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A LOOK AT THE ESTABLISHMENT CLAUSE THROUGH THE PRISM OF RELIGIOUS PERSPECTIVES: RELIGIOUS MAJORITIES, RELIGIOUS MINORITIES, AND NONBELIEVERS

SAMUEL J. LEVINE*

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This Article is based on my remarks presented at the symposium: *The Future of the Establishment Clause in Context: Neutrality, Religion, or Avoidance?*, organized by Bruce Ledewitz at Duquesne University School of Law on November 23, 2011. I thank Bruce for inviting me to participate at the symposium and in this symposium issue of the *Chicago-Kent Law Review*. I thank Dean Ken Gormley, Associate Dean Jane Moriarty, and the Duquesne University School of Law for their hospitality, and I thank the participants at the symposium for thoughtful conversations.

INTRODUCTION

In an influential 1995 law review article, Kent Greenawalt crafted the image of “Shards of *Lemon*”¹ to illustrate the deep divisions that had emerged among Supreme Court Justices over the landmark 1971 Establishment Clause case, *Lemon v. Kurtzman*.² As Greenawalt observed, although the Court did not formally disavow or overrule *Lemon*, the Justices differed sharply over the viability, interpretation, and application of each of the three prongs of the *Lemon* test.³ Greenawalt’s imagery and analysis continue to provide a helpful framework for an updated assessment of the status and future of the Establishment Clause. The Justices remain deeply divided in their approaches to the *Lemon* test and, more broadly, to the meaning of the Establishment Clause. This Article suggests that, although a number of factors have contributed to the splintering of the Court in its Establishment Clause jurisprudence, one of the key issues of contention has revolved around attitudes toward the perspectives of religious minorities and nonbelievers.

Indeed, questions about the significance of the perspectives of religious minorities have played a central role in the modern development of the Supreme Court’s Religion Clause jurisprudence. Many of the leading Supreme Court cases addressing the Free Exercise Clause in the second half of the twentieth century involved the claims of religious minorities.⁴ These cases included important free exercise challenges by the Amish, Muslims, Native Americans, Orthodox Jews, and Santeros, among others.⁵

Yet, as a number of commentators have observed, the Supreme Court’s record in adjudicating the free exercise claims of religious minorities—in particular, unfamiliar and unpopular religious minorities—is vul-

1. Kent Greenawalt, *Quo Vadis: The Status and Prospects of “Tests” Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 359 (1996).

2. 403 U.S. 602 (1971).

3. See Greenawalt, *supra* note 1, at 361–69.

4. See, e.g., Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L. Q. 919 (2004); Amy Bowers & Kristen A. Carpenter, *Lyng v. Northwest Indian Cemetery Protective Association: Challenging the Narrative of Conquest*, in INDIAN LAW STORIES (Carole Goldberg, Kevin Washburn, and Philip P. Frickey eds., Foundation Press 2010); Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222 (2003); Samuel J. Levine, *The Challenges of Religious Neutrality*, 13 J.L. & RELIGION 535 (1999) (reviewing FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE* (1995)); Samuel J. Levine, *Toward a Religious Minority Voice: A Look at Free Exercise Law Through a Religious Minority Perspective*, 5 WM. & MARY BILL RTS. J. 153 (1996) [hereinafter Levine, *Toward a Religious Minority Voice*]; Christopher C. Lund, *The New Victims of the Old Anti-Catholicism*, CONN. L. REV. (forthcoming 2012), available at SSRN: <http://ssrn.com/abstract=1943646> (last visited Mar. 24, 2012); Suzanna Sherry, *Religion and The Public Square: Making Democracy Safe for Religious Minorities*, 47 DEPAUL L. REV. 499 (1998).

5. See Levine, *Toward a Religious Minority Voice*, *supra* note 4 *passim*.

nerable to the critique that the Court's rhetoric and, at times, the Court's holdings demonstrate an inability or unwillingness to look beyond majoritarian religious perspectives.⁶ A brief survey of cases in which the Supreme Court evaluated—and often rejected—the free exercise claims of various religious minorities suggests that, in addition to its doctrinal analysis, the Court's rhetoric has been disappointing in its lack of sensitivity to the perspectives of religious minorities.⁷ Indeed, all too often it has been left to the Court's dissenters to recognize that proper adjudication of free exercise rights entails an appreciation for religious minority perspectives.⁸

Building on these observations, this Article applies a similar analysis to the Court's adjudication of Establishment Clause cases. At the same time, the Article suggests that, in some ways, the Establishment Clause calls for a more careful and complex consideration of religious perspec-

6. See sources cited *supra* note 4.

7. See Levine, *Toward a Religious Minority Voice*, *supra* note 4 *passim*.

8. To cite just a few examples of this phenomenon:

In 1944, in *Prince v. Massachusetts*, one of a long line of cases involving the claims of Jehovah's Witnesses, Justice Murphy concluded his dissenting opinion with an eloquent and urgent call for protection of the rights of religious minorities:

From ancient times to the present day, the ingenuity of man has known no limits in its ability to forge weapons of oppression for use against those who dare to express or practice unorthodox religious beliefs. And the Jehovah's Witnesses are living proof of the fact that even in this nation . . . the right to practice religion in unconventional ways is still far from secure. Theirs is a militant and unpopular faith, pursued with a fanatical zeal. They have suffered brutal beatings; their property has been destroyed; they have been harassed at every turn by the resurrection and enforcement of little used ordinances and statutes. To them, along with other present-day religious minorities, befalls the burden of testing our devotion to the ideals and constitutional guarantees of religious freedom.

321 U.S. 158, 175–76 (1944) (Murphy, J., dissenting) (citation omitted).

In the 1986 case *Goldman v. Weinberger*, involving the military's denial of the right of an Orthodox Jewish serviceman to wear a yarmulke while in uniform, Justice Brennan observed in dissent:

Definitions of necessity are influenced by decisionmakers' experiences and values. As a consequence, in pluralistic societies such as ours, institutions dominated by a majority are inevitably, if inadvertently, insensitive to the needs and values of minorities when these needs and values differ from those of the majority A critical function of the Religion Clauses of the First Amendment is to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar. It is the constitutional role of this Court to ensure that this purpose of the First Amendment be realized.

475 U.S. 503, 523–24 (1986) (Brennan, J., dissenting).

Finally, regarding the Native American claims in the landmark 1990 case of *Employment Division, Department of Human Resources of Oregon v. Smith*, in a concurring opinion, Justice O'Connor emphasized that:

[T]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups.

494 U.S. 872, 902 (O'Connor, J., concurring).

In dissent, Justice Blackmun added: "[T]his Court must scrupulously apply its free exercise analysis to the religious claims of Native Americans, however unorthodox they may be." *Id.* at 921 (Blackmun, J., dissenting).

tives. After all, to properly assess the meaning and effect of the government's accommodation or endorsement of religious practices or symbols, a court has to look not only beyond majoritarian religious perspectives, but also beyond the perspectives of those religious adherents—including, at times, religious minorities—who support the government's involvement in