part Establishment Clause test dubbed the *Lemon* test in *County of Allegheny v. ACLU*:

> Under the *Lemon* analysis, a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion.[91]

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[84] Bd. of Educ. v. Allen, 392 U.S. 236, 245–47 (1968).

[85] Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

[86] Decided on the same day as *Lemon.*

[87] Tilton v. Richardson, 403 U.S. 672, 672–73 (1971).

[88] *Id.* at 678, 687.

[89] *Id.* at 696 (Douglas, J., concurring in part and dissenting in part).

[90] *Id.*

[91] Cnty. of Allegheny v. ACLU, 492 U.S. 573, 592 (1989). The ACLU challenged two public-sponsored holiday displays: a Christian nativity scene inside the Allegheny County Courthouse and a large Chanukah menorah outside the City-County building. *Id.* The Court found the nativity scene unconstitutional while it found the menorah constitutional based on their respective locations. *Id.* For an interesting perspective on why such a distinction was made, see Kent Greenawalt, *Establishment Clause Limits on Free Exercise Accommodations*, 110 W. VA. L. REV. 343, 357 (2007) ("In drawing the line between permitted accommodation and forbidden

While "[t]he strength of the *Lemon* test is its flexibility and potential for considering real-world effects,"[92] that has also been viewed by many as its weakness, leaving the *Lemon* test and general Establishment Clause doctrine open to strong criticism from scholars and justices alike.[93] Justice White acquiesced that the Court "sacrifices clarity and predictability for flexibility" through the *Lemon* test,[94] which would not entirely be a fault except that the Supreme Court chooses not to always apply the *Lemon* test, turning the test into one of convenience rather than one of stare decisis.[95] One scholar took a scathing perspective, concluding that the Court uses flexibility as a pretense for "the absence of any principled rationale for its product."[96] Still others grapple for ways to make the *Lemon* test a workable one, with one scholar finishing his argument with the maxim, religious irony aside, "Better to live with the devil we do know, than the devil we don't."[97]

4. Modern Accommodationist Jurisprudence

Despite having an affirmative test for Establishment Clause issues, the Court has continued to struggle with consistent application, handing down plurality and 5–4 decisions with strongly worded dissents, even refusing to apply the *Lemon* test at times. In *Marsh v. Chambers*, Justice Burger blatantly ignored the *Lemon* test reasonably relied on by the Eighth Circuit Court of Appeals when determining whether legislative prayer violated the Establishment Clause.[98] In reversing the Court of Appeals' holding, Justice Burger, for the majority, repeated and built on the history and tradition reasoning found in *Zorach* by explaining that "Nebraska's practice of over a

establishment, courts must engage a number of inquiries. Sometimes their analysis can be categorical, whether a law is of one kind or another, *but often they must assess subtle nuances and matters of degree* to determine whether the border between the constitutional and the unconstitutional has been crossed.") (emphasis added). For an illuminating summary of government aid to parochial school cases that further demonstrate the ludicrous nature of some of this judicial line-drawing, see Jesse H. Choper, *The Religious Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 680–81 (1980).

92 RAVITCH, *supra* note 16, at 177.

93 For an in-depth treatment of this criticism, see *id.* at 168–80. *See also* Daniel O. Conkle, *The Establishment Clause and Religious Expression in Government Settings: Four Variables in Search of a Standard*, 110 W. VA. L. REV. 315, 315 (2007) ("Establishment Clause doctrine is a muddled mess [and] . . . [t]he Lemon [test] . . . hang[s] by a thread.").

94 Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980).

95 *See infra* § II(C)(4). This is also an important distinction when discussing the issue of judicial hypocrisy and legitimacy. *See, e.g.*, Todd E. Pettys, *Judging Hypocrisy*, 70 EMORY L. J. 251, 306 (2020); *see also* Alex Badas, *Policy Disagreement and Judicial Legitimacy: Evidence from the 1937 Court-Packing Plan*, 48 J. LEGAL STUD. 377, 378 (2019) ("An emerging body of literature argues that ideological or policy disagreement does influence legitimacy judgments.").

96 Choper, *supra* note 91, at 681.

97 Carl H. Esbeck, *The* Lemon *Test: Should It Be Retained, Reformulated or Rejected?*, 4 NOTRE DAME J. L., ETHICS & PUB. POL'Y, 513, 548 (1990).

98 Marsh v. Chambers, 463 U.S. 783, 785 (1983).

century, consistent with two centuries of national practice, [cannot] be cast aside."[99]

In *Lynch v. Donnelly*, Justice Burger again applied his soft accommodationist approach to the Establishment Clause but this time included a narrowed application of the *Lemon* test more closely aligned with the previous *Schempp* test.[100] In determining whether a nativity scene on city public land violated the Constitution, Justice Burger explained that "we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area."[101] He then proceeded to apply a rational basis standard of review and harkened back to the *Schempp* test and its focus on other civil purposes.[102] The Court ultimately held that the city had other, secular purposes for the Christmas display and thus, it did not violate the Establishment Clause.[103] Justice Brennan, however, explained in his dissent that the majority's narrowed application of the *Lemon* test left open the true constitutional question regarding purely religious symbols on public property.[104] Justice Brennan went on to express concern that "the Court's less-than-vigorous application of the *Lemon* test suggests that its commitment to those standards may only be superficial."[105]

In *Capitol Square Review & Advisory Board v. Pinette*, the Court, led by Justice Scalia, followed an accommodationist approach allowing religious displays unaccompanied by disclaimers on public property that has been designated as a public forum, in this case, a cross raised by the Ku Klux Klan.[106] The Court supported its conclusion by distinguishing the facts from *Allegheny* and *Lynch* and explaining that the government must be neutral towards private religious expression.[107] Justice Stevens dissented, relying on, among other principles, an originalist and historical approach to the Establishment Clause:

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[99] *Id.* at 790.

[100] Lynch v. Donnelly, 465 U.S. 668 (1984); *see also* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963) (language of the *Schempp* test).

[101] *Lynch*, 465 U.S. at 679.

[102] *Id.* at 680 ("The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations." (citing *Schempp*, 374 U.S. at 223–24)).

[103] *Id.* at 685.

[104] *See id.* at 695 (Brennan, J., dissenting) ("Nothing in the history of such practices [of displaying religious symbols] or the setting in which the city's crèche is presented obscures or diminishes the plain fact that Pawtucket's action amounts to an impermissible governmental endorsement of a particular faith.").

[105] *Id.* at 696.

[106] Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 757, 769 (1995).

[107] *Id.* at 764 ("[A]s a matter of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion.").

> The wrestling over the Klan cross in Capitol Square is far removed from the persecution that motivated William Penn to set sail for America, and the issue resolved in *Everson* is quite different from the controversy over symbols that gave rise to this litigation. Nevertheless, the views expressed by both the majority and the dissenters in that landmark case counsel caution before approving the order of a federal judge commanding a State to authorize the placement of free-standing religious symbols in front of the seat of its government. *The Court's decision today is unprecedented.* It entangles two sovereigns in the propagation of religion, and it disserves the principle of tolerance that underlies the prohibition against state action "respecting an establishment of religion."[108]

In *Good News Club v. Milford Center School*, the Court again leaned accommodationist by allowing a religious after-school club to operate on public school grounds.[109] Justice Thomas for the majority weighed the importance of the club's free speech rights against the possible Establishment Clause concerns, and the Court ultimately held that the Establishment Clause concerns did not justify the potential violation of free speech.[110] Justice Stevens rejected the majority's conclusion, noting three categories of religious speech,[111] the third of which included "proselytizing or inculcating belief in a particular religious faith."[112] He analogized that "[d]istinguishing speech from a religious viewpoint . . . from religious proselytizing . . . is comparable to distinguishing meetings to discuss political issues from meetings whose principal purpose is to recruit new members to join a political organization."[113] Ultimately, Justice Stevens concluded that the "religious proselytizing" led by the club should not be allowed in the limited public forum of public schools.[114] Justice Souter, joined by Justice Ginsburg, strongly dissented, explaining that "[i]t is beyond question that Good News intends to use the public school premises not for the mere discussion of a subject from a particular, Christian point of view, but for an evangelical

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[108] *Id.* at 815 (Stevens, J., dissenting) (emphasis added).

[109] *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 119–20 (2001).

[110] *Id.* at 112, 119.

[111] *Id.* at 130 (Stevens, J., dissenting) ("First, there is religious speech that is simply speech about a particular topic from a religious point of view. . . . Second, there is religious speech that amounts to worship, or its equivalent. . . . Third, there is an intermediate category that is aimed principally at proselytizing or inculcating belief in a particular religious faith.").

[112] *Id.*

[113] *Id.* at 131

[114] *Id.* at 133–34.

service of worship calling children to commit themselves in an act of Christian conversion."[115]

A year later, in *Zelman v. Simmons-Harris*, the Court in a 5–4 decision followed an accommodationist approach cloaked in neutrality, ultimately holding that a tax-funded scholarship program did not violate the Establishment Clause even though it allowed children to attend private schools in Ohio, some of which were religious.[116] Justice Stevens balked at the majority's holding, asking, "[i]s a law that authorizes the use of public funds to pay for the indoctrination of thousands of grammar school children in particular religious faiths a 'law respecting an establishment of religion' within the meaning of the First Amendment?"[117] Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, declared:

> How can a Court consistently leave *Everson* on the books and approve the Ohio vouchers? The answer is that it cannot. It is only by ignoring *Everson* that the majority can claim to rest on traditional law in its invocation of neutral aid provisions and private choice to sanction the Ohio law. It is, moreover, only by ignoring the meaning of neutrality and private choice themselves that the majority can even pretend to rest today's decision on those criteria.[118]

Next, in a series of cases, the Court accommodated placement of Christian religious symbols on public property.[119] In *Van Orden v. Perry*, the

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[115] Good News Club v. Milford Cent. Sch., 533 U.S. 98, 137–38 (2001) (Souter, J., dissenting) ("Good News's classes open and close with prayer. In a sample lesson considered by the District Court, children are instructed that '[t]he Bible tells us how we can have our sins forgiven by receiving the [l]ord Jesus Christ. It tells us how to live to please [h]im . . . . If you have received the [l]ord Jesus as your [s]aviour from sin, you belong to [g]od's special group—[h]is family.' The lesson plan instructs the teacher to 'lead a child to Christ,' and, when reading a Bible verse, to 'emphasize that this verse is from the Bible, [g]od's [w]ord,' and is 'important—and true— because [g]od said it.' The lesson further exhorts the teacher to '[b]e sure to give an opportunity for the 'unsaved' children in your class to respond to the [g]ospel' and cautions against 'neglecting this responsibility.' While Good News's program utilizes songs and games, the heart of the meeting is the 'challenge' and 'invitation,' which are repeated at various times throughout the lesson. . . . '[T]he teacher 'invites' the 'unsaved' children 'to trust the [l]ord Jesus to be your [s]avior from sin,' and 'receive [him] as your [s]avior from sin.' The children are then instructed that 'if you believe what [g]od's [w]ord says about your sin and how Jesus died and rose again for you, you can have [h]is forever life today. Please bow your heads and close your eyes. If you have never believed on the [l]ord Jesus as your [s]avior and would like to do that, please show me by raising your hand. If you raised your hand to show me you want to believe on the [l]ord Jesus, please meet me so I can show you from [g]od's [w]ord how you can receive [h]is everlasting life.'" (citations omitted)).

[116] Zelman v. Simmons-Harris, 536 U.S. 639, 662–63 (2002).

[117] *Id.* at 684 (Stevens, J., dissenting).

[118] *Id.* at 688 (Souter, J., dissenting).

[119] *See* Van Orden v. Perry, 545 U.S. 677, 689–91 (2005); Salazar v. Buono, 559 U.S. 700, 721–22 (2010); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2089 (2019); *see also supra* text accompanying notes 107–08 (discussing a similar accommodationist holding in *Pinette*).

Court held that a Ten Commandments monument on the Texas State Capitol grounds did not violate the Establishment Clause.[120] Justice Stevens, joined in dissent by Justice Ginsburg, rejected the history and tradition reasoning utilized by the majority, explaining that "[t]he monument is not a work of art and does not refer to any event in the history of the State."[121] Then came *Salazar v. Buono*, where the Court sided with traditionally Christian symbols and handed down a plurality decision allowing a traditional Latin cross placement in the Mojave National Preserve, publicly held land, in an attempt to honor World War I veterans.[122] Again, in *American Legion v. American Humanist Association*, the Court held that a Latin cross was not inherently religious under the Establishment Clause when used for veteran memorials.[123] The dissent pointed out that context has not and should not matter when a symbol is so historically entrenched with a specific religion.[124] The Court had also explored this "context" concept years before in *Pinette*[125] where Justice Stevens vouched for a contextual analysis of the meaning of the Klan cross but ultimately noted that the display should be unconstitutional as either a religious symbol or irreligious symbol:

> Some observers, unaware of who had sponsored the cross, or unfamiliar with the history of the Klan and its reaction to the menorah, might interpret the Klan's cross as an inspirational symbol of the crucifixion and resurrection of Jesus Christ. More knowledgeable observers might regard it, given the context, *as an anti-semitic* [sic] *symbol of bigotry and disrespect for a particular religious sect*. Under the first interpretation, the cross is plainly a religious symbol. Under the second, an icon of intolerance expressing an anticlerical message should also be treated as a religious symbol because the Establishment Clause must prohibit official sponsorship of irreligious as well as religious messages.[126]

Yet, temporally positioned amid these Christian symbol cases was *Pleasant Grove City v. Summum*, where the Court deemed that a city did not have to display a donated monument of the Seven Tenets of Summum[127] on

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[120] *Van Orden*, 545 U.S. at 681.

[121] *Id.* at 707 (Stevens, J., dissenting).

[122] *Salazar*, 559 U.S. at 705–06.

[123] *Am. Humanist Ass'n*, 139 S. Ct. at 2089.

[124] *Id.* at 2105–06 (Ginsburg, J., dissenting) ("[T]he government may not favor one religion over another, *or religion over irreligion*." (quoting McCreary Cnty. v. ACLU, 545 U.S. 844, 875 (2005) (emphasis added))).

[125] Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 797–98 (Stevens, J. dissenting).

[126] *Id.* (emphasis added).

[127] For further reading on Seven Tenets of Summum, see *The Principles of Creation*, SUMMUM, https://www.summum.us/philosophy/principles.shtml [https://perma.cc/XJ3N-ERYY].

public land even though there already was a monument of the Ten Commandments.[128] The Court's accommodationist interpretation of the Establishment Clause began to demonstrate a tacit affinity for traditionally Christian symbols and values.

5. Imbalance Between the Religious Clauses

Most constitutional scholars, and even the Supreme Court at times, agree that there is a necessary tension between the Free Exercise Clause and the Establishment Clause, arguably intentionally manufactured by the drafters.[129] The Free Exercise Clause is generally understood to define appropriate religious accommodations while the Establishment Clause put limits on those accommodations.[130] Scholars generally agree that, when appropriately interpreted and applied, the Religious Clauses actually fit together like a "jigsaw puzzle" rather than compete with each other for dominance.[131] Specifically, the perfect fit between the Religious Clauses can be encompassed by the idea of "secular respect."[132] Rather than legislating religious moral values, which would be acting from a place of religious purpose and strong accommodation, scholars support an interpretation of the Religious Clauses that is grounded in secular respect: generously applying the Free Exercise Clause while strictly applying the Establishment Clause.[133]

Despite the academic acceptance of religious clause tension, there is a general consensus that the Supreme Court has failed to adequately define a judicial path that supports that necessary tension.[134] Scholars have even

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[128] Pleasant Grove City v. Summum, 555 U.S. 460, 460 (2009).

[129] Choper, *supra* note 91, at 674 ("[T]he seemingly irreconcilable conflict: on the one hand the Court has said that the Establishment Clause forbids government action whose purpose is to aid religion, but on the other hand the Court has held that the Free Exercise Clause may require government action to accommodate religion."); Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970) ("The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses *may have been calculated*; but the purpose was to state an objective not to write a statute.") (emphasis added).

[130] Greenawalt, *supra* note 91, at 357; Nuechterlein, *supra* note 14, at 1128.

[131] Nuechterlein, *supra* note 14, at 1128; *see also* Derek H. Davis, *Resolving Not to Resolve the Tension Between the Establishment and Free Exercise Clauses*, 38 J. CHURCH & ST. 245, 259 (1996).

[132] For helpful illustrative examples contrasting religious purpose and secular respect, see Nuechterlein, *supra* note 14, at 1135–36 (note that Nuechterlein uses the term "religious purpose" to mean what the present Author means with the term "accommodation".).

[133] *See* Nuechterlein, *supra* note 14, at 1135–36. For more treatment on how the present Author believes secular respect should be applied, see *infra* § III.

[134] *See, e.g.*, Greenawalt, *supra* note 91, at 343 ("[T]he Supreme Court has given us no theory, or no tenable theory, for drawing the line between permissible accommodation and impermissible establishment."); Choper, *supra* note 91, at 674–75 ("Unfortunately, the Court's separate tests for the Religion Clauses have provided virtually no guidance for determining when an accommodation for religion, seemingly required under the Free Exercise Clause,

observed that the Court has "exacerbat[ed] the tension between the clauses by attempting to enforce, simultaneously, broad interpretations of both clauses."[135] Even some of the Supreme Court justices have recognized this failure. Justice Burger observed that "[t]he Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[136] Justice O'Conner acknowledged the hypocrisy of the Court's approach, writing that "[i]t is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden."[137]

Considering this necessary tension for the religious clauses to effectively balance each other, it is no wonder that the shift from a primarily separationist Establishment Clause interpretation to an accommodationist Establishment Clause interpretation has caused imbalance. This imbalance between the clauses has not only added to the inconsistency of more recent religious clause adjudications but has also created an environment ripe for exploitation by dominionism.[138]

a. Favoritism, inconsistency, and dominionism

Stemming from this manufactured imbalance between the religious clauses, a strengthening theme of favoritism for traditionally Christian values emerged in both Free Exercise and Establishment Clause cases. More Supreme Court holdings than not have demonstrated a favor for Christian tenets or a particular disfavor for other religions or irreligion as discussed

constitutes impermissible aid to religion under the Establishment Clause . . . [n]or has the Court adequately explained why aid to religion, seemingly violative of the Establishment Clause, is not actually required by the Free Exercise Clause."); Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970) ("In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been to [sic] sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.").

135 Davis, *supra* note 131, at 246–47 ("Generally speaking, a broad interpretation of the Establishment Clause finds that the clause proscribes a national church and prohibits aid to religion—even nondiscriminatory aid to religion in general. A broad interpretation of the Free Exercise Clause requires government to grant the widest possible religious liberty to its citizens . . . .").

136 *Walz*, 397 U.S. at 668–69.

137 Wallace v. Jaffree, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring). For more treatment of judicial hypocrisy, see Pettys, *supra* note 95, at 306.

138 For more treatment of the history of dominionism in the United States, see Sarah Powell Miller, Soldiers for Christ: The History and Future of Dominionism in America (April 24, 2012) (Honors Thesis, Wellesley College) (on file with the Wellesley College Digital Repository); TRUMPING DEMOCRACY: FROM REAGAN TO THE ALT-RIGHT (Chip Berlet ed., 2019).

below. These opinions, cloaked in the guise of "history and tradition," differing standards of review, and neutrality, are arguably galvanized by the increased political polarization and rising influence of dominionists.[139]

In *Bowen v. Roy*, the Court held that Native American parents must comply with the statutory requirement that children have Social Security numbers, in spite of the parents' religious views, in order to participate in a federal food aid program.[140] In *Lyng v. Northwest Indian Cemetery Protective Association*, the Court found that the government could complete a road through and harvest timber on land held sacred by Native Americans, relying heavily on the reasoning in *Bowen v. Roy*.[141] Again disregarding Native American religious practices, the Court in *Employment Division v. Smith* held that members of the Native American Church could not ingest peyote, considered a controlled substance under Oregon law, even for sacramental purposes through their religion.[142] Led by Justice Scalia, the majority declined to apply the strict scrutiny standard of review set forth in *Sherbert v. Verner*,[143] and instead applied rational basis review after declaring that the law was

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[139] For a helpful overview of political polarization paired with dominionists in both academic and popular discourse, see Clarkson, *supra* note 10; Bob Smietana, *Michael Flynn Calls for 'One Religion' at Event that is a Who's Who of the New Christian Right*, WASH. POST (Nov. 19, 2021, 3:47 PM), https://www.washingtonpost.com/religion/2021/11/19/michael-flynn-alex-jones-feucht [https://perma.cc/GLX8-5R27]; Alex Morris, *Michael Flynn and the Christian Right's Plan to Turn America Into a Theocracy*, ROLLING STONE, (Nov. 21, 2021), https://www.rollingstone.com/politics/politics-features/michael-flynn-cornerstone-church-christian-theocracy-1260606 [https://perma.cc/4ZVT-6VV7]; David R. Brockman, *The Radical Theology That Could Make Religious Freedom a Thing of the Past*, TEX. OBSERVER (June 2, 2016, 10:57 AM), https://www.texasobserver.org/dominion-theology [https://perma.cc/DU9N-RWR9]; Rachel S. Mikva, *Christian Nationalism is a Threat, and Not Just From Capitol Attackers Invoking Jesus*, USA TODAY (Jan. 31, 2021, 6:00 AM), https://www.usatoday.com/story/opinion/2021/01/31/christian-nationalism-josh-hawley-ted-cruz-capitol-attack-column/4292193001 [https://perma.cc/6PME-6QJA] (Senator Josh Hawley claims "their charge is to 'take the lordship of Christ, that message, into the public realm and to seek the obedience of the nations — of our nation . . . to influence our society, and even more than that, to transform our society to reflect the gospel truth and lordship of Jesus Christ.'"); Stephanie McCrummen, *An American Kingdom*, WASH. POST (July 11, 2021, 6:09 PM), https://www.washingtonpost.com/nation/2021/07/11/mercy-culture-church [https://perma.cc/L7Y5-8GQ9].

[140] Bowen v. Roy, 476 U.S. 693, 712 (1986).

[141] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 448–49 (1988).

[142] Emp. Div. v. Smith, 494 U.S. 872, 882 (1990). Compare with judicial treatment (or lack thereof) of the Roman Catholic Church's belief in transubstantiation and anti-cannibalism laws.

[143] *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963) (holding that the state violated the *Free Exercise Clause* when it disqualified a Christian individual—a Seventh-Day Adventist— from receiving unemployment benefits because her religion did not permit her to work on Saturdays, reaching this result through a strict scrutiny standard of review). The *Sherbert* test stated that a state must have a compelling interest and demonstrate that a law is narrowly tailored in order to restrict an individual's right to free exercise under the First Amendment. *See also* cases cited *supra* note 3. *But see* Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710–11 (1985) (holding a Connecticut statute unconstitutional under the Establishment Clause for only allowing "Sabbath day" work exemptions).

generally applicable and facially neutral.[144] In *Goldman v. Weinberger*, the Court again declined to apply the *Sherbert* test and held that the military's interest in uniformity outweighed the religious interest of Orthodox Jews in wearing their religious garb, namely the yarmulke.[145] In *O'Lone v. Estate of Shabazz*, the Court did not even mention the *Sherbert* test and denied Islamic prisoners' request to be allowed to attend a religious ceremony held at the prison every Friday.[146] In *United States v. Lee*, the Court held that Amish people must pay social security taxes regardless of religious prohibitions on payment of taxes or receipt of social security benefits.[147] In *Reynolds v. United States*, the Court upheld a conviction of a Mormon member for practicing polygamy in accordance with his faith.[148]

In contrast, precedent demonstrates generally more favorable outcomes for cases involving Christian values. In *Lamb's Chapel v. Center Moriches Union Free School District*, the Court held that public schools cannot bar religious groups, specifically Christian groups, from using their buildings when they otherwise open themselves after hours for community use.[149] In *Town of Greece v. Galloway*, the Court followed an originalist interpretation of the Establishment Clause and held that the Constitution "does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing" as long as they don't discriminate.[150] However, the city council members would invite only local Christian clergy members to lead a prayer before meetings.[151] Through this holding, the Court demonstrated that it viewed a purely Christian religious viewpoint as sufficiently accommodating.

Less than three years later in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Court manufactured a way to circumvent the less favorable Establishment Clause approach to the question presented.[152] The Missouri

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[144] *Emp. Div.*, 494 U.S. at 890.

[145] Goldman v. Weinberger, 475 U.S. 503, 506–07 (1986) (plurality opinion).

[146] O'Lone v. Estate of Shabazz, 482 U.S. 342, 353 (1987).

[147] United States v. Lee, 455 U.S. 252, 261 (1982).

[148] Reynolds v. United States, 98 U.S. 145, 145 (1878).

[149] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395–96 (1993); *see also* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 107 (2001).

[150] Town of Greece v. Galloway, 572 U.S. 569, 586 (2014).

[151] *Compare id.* (holding that the Constitution does not require religious balancing as long as the institution involved does not discriminate against religions), *with* Satanic Temple, Inc. v. City of Boston, No. 21-cv-10102-ABD, 2021 U.S. Dist. LEXIS 136031, at *13 (D. Mass. July 21, 2021) ("Defendant's policy does not allow for minority religions to put their names forward to be selected for a legislative prayer opportunity and instead relies on individual legislator preferences.").

[152] *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 1209 (2017) ("The parties agree that the Establishment Clause of that Amendment does not prevent

Department of Natural Resources offered a state-funded grant program that allowed organizations to apply for funds to resurface playgrounds with recycled tires but excluded religious organizations from the grant program based on the Missouri Constitution's robust establishment clause.[153] Rather than focusing on the potential Establishment Clause issues presented by a parochial school seeking tax-funded grants, the Court analyzed the facts under a more lenient Free Exercise framework in order to manufacture the intended outcome: deepening favoritism for Christian-based values and organizations.[154]

In *Marsh v. Chambers*, the Court upheld the practice of opening the Nebraska legislative sessions with a Christian chaplain's prayer.[155] In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Court placed religious free exercise over the civil rights of a same-sex couple by allowing a baker to discriminate based on sexual orientation when he accepted clients.[156] In *Burwell v. Hobby Lobby*, the Court was again happy to prioritize Free Exercise rights of employers over the civil rights of employees trying to access reproductive healthcare through employer-sponsored health plans.[157] In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Court unanimously prioritized Free Exercise rights over equal opportunity employment rights.[158] These cases demonstrate that the Free Exercise Clause has become a overpowered tool for the Court and claimants or defendants alike to overcome not only Establishment Clause concerns but also other civil rights claims.

Only in cases of obvious religious bias was a majority of the Court unable to come up with a justification for ruling in favor of the Christian values. For example, in *Edwards v. Aguillard*, the Court invalidated a piece of Louisiana legislation titled the "Creationism Act" which forbade the teaching of evolution in public schools unless it was paired with the religious creationist story.[159] Yet even in the face of this blatant legislative catering to Christian beliefs to the point of indoctrinating even the youngest students, Justice Scalia took the opportunity to dissent, happy to defer to the legislature and

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Missouri from including Trinity Lutheran in the Scrap Tire Program. That does not, however, answer the question under the Free Exercise Clause, because we have recognized that there 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels." (citing Locke v. Davey, 540 U.S. 712, 718 (2004))).

[153] *Id.* at 2017.

[154] *See id.* at 2024 ("The State in this case expressly requires Trinity Lutheran to renounce its religious character in order to participate in an otherwise generally available public benefit program, for which it is fully qualified.").

[155] Marsh v. Chambers, 463 U.S. 783, 795 (1983).

[156] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1731 (2018).

[157] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 723 (2014).

[158] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012).

[159] Edwards v. Aguillard, 482 U.S. 578, 596–97 (1987).

its half-hearted "secular purpose" for the legislation.[160] In *Bob Jones University v. United States*, the Court upheld the IRS's revocation of tax-exempt status for Christian schools that racially discriminated against all races except Caucasian in their admission process and justified the discrimination through their interpretation of the Christian Bible.[161] Even here, Justice Rehnquist mustered a dissent, deferring to the political process to solve the discrimination problems.[162] In another tax-exemption case, *Texas Monthly, Inc. v. Bullock*, the Court held unconstitutional a tax exemption for purely religious publications explaining that the tax exemption is not generally applicable and specifically singles out religious proselytizing for special state treatment.[163] The Court also distinguished the *Texas Monthly* facts from those of *Walz*[164] since the express purpose of the New York property tax exemption in *Walz* was not to accommodate religion.[165] Rather, the general purpose in *Walz* was to support community establishments, churches just being one "among a diverse array of nonprofit groups that promoted this end."[166] Not surprisingly, Justice Scalia dissented, vouching strongly for accommodation of religious practices, in his mind apparently one of which is printing and disseminated faith-based information without paying a tax.[167]

This survey of cases is by no means a comprehensive list but does demonstrate the overarching trend towards accommodation primarily for Christian values. This trend has also contributed to the "collapse[] [of] religion into civic duty," a warning sign of the rise of dominionism.[168]

6. The Establishment Clause and abortion

The Court has historically analyzed abortion regulations under a substantive due process framework after the famous *Slaughter-House Cases* severely limited the Privileges or Immunities Clause of the Fourteenth

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[160] *Id.* at 610 (Scalia, J., dissenting). For more discussion on religious purpose versus secular respect, see Nuechterlein, *supra* note 14, at 1135–36. Former Justice Scalia followed a strong accommodationist/religious purpose reasoning while the majority was more aligned with a secular respect approach.

[161] Bob Jones Univ. v. United States, 461 U.S. 574, 605 (1983).

[162] *Id.* at 612–13 (Rehnquist, J., dissenting).

[163] Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 13 (1989).

[164] Walz v. Tax Comm'n, 397 U.S. 664, 664 (1970).

[165] *Texas Monthly*, 489 U.S. at 13 n.3.

[166] *Id.*

[167] *Id.* at 38 (Scalia, J., dissenting). An interesting comparison is his dissent in *Texas Monthly* versus his dissent in Bd. of Educ. v. Grumet, 512 U.S. 687, 732–52 (1994) when the subject religion was not Christian or Catholic. Justice Scalia is perfectly happy to keep Satmar Hasidim's followers separated into their own public school district rather than implement his accommodation principles at the surrounding schools.

[168] Davis, *supra* note 3, at 13.

Amendment.[169] Despite the clear Christian-influenced undertones in anti-choice stances,[170] there is only limited jurisprudence regarding Establishment Clause concerns and abortion rights. Although the arguments have been raised before, even by some religious groups themselves, they are generally found in amicus briefs rather than legal arguments presented by the party's attorneys.[171]

Most notably, the Establishment Clause argument against anti-abortion legislation was litigated and rejected in *Harris v. McRae*.[172] Over a decade after Congress established the Medicaid program, it passed a number of versions of the Hyde Amendment that restricted the reimbursement of health costs related to abortion care.[173] Upon review by the Court in *McRae*, the Hyde Amendment survived multiple constitutional hurdles, including that of the Establishment Clause, in a 5–4 opinion.[174] The majority diminutively dismissed the Establishment Clause concerns, stating that they were "convinced that the fact that the funding restrictions in the Hyde Amendment may *coincide* with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause."[175]

Considering the accommodationist interpretation of the Establishment Clause that the Court embraced by the time *Harris v. McRae* was litigated, coincidence had nothing to do with it. In fact, the district court in *McRae* found that the Roman Catholic Church was heavily involved in the creation of the Hyde Amendment and its abortion restrictions.[176] Scholars have

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[169] Slaughter-House Cases, 83 U.S. 36, 36–38 (1872); U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."). This Note will not argue for the overruling of *Slaughter-House* because of the extensive arguments already written on this topic. However, the present Author would argue generally that abortion rights would more appropriately be protected under the Privileges or Immunities Clause of the 14th Amendment. Ultimately, this Note operates within the constitutional confines set forth in *Slaughter-House*.

[170] *See supra* § II(C).

[171] *See generally* Lewis, *supra* note 9, at 529–37 (outlining the history of Establishment Clause arguments against governmental legislation on abortion rights). *See also* Oral Argument at 26:35, Dobbs v. Jackson Women's Health Org., 141 S. Ct. 2619 (2021) (No. 19-1392), https://www.oyez.org/cases/2021/19-1392 [https://perma.cc/33YY-28PF]. Justice Sonia Sotomayor asks, "How is your interest anything but a religious view? The issue of when life begins has been hotly debated by philosophers since the beginning of time. It's still debated in religions. So, when you say this is the only right that takes away from the state the ability to protect a life, that's a religious view, isn't it[?]" *Id.*

[172] Harris v. McRae, 448 U.S. 297, 298 (1980).

[173] *Id.* at 326.

[174] *Id.*

[175] *Id.* at 319–20 (emphasis added).

[176] McRae v. Califano, 491 F. Supp. 630, 727 (E.D.N.Y. 1980) ("[T]he record indicates, only the Roman Catholic Church, among the institutional religions, has sought to secure the enactment of legislation that would forbid abortion, has organized educational and lobbying efforts to that end, and acted to mobilize popular support for its legislative goals.").

recognized this discrepancy and opined that the church's "role in the creation of the Hyde amendment indicates that the statute's similarity to the religious tenets of the Roman Catholic Church was more than mere coincidence," indicating a bias of the Court in favor of legislating Christian values.[177] Furthermore, the dissenters in *McRae* railed against this blatant diminution with Justice Brennan demanding a heightened standard of review and explaining that:

> [T]he Hyde Amendment does not foist that majoritarian viewpoint with equal measure upon everyone in our Nation, rich and poor alike; rather, it imposes that viewpoint only upon that segment of our society which, because of its position of political powerlessness, is least able to defend its privacy rights from the encroachments of *state-mandated morality*.[178]

Justice Marshall echoed Justice Brennan's concerns, observing that the Hyde Amendment would have "a devastating impact on the lives of minority racial groups."[179] Justice Blackmun expressed his disgust with the majority holding by stating that their opinion was condescending and disingenuous, apparently picking up the majority's favor for Christian-influenced policies.[180] Justice Stevens rounded out the strong dissents by addressing the true medical risks faced by pregnant people every day.

> If a woman has a constitutional right to place a higher value on avoiding either serious harm to her own health or perhaps an abnormal childbirth than on protecting potential life, the exercise of that right cannot provide the basis for the denial of a benefit to which she would otherwise be entitled.[181]

Despite these strong and intelligent dissents, the Court has yet to accept an Establishment Clause argument against anti-abortion legislation.

D. The Satanic Temple

The Satanic Temple (TST) is a nontheistic "political and religious movement that advocates progressive values and the separation of church and state."[182] Specifically, TST's mission statement is "to encourage benevolence and empathy, reject tyrannical authority, advocate practical

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[177] Cummings, *supra* note 33, at 1218.

[178] Harris v. McRae, 448 U.S. at 332 (Brennan, J., dissenting) (emphasis added).

[179] *Id.* at 344 (Marshall, J., dissenting).

[180] *Id.* at 348 (Blackman, J., dissenting).

[181] *Id.* at 351 (Stevens, J., dissenting).

[182] JOSEPH P. LAYCOCK, SPEAK OF THE DEVIL: HOW THE SATANIC TEMPLE IS CHANGING THE WAY WE TALK ABOUT RELIGION 1 (2020).

common sense, oppose injustice, and undertake noble pursuits."[183] TST is often confused with but is a distinctly different organization from the Church of Satan.[184]

1. Beginning of The Satanic Temple

TST began in 2012 in response to a controversial bill signed into law in Florida by then-governor Rick Scott allowing students to read "inspirational messages" at public school assemblies and sporting events.[185] The two founders, Malcolm Jarry and Doug Mesner (later taking the name Lucian Greaves), concerned by the clear Christian purpose of the bill,[186] led a small group in January of 2013 to the capitol steps in Tallahassee and presented several speakers under a banner reading "Hail Satan! Hail Rick Scott!" and praising Rick Scott's bill for creating the opportunity for TST to share and spread Satanism in schools.[187] The media coverage at the time generally dismissed TST as a parody or publicity stunt.[188]

The second satirical move by the early TST was called The Pink Mass in response to threats from the Westboro Baptist Church targeting the funerals of Boston Marathon bombing victims in April of 2013.[189] Jarry and Greaves traveled to the grave of Catherine Johnston, the deceased mother of Westboro Baptist Church's founder, Fred Phelps, with two same-sex couples.[190] The couples took turns kissing their partners over the grave while Greaves officiated the ritual that culminated in Greaves uncovering and

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[183] THE SATANIC TEMPLE, https://thesatanictemple.com/pages/about-us [https://perma.cc/R7AD-6DEB].

[184] *Id.*

[185] LAYCOCK, *supra* note 182, at 31.

[186] Prior drafts of the bill used the word "prayer" rather than "inspirational messages." *Id.*

[187] *Id.* at 32–33.

[188] *See* Paige Lavender, *Rick Scott Praised by 'Satanists' at Mock Rally*, HUFFPOST (Jan. 28, 2013, 4:34 PM), https://www.huffpost.com/entry/rick-scott-satanists_n_2559018 [https://perma.cc/BTB2-CKD4] ("Lucien Greaves, the spokesman for the group, insisted earlier that the rally was 'not a hoax,' but the Miami Herald discovered that Greaves is currently working on a film called 'The Satanic Temple.'"); Thomas Andrew Gustafson, *Satanists for Scott: Real or Fake?*, WFSU PUB. MEDIA (Jan. 25, 2013, 4:30 PM), https://news.wfsu.org/state-news/2013-01-25/satanists-for-scott-real-or-fake [https://perma.cc/72CL-4ZSU] ("[T]he group, called The Satanic Temple, came with its own media team and rumors of being a hoax."); Erin Sullivan, *Satanists [heart] Gov. Rick Scott*, ORLANDO WKLY. (Jan. 18, 2013, 2:58 PM), https://www.orlandoweekly.com/news/satanists-heart-gov-rick-scott-2270263 [https://perma.cc/PMG9-KB43]; Erin Sullivan, *Happytown: Satanic Temple to Rally in Florida*, ORLANDO WKLY. (Jan. 22, 2013, 11:00 PM), https://www.orlandoweekly.com/orlando/happytown-satanic-temple-to-rally-in-florida/Content?oid=2245633 [https://perma.cc/9HZU-VTCN] ("The Satanists showed up on Tallahassee, as scheduled, on Jan. 25. Only, were they really Satanists? Probably not.").

[189] LAYCOCK, *supra* note 182, at 34.

[190] *Id.* at 34–35.

placing his genitals on the tombstone.[191] Jarry and Greaves submitted a press release declaring that Catherine Johnston was now gay in the afterlife due to The Pink Mass, an idea repugnant to the beliefs of Westboro Baptist Church followers.[192] The press exploded with news[193] and Greaves was charged with desecration of a grave although nothing ultimately came of the charge.[194]

In the aftermath of The Pink Mass, it became clear to TST founders that there should be an organized Satanic religion fighting for their beliefs rather than just continuing their "series of politically motivated pranks."[195] Jarry and Greaves worked together on drafting The Seven Tenets of TST, tenets that followers would describe as "articulating[]and . . . *sacralizing*[] the values they already held."[196]

Following the establishment of TST as an official religion, true advocacy, sprinkled with their hallmark satire, began. TST launched their Protect Children Campaign in April of 2014 targeting the use of corporal punishment and isolation tactics in public schools.[197] Also beginning in 2014, TST began applying for permits to erect their own religious displays along with the more

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[191] *Id.* at 35.

[192] *Id.* This idea was loosely based on the Mormon practice of baptizing the dead.

[193] Jonathan Smith, *Satanists Turned the Founder of the Westboro Baptist Church's Dead Mom Gay*, VICE (July 17, 2013), https://www.vice.com/en/article/5gwnj8/satanists-turned-the-founder-of-the-westboro-baptist-churchs-mom-gay [https://perma.cc/2N25-B823]; Andres Jauregui, *'Pink Mass' Has Made Westboro Baptist Church Founder's Mom Gay In Afterlife, Satanists Claim*, HUFFPOST (July 18, 2013), https://www.huffpost.com/entry/pink-mass-westboro-baptist-church-gay-satanists_n_3616642 [https://perma.cc/HZ6C-JVU2]; Russell Goldman, *Satanists Perform 'Gay Ritual' at Westboro Gravesite*, ABC NEWS (July 18, 2013), https://abcnews.go.com/blogs/headlines/2013/07/satanists-perform-gay-ritual-at-westboro-gravesite [https://perma.cc/QF25-M67A].

[194] LAYCOCK, *supra* note 182, at 36.

[195] *Id.*

[196] *Id.* at 38. The Seven Tenets of TST are as follows:

> I. One should strive to act with compassion and empathy toward all creatures in accordance with reason. II. The struggle for justice is an ongoing and necessary pursuit that should prevail over laws and institutions. III. One's body is inviolable, subject to one's own will alone. IV. The freedoms of others should be respected, including the freedom to offend. To willfully and unjustly encroach upon the freedoms of another is to forgo one's own. V. Beliefs should conform to one's best scientific understanding of the world. One should take care never to distort scientific facts to fit one's beliefs. VI. People are fallible. If one makes a mistake, one should do one's best to rectify it and resolve any harm that might have been caused. VII. Every tenet is a guiding principle designed to inspire nobility in action and thought. The spirit of compassion, wisdom, and justice should always prevail over the written or spoken word.

THE SATANIC TEMPLE, https://thesatanictemple.com/pages/about-us [https://perma.cc/W6JU-D4A9].

[197] LAYCOCK, *supra* note 182, at 39–41.

traditional holiday displays on government-held property.[198] Under a public forum free speech analysis, TST was legally able to erect multiple displays, but not without substantial community backlash.[199] Along with threats and vandalism came critics stating that these displays amounted to nothing more than publicity stunts.[200] A spokesperson for TST responded coolly to these accusations, countering that "by erecting holiday displays at government buildings instead of their churches, Christians are likewise engaging in a publicity stunt by signaling their religion's link to the authority of government."[201] In 2016, TST began a Satanic after-school program, not unlike the Good News Club, an Evangelical after-school program famously upheld as constitutionally operating on public school property in *Good News Club v. Milford Central School*.[202]

2. The Satanic Temple as a Religion

TST's journey from parody to legitimate religious movement brings to the foreground the extensive debates in the history of U.S. Supreme Court jurisprudence over what "qualifies" as a religion.[203] The U.S. Supreme Court has generally refused to define "religion" as it applies under the First Amendment because the Court has found that question beyond the scope of government.[204] Instead, the Court purports to take a subjective look at claimants requesting First Amendment religious protections, requiring that their beliefs be "sincerely held and . . . in [the claimants'] own scheme of things, religious."[205] This inquiry cannot "turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[206] Thus TST's lack of any worshipped deity or deities does not automatically preclude their religious claims under either

198 *Id.* at 41–42.

199 *Id.*

200 *Id.* at 43.

201 *Id.* at 44.

202 *Id.* at 50–57.

203 *See generally* LAYCOCK, *supra* note 182, at 103–30 (outlining the history of TST).

204 United States v. Seeger, 380 U.S. 163, 184 (1965) ("The validity of what he believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's 'Supreme Being' or the truth of his concepts. But these are inquiries foreclosed to Government."); *see also* United States v. Meyers, 95 F.3d 1475, 1489 (10th Cir. 1996) (Brorby, J., dissenting) ("The ability to define religion is the power to deny freedom of religion.").

205 *Seeger*, 380 U.S. at 185.

206 Thomas v. Rev. Bd., 450 U.S. 707, 714 (1981).

of the religion clauses in the First Amendment.[207] Further, TST has been recognized by the Internal Revenue as a nonprofit organization,[208] supporting an analysis under the idea that TST is a legitimate religious organization.[209]

3. The Satanic Temple's Litigation Efforts

TST has taken to the courts to fight for the legal legitimacy of their religious, political positions, often utilizing legal tactics proven successful by Christian groups.[210] Although not a lawsuit instigated by TST, *Prescott v.*

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[207] *See Seeger*, 380 U.S. at 165–66 (discussing what Congress meant when they drafted the conscientious objector exception to the war draft: "in using the expression 'Supreme Being' rather than the designation '[g]od,' was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views. We believe that under this construction, the test of belief 'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in [g]od of one who clearly qualifies for the exemption."); Gillette v. United States, 401 U.S. 437, 454 (1971) (equating conscientious beliefs with religious beliefs, noting that "valid neutral reasons exist for limiting the exemption to objectors to all war, and that the section therefore cannot be said to reflect a religious preference."); Torcaso v. Watkins, 367 U.S. 488, 495 fn.11 (1961) (noting that not all religions believe in a god in the Christian sense: "Among religions in this country which do not teach what would generally be considered a belief in the existence of [g]od are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.").

[208] Erik Larson, *Satanists Go to Court Seeking Right to Pray at City Meetings*, BLOOMBERG L. (Mar. 22, 2021, 5:30 AM), https://www.bloomberg.com/news/articles/2021-03-22/satan-s-lawyers-try-christian-right-tactics-in-lawsuits-over-religious-liberty [https://perma.cc/X4N6-6XR4].

[209] *See* Fellowship of Human. v. Cnty. of Alameda, 315 P.2d 394, 406 (Cal. Ct. App. 1957) (granting a religious property tax exemption for a humanist organization, setting forth this definition: "Religion simply includes: (1) a belief, not necessarily referring to supernatural powers; (2) a cult, involving a gregarious association openly expressing the belief; (3) a system of moral practice directly resulting from an adherence to the belief; and (4) an organization within the cult designed to observe the tenets of belief."); *id.* at 404–05 ("The idea of religion without [g]od is shocking to Christians, Jews, and Muhammadans, but Buddha and Confucius long ago founded nontheistic religions and some modern Unitarian Humanists insist that the idea of [g]od is a positive hindrance to the progress of real religion. An inclusive definition, then, must recognize both varieties of religion, theistic and non-theistic."); Wash. Ethical Soc'y v. Dist. of Colum., 249 F.2d 127, 128 (D.C. Cir. 1957) (also granting a religious property tax exemption for the meeting building of an ethical society that believed "Ethical Culture is a way of life – an enriching, vital and meaningful force contributing to the moral and spiritual advancement of our times" and not in a god in the traditional Christian sense.); *In re* Walker, 66 N.E. 144, 147 (Ill. 1902) (analyzing a state constitution's meaning: "our constitution therefore constitutes a guaranty of absolute freedom of thought and faith, whether orthodox, heterodox, Christian, Jewish, Catholic, Protestant, liberal, conservative, Calvinistic, Armenian, Unitarian, or other religious belief, theology, or philosophy, and also the right of the free exercise and enjoyment of religious professions and worship of any variety or form.").

[210] *See* Larson, *supra* note 208; *see also* Erik Larson, *Satanic Temple's Lawyers Try Christian-Right Tactics*, SEATTLE TIMES (Mar. 22, 2021, 3:08 PM), https://www.seattletimes.com/nation-world/satanic-temples-lawyers-try-christian-right-tactics [https://perma.cc/EYD2-YB2H] (explaining how TST utilized legal tactics successful for Christian groups); Meghan Keneally, *Satanists Use* Hobby Lobby *Decision to Play Devil's Advocate*, ABC NEWS (July 30, 2014, 11:34

Oklahoma Capitol Preservation Commission helped elevate TST to a new level of notoriety and credibility.[211] At the behest of a Baptist pastor, the ACLU brought suit against the Oklahoma Capitol Preservation Commission for having a large monument of the Ten Commandments on Capitol grounds in violation of the state constitution.[212] TST came forward during the litigation and submitted forms to the Oklahoma Capitol Preservation Commission proposing another monument for the Capitol grounds, a large Baphomet sculpture with a child on each side.[213] The Commission quickly countered TST's request, explaining that the Ten Commandments had historical significance while the Baphomet sculpture did not, attempting to parrot the reasoning in *Van Orden v. Perry*.[214] TST retorted that Satanism also had historical significance, citing the "[m]edieval witch-hunts [that] taught us to adopt presumption of innocence, secular law, and a more substantive burden of proof" among other examples.[215] The Oklahoma Supreme Court ultimately distinguished *Perry* from *Prescott* on the basis that this was a state law issue, not federal, and held that the Ten Commandment monument did indeed violate the state constitution.[216] While, not a complete victory for TST because their Baphomet sculpture was not displayed on Oklahoma Capitol property, their involvement demonstrated TST's commitment to "tolerance and free inquiry" and highlighted the disingenuousness of the historical argument for state displays of religious monuments.[217] Greaves pondered their involvement, noting that

> People get a laugh when they see us fighting to put a Satanic monument on the same grounds as the Ten Commandments, but whether we succeed or fail is not of

AM), https://abcnews.go.com/Politics/satanists-hobby-lobby-decision-play-devils-advocate/story?id=24772548 [https://perma.cc/54EQ-CVJX] (noting the legal tactics utilized by Christian groups).

[211] *See, e.g.*, Prescott v. Okla. Capitol Pres. Comm'n, 373 P.3d 1032 (Okla. 2015) (showing a case that elevated the TST to a new level of credibility); *see also* LAYCOCK, *supra* note 182, at 10 ("[S]ome people now saw TST as a credible threat if the separation of church and state were removed.").

[212] *Prescott*, 373 P.3d at 1033. For a fascinating look into the beliefs of the Baptist pastor who helped bring the lawsuit, see Bruce Prescott, *On Removing Oklahoma's Ten Commandments Monument(s)*, OKLA. FAITH NETWORK (July 7, 2015, 8:19 PM), http://okfaith.blogspot.com/2015 [https://perma.cc/NTV6-T6PU] (providing a look into the beliefs of the Baptist pastor who helped bring the lawsuit); *see generally* Lewis, *supra* note 9 (noting the history of the Baptist denomination's relationship with religious liberty and abortion rights).

[213] LAYCOCK, *supra* note 182, at 5–8.

[214] *Id.* at 6. *See also supra* notes 120–21 and accompanying text.

[215] LAYCOCK, *supra* note 182, at 7.

[216] *Prescott*, 373 P.3d at 1034.

[217] LAYCOCK, *supra* note 182, at 7 ("[I]f many religious symbols can be framed as having historical significance, it seems that the real reason the legislature chose the Ten Commandments [and denied others] was to designate Christianity as privileged by the state.")

> minor importance. . . . When Christians seek to put up monuments in public spaces, that's not all they're asking for, . . . [t]hat's just a first step.[218]

Similar litigation is currently ongoing in Little Rock, Arkansas where the TST intervened in a case involving another monument of the Ten Commandments displayed on Capitol grounds.[219] TST would like their Baphomet statue displayed alongside the Ten Commandments in an effort to demonstrate that there either should be no religious symbols on government property or all religions should be allowed representation.[220] Greaves explained at a rally in Little Rock "[w]e have as little interest in forcing our beliefs and symbols upon you as we do in having the beliefs of others forced upon us."[221] Most recently, TST had a positive ruling on discovery disputes in the lawsuit but at the time of this publication, the case is still in its early stages.[222]

In 2016, TST attempted to display a different monument honoring veterans in Veteran's Park in Belle Plaine, Minnesota, where a Christian-themed monument was already on display.[223] After months of delay and outrage from the city's inhabitants, the City Council granted TST's permit but then revoked Veteran Park's limited public forum status, removing the Christian monument and denying TST the ability to erect their monument.[224] Bringing suit on multiple grounds, TST faced an uphill legal battle marked by delay and missed deadlines, necessitating TST to file a second lawsuit.[225] The second suit was ultimately dismissed in 2021 over procedural issues but the court did briefly address the Establishment Clause argument, noting that "[p]ursuant to the Enacting Resolution and the permit Belle Plaine issued,

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[218] Larson, *supra* note 208.

[219] For a brief history on where all these Ten Commandment monuments came from, see Jenna Weissman Joselit, *Breaking the Ten Commandments: A Short History of the Contentious American Monuments*, RELIGION & POL. (Aug. 1, 2017), https://religionandpolitics.org/2017/08/01/breaking-the-ten-commandments-a-short-history-of-the-contentious-american-monuments [https://perma.cc/2TKF-54SV].

[220] Vanessa Romo, *Satanic Temple Protests Ten Commandments Monument with Goat-Headed Statue*, NPR (Aug. 17, 2018, 7:27 PM), https://www.npr.org/2018/08/17/639726472/satanic-temple-protests-ten-commandments-monument-with-goat-headed-statue [https://perma.cc/73G5-ACHG].

[221] *Id.*

[222] Cave v. Thurston, No. 4:18-cv-00342-KGB, 2021 U.S. Dist. LEXIS 203757, at *2–3 (Ark. Dist. Ct. Oct. 22, 2021) (finding for TST on multiple discovery disputes).

[223] LAYCOCK, *supra* note 182, at 58–60.

[224] *Id.*

[225] *Id.* at 60.

TST had an equal opportunity to place its display in Veterans Memorial Park during the same timeframe that the Christian monument was on display."[226]

In 2021, TST suffered another legal defeat, this time over legislative prayers in Scottsdale, Arizona.[227] TST brought suit against the city after the Scottsdale City Council denied them the right to lead the religious invocation prior to a city meeting.[228] The Ninth Circuit ultimately affirmed the lower court's judgment dismissing the case because TST was unable to prove that the city council members were acting from religiously discriminatory motives as agents of the city when they denied TST's request.[229] However, in a similar suit brought over legislative prayers in Boston, the battle continues with some victories for TST.[230] In the most recent attempt by Boston to dismiss the case, the district court judge found TST could continue with the Establishment Clause claim since "[d]efendant's policy does not allow for minority religions to put their names forward to be selected for a legislative prayer opportunity and instead relies on individual legislator preferences."[231]

a. Abortion litigation

Similarly, TST has also targeted restrictive abortion laws, approaching the issue with an interesting tactic. TST developed Satanic abortion rituals, both for surgical abortions and medicinally induced abortions, bringing the right to abortion under the religious clauses' purview rather than the Due Process Clause.[232] They provide their followers with a regulation exemption letter outlining how mandatory waiting periods, compulsory counseling, compulsory burial of fetal remains, and medically unnecessary sonograms violate and burden their Free Exercise rights.[233] TST filed suit in Texas over

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[226] Satanic Temple, Inc. v. City of Belle Plaine, No. 19-cv-1122, 2021 U.S. Dist. LEXIS 175410, at *37 (Minn. Dist. Ct. Sept. 15, 2021) (explaining that TST had an equal opportunity to have their monument in Veterans Memorial Park).

[227] Satanic Temple, Inc. v. City of Scottsdale, 856 F. App'x. 724, 726 (9th Cir. 2021) (ruling against TST over legislative prayers).

[228] *Id.* at 724.

[229] *Id.* at 726.

[230] Satanic Temple, Inc. v. City of Boston, No. 21-cv-10102-ADB, 2021 U.S. Dist. LEXIS 136031, at *1, 20 (D. Mass. July 21, 2021) (finding for TST over legislative prayers).

[231] *Id.* at *13. *But see* Town of Greece v. Galloway, 572 U.S. 565, 567 (2014) (finding that TST can continue with its Establishment Clause claim).

[232] *How Is the Satanic Abortion Ritual Legally Protected?,* THE SATANIC TEMPLE, https://announcement.thesatanictemple.com/rrr-campaign41280784 [https://perma.cc/B4ZZ-WPUR].

[233] *What Protections Does the Satanic Abortion Ritual Provide?,* THE SATANIC TEMPLE, https://announcement.thesatanictemple.com/rrr-campaign41280784 [https://perma.cc/B4ZZ-WPUR].

the state's burdensome abortion regulations in February of 2021.[234] Later that year, Texas implemented an even more restrictive "6-week abortion ban,"[235] that instantly induced a flurry of litigation brought by impacted abortion providers in the state, culminating in a disappointing ruling in *Whole Woman's Health v. Jackson*.[236] However, since *Roe* and *Casey* were overruled by a now extremely conservative and outspokenly religious United States Supreme Court,[237] and strict abortion bans are being enacted across the country,[238] some opined that TST may be a "last hope"[239] for people seeking abortions while others remain more skeptical.[240]

III. ANALYSIS

While the rhetoric used in Establishment Clause cases seems to show a deep respect for the principle in theory, the actual Supreme Court holdings make the rhetoric seem like tokenism in practice, particularly with the rise of dominionism. Instead, the Court has steadily moved into constitutionally dangerous territory, advancing Christian moral values while not-so-slyly ruling against minority religious groups under the guise of neutrality and "history and tradition" reasoning. Unfortunately, hindsight and analysis allow us to see that "these cases highlight a major problem in Establishment Clause adjudication: the underlying principles are continuously endorsed, but

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[234] Complaint at 5–12, The Satanic Temple, Inc. v. Hellerstedt, No. 4:21-cv-00387 (S.D. Tex. Feb. 5, 2021).

[235] TEX. HEALTH & SAFETY CODE ANN. § 171.204(a) (West 2021) (known as Texas Heartbeat Act, Senate Bill 8); *see also* Ashley Lopez, *Federal Appeals Court Temporarily Reinstates Texas' 6-week Abortion Ban*, NPR (Oct. 8, 2021, 10:06 PM), https://www.npr.org/2021/10/08/1044512475/texas-abortion-ban-reinstated [https://perma.cc/MPZ3-YU2G] (noting that Texas implemented a six-week abortion ban in 2021).

[236] *See, e.g.*, Whole Woman's Health v. Jackson, 142 S. Ct. 522, 525–27 (2021) (holding that abortion providers could not sue state-court judges, court clerks, or the state's Attorney General in an effort to stop the filing of private civil-enforcement lawsuits starting in Texas but ending in the Supreme Court).

[237] For a thought-provoking, but by no means conclusive, discussion on the topic of religion in the Supreme Court, see Terri Langston, *The U.S. Supreme Court: Now a Roman Catholic Institution?*, THE GLOBALIST (May 6, 2021), https://www.theglobalist.com/the-u-s-supreme-court-now-a-roman-catholic-institution [https://perma.cc/BGL2-HSB9] (examining the topic of religion in the Supreme Court).

[238] Sarah McCammon, *Two Months After the Dobbs Ruling, New Abortion Bans Are Taking Hold*, NPR (Aug. 23, 2022, 2:42 PM), https://www.npr.org/2022/08/23/1118846811/two-months-after-the-dobbs-ruling-new-abortion-bans-are-taking-hold [https://perma.cc/5QV5-KRPM].

[239] *See* Goodkind, *supra* note 12.

[240] Susan Rinkunas, *Don't Count on the Satanic Temple for a Legal Abortion*, JEZEBEL (June 25, 2022), https://jezebel.com/satanic-temple-abortion-rights-religious-exemption-real-1849073332 [https://perma.cc/8A29-DW7Q] (arguing "that TST has yet to prove that its religious exemptions will hold up in court.").

inconsistently applied."[241] This inconsistency has left citizens seeking redress and their experienced attorneys unsure of the way the court would rule, often proved wrong.[242]

Further, it has subversively allowed dominionists to gain wide latitude in legislatures and courts. The prime example of this is certain states' recent implementation of progressively stringent abortion restrictions,[243] emboldened by the outspoken anti-choice justices on the current Supreme Court and the *Dobbs* decision.[244] Further proof of this Court-approved reassurance, dominionists have since secured favorable legal rulings on HIV medication[245] and Christian prayers on public school property[246] above and beyond the abortion restrictions tumbling into place. States are legislating traditionally Christian values, causing the wholesale imposition of a single group's values on the whole of our theoretically pluralistic society. This observation is not just a fluke or theoretical hypothesis. A recent study has mathematically demonstrated a statistically significant link between abortion politics and church-state politics.[247] Dominionists are increasingly blurring the line between church and state.

Thankfully, the judicial shift to accommodationism has not entirely left other religious groups and irreligious individuals without recourse, albeit unintentionally. While the Court may have thought that their accommodationist reading of the Establishment Clause had only advanced Christian-favored legislation, it actually fractured the delicate harmony

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[241] Cummings, *supra* note 33, at 1199.

[242] *See generally* Chemerinsky, *supra* note 19, at 2193 (discussing the author's surprise at finding out which Justices voted for and against the case he argued in front of the U.S. Supreme Court after careful study of prior decisions).

[243] McCammon, *supra* note 238.

[244] *See generally* Mark Sherman & Jessica Gresko, *Justices' Views on Abortion in Their Own Words and Votes*, AP NEWS (Nov. 28, 2021), https://apnews.com/article/abortion-us-supreme-court-health-voting-rights-john-roberts-32d2ff1e016c8f72012c49a4ed2bf2e1 [https://perma.cc/7SLR-GE76] (listing comments by the current Supreme Court Justices on abortion).

[245] *See* Braidwood Mgmt. v. Becerra, No. 4:20-cv-00283-O, 2022 U.S. Dist. LEXIS 161052, at *60–61 (N.D. Tex. Sep. 7, 2022); *see also* Erik Larson, *Texas Judge Says HIV Drug Mandate Violates Religious Freedom (3)*, BLOOMBERG L. (Sept. 7, 2022, 3:55 PM), https://news.bloomberglaw.com/daily-labor-report/judge-says-hiv-drug-coverage-violates-religious-freedom [https://perma.cc/P2ZM-AKRA] (discussing Texas ruling that held ACA mandate for free coverage of HIV prevention drugs violated the religious beliefs of Christian-owned company).

[246] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2407 (2020); *see also* Nina Totenberg, *Supreme Court Backs a High School Coach's Right to Pray on the 50-Yard Line*, NPR (June 27, 2022, 3:44 PM), https://www.npr.org/2022/06/27/1106290141/supreme-court-high-school-coach-right-to-pray [https://perma.cc/3FL6-LPVN] (highlighting SCOTUS's ruling that football coach's post-game prayer was protected by the First Amendment).

[247] Lewis, *supra* note 9, at 527, 535.

between the Free Exercise Clause and the Establishment Clause.[248] The stage has been legally set for the current litigation efforts by TST and while many saw the advent of TST as a parody or joke, their power under (or over) the First Amendment became apparent as their influence grew and they achieved legal victories. Considering the discussed backdrop of legal catering to traditional Christian values, it is no wonder that organizations such as TST have begun to take advantage of the now-overpowered Free Exercise Clause to vouch for ignored and undervalued individual liberties. Through a pyrrhic lens, those supporting the legislation of traditional Christian values are now faced with an organization utilizing their same legal tactics to reach a wholly un-Christian end. The Free Exercise Clause has become a powerful justification that TST is using to support its abortion ritual. "The legislature can pass a lot of laws but they can't repeal the law of unintended consequences."[249]

The question ultimately becomes, should we allow these religious sects to politically spar for dominance in a theoretically secular, pluralistic nation? No indeed. The Court should depart from its accommodationist interpretation of the Establishment Clause of the First Amendment and follow a more rigid separationist interpretation paired with strong secular respect so that, among other concerns, people who are pregnant are not subject to the moral values of one specific religious organization or are forced to operate under the guise of another religious organization, such as TST, in order to have their reproductive healthcare needs met.

Following this doctrinal approach to religious clause questions will prevent the government from being excessively entangled with religion, which also removes the ability of religious groups to unduly influence the law in the United States. However, this does not mean religious discrimination will run rampant. Rather, if the Court takes a stance of secular respect and its stance is supported by the legislature, all religions will be treated equally under the law and religious followers will be able to practice their respective faiths with reduced government meddling. Christians can abstain from abortions as dictated by their faith while individuals with differing belief systems can pursue reproductive healthcare as they see fit.[250]

If we do continue with *pure* accommodationist interpretations, however, we must be ready for a flurry of litigation and religious exemptions. The wide variety of religious exemptions from laws would effectively make these laws unenforceable. It would turn the government into an entity merely making

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[248] RAVITCH, *supra* note 16, at 78.

[249] LAYCOCK, *supra* note 182, at 10.

[250] For an insightful discussion on the distinction between personal moral values and values that should be legislated and imposed on the nation, see Todd E. Pettys, *Sodom's Shadow: The Uncertain Line Between Public and Private Morality*, 61 HASTINGS L. J. 1161 (2010).

suggestions and each person can decide if that law applies or does not apply to them according to their religion.

If we continue our accommodationist interpretation while only catering to Christian values as interpreted by the Court, we will continue to violate the Establishment Clause and further the goals of dominionists at the expense of minority religious groups and individual liberties. Precedent demonstrates that the government, supported by the Court, has been quick to railroad religious convictions when their own interests are at stake[251] but are more than happy to accommodate Christian values when other citizen's constitutional liberties are in jeopardy.[252]

Some may say this argument is a slippery slope that does not guarantee the outlined outcomes. The response to that premature and overly simplistic dismissal, however, is based in recent history. In a United States where it has become increasingly common for Congress to operate purely along partisan lines,[253] where a former president and his associates face an exorbitant number of civil and criminal lawsuits for overstepping current legal boundaries,[254] where some of those same associates have publicly called for

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[251] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 441–42 (1988) (analyzing whether the Free Exercise Clause prohibits the Government from harvesting lumber in an area of the National Forest that Native American tribes traditionally used for religious purposes).

[252] *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 682–84 (2014) (asking whether religious organizations are exempted from the Affordable Care Act's requirement that they provide access to contraceptives); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1731 (2018) (looking into the right of a private bakery to decline to provide a wedding cake to a same-sex couple).

[253] *See* Jesse M. Crosson et al., *Partisan Competition and the Decline in Legislative Capacity among Congressional Offices*, 46 L.S.Q. 745, 756–57 (2020); *This 60-second Animation Shows How Divided Congress has Become Since 1949*, BUS. INSIDER (Sept. 11, 2016, 12:04 PM), https://www.businessinsider.com/animation-rise-partisanship-congress-house-representatives-60-years-2016-4 [https://perma.cc/K7QR-UWUL].

[254] Karl Mihm et al., *Litigation Tracker: Pending Criminal and Civil Cases Against Donald Trump*, JUSTSECURITY (Sept. 29, 2022), https://www.justsecurity.org/75032/litigation-tracker-pending-criminal-and-civil-cases-against-donald-trump [https://perma.cc/D4NQ-GPFN]; C. Ryan Barber & Sonam Sheth, *Mar-a-Lago Affidavit Reveals FBI Expected to Find Evidence of Multiple Federal Crimes If It Could Search Trump's Club and Private Residence in South Florida*, INSIDER (Aug, 26, 2022, 1:11 PM), https://www.businessinsider.com/read-affidavit-redacted-fbi-search-warrant-trump-mar-a-lago-2022-8 [https://perma.cc/D7DT-4T69]; Kevin Liptak*, A List of Trump Associates and Their Legal Entanglements*, CNN (Aug. 20, 2020), https://www.cnn.com/2020/08/20/politics/trump-bannon-law-associates/index.html [https://perma.cc/8QGJ-WVB6]; Ja'han Jones, *Team Trump is Melting Down as Probe by N.Y. AG Letitia James Intensifies*, MSNBC (Jan. 11, 2022, 1:13 PM), https://www.msnbc.com/the-reidout/reidout-blog/donald-trump-eric-trump-letitia-james-rcna11779 [https://perma.cc/ABZ6-5HYY]; Erik Larson & Bloomberg, *Trump and Rioters Face Hundreds of Criminal Charges in Connection to January 6*, FORTUNE (Jan. 6, 2022, 3:45 PM), https://fortune.com/2022/01/06/donald-trump-rioters-criminal-charges-january-6-insurrection [https://perma.cc/Q5MW-RMT9]; Natasha Bach, *The Trump Administration Has Been Sued More Than Any Other Since 1982*, FORTUNE (Aug. 30, 2019, 6:00 AM),

a theocracy,[255] where the United States Capitol building was attacked by religious and alt-right political zealots based on factually-incorrect claims about the 2020 presidential election,[256] it is not so difficult to imagine an impending dominionist political ouster.

IV. CONCLUSION

Despite being founded as a theoretically pluralistic nation, the United States of America has demonstrated through accommodationist judicial rulings the clear favor for historically Christian moral values. However, while Christian groups may see the decades of advantageous rulings and Christian legislation as a victory, the rise of TST and its ongoing litigation efforts seems to make it a pyrrhic one, demonstrating, and rightfully so, the ultimate absurdity of accommodationist interpretation of the Establishment Clause when taken to its logical end. Christian influence in United States politics has led to the rise of dominionism in a country where its Supreme Court states that it must uphold the "high and impregnable" wall of separation between church and state.[257] This perceived hypocrisy poses serious judicial legitimacy concerns on top of the potential civil rights violations that have become law.[258]

TST is using legal arguments and tactics that are sound interpretations of the accommodationist precedent, particularly in its arguments for the right to abortion. It is relying on the warped view of the Free Exercise Clause that has been utilized in so many cases before by the traditionally Christian political groups. The fact that TST's politics have caused so much disruption

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https://fortune.com/2019/08/30/trump-administration-multistate-lawsuits [https://perma.cc/G38Q-DR6W].

[255] Smietana, *supra* note 139; Morris, *supra* note 139; Ian Millhiser, *A GOP Senator Just Laid Out His Blueprint for Theocratic Segregationism*, THINKPROGRESS (July 22, 2019, 8:00 AM), https://archive.thinkprogress.org/a-u-s-senator-just-laid-out-a-blueprint-for-turning-the-united-states-into-a-theocracy-17f8262398df [https://perma.cc/2HNW-2SQH].

[256] *See In Pictures: The January 6 Capitol Riot*, CNN (June 9, 2022), https://www.cnn.com/2022/01/03/politics/gallery/january-6-capitol-insurrection/index.html [https://perma.cc/ZJU5-R6RH]; John Gramlich, *A Look Back at Americans' Reactions to the Jan. 6 Riot at the U.S. Capitol*, PEW RSCH. CTR. (Jan. 4, 2022), https://www.pewresearch.org/fact-tank/2022/01/04/a-look-back-at-americans-reactions-to-the-jan-6-riot-at-the-u-s-capitol [https://perma.cc/HRR8-DY99].

[257] Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

[258] *See generally* Pettys, *supra* note 95, at 306 ("The possibility of hypocrisy becomes especially difficult to ignore when—in cases prominently featuring the Democrats' and Republicans' competing political interests—the Justices each side with the party that successfully sought their placement on the Court."). Paired with the increasing partisanship of Congress, a vicious cycle emerges.

and angst in the Christian spheres demonstrates their own dissatisfaction with where *their own* religious policies have taken the United States.[259]

The United States is now at a turning point. The courts and legislatures must now face the repercussions of their accommodationist view after *Dobbs* as we devolve into a nation where any right, such as the right to abortion, must operate under the guise of religion to be recognized by the courts. Alternatively, the Supreme Court can apply a separationist interpretation of the Establishment Clause with strong secular respect under the Free Exercise Clause which would end the wholesale imposition of traditional Christian values on our society while still supporting religious individuals' rights to practice their faith.

We have come to a point where even non-religious people have to use religion as a guise to be able to advocate for their basic rights in the court system, and TST's recent litigation efforts have brought this requirement to the forefront. While traditional Christians may revolt against the idea of other religions stepping into the Constitutional vacuum they created, the truth remains that the Constitutional interpretation that is most favorable to them is also most favorable to all other religious organizations.

Instead of legal lobbying and nitpicking, the Court must adopt a more consistent and apolitical approach to the religious clauses. Instead of following the current pattern of justifying whatever outcome it feels aligns with its members' beliefs, the Court must focus on precedent combined with the principles outlined in the Constitution and Bill of Rights of the United States, including those of the religious clauses of the First Amendment. This step would allow the Establishment Clause and the Free Exercise Clause to operate together, checking and balancing the other while maintaining a stabilized equilibrium that avoids government infringement and supports free exercise.

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[259] *See, e.g.*, *Catholic Church Denounces Planned Satanic Mass at Harvard*, CBS NEWS (May 9, 2014, 2:21 PM), https://www.cbsnews.com/news/catholic-church-denounces-planned-satanic-mass-at-harvard [https://perma.cc/EPK7-4YDM] (describing the outrage of the Catholic Church at a planned "Black Mass"); Heather Greene, *Catholic Bishop Criticizes Satanic Temple Holiday Display at Illinois Statehouse*, RELIGION NEWS SERV. (Dec. 21, 2021) https://religionnews.com/2021/12/21/catholic-bishop-criticizes-satanic-temple-holiday-display-at-illinois-statehouse [https://perma.cc/Y6C8-D43K] (explaining the Catholic Church's criticism of a Baphomet statute inside the Springfield Statehouse). For a fascinating peek into the cognitive dissonance and religious superiority complex that the Roman Catholic Church embraces, see Andrea Picciotti-Bayer, *Why the Satanic Temple Backs Big Abortion*, NAT'L CATH. REG. (Sept. 18, 2021) https://www.ncregister.com/commentaries/why-the-satanic-temple-backs-big-abortion [https://perma.cc/EU7X-H3XU].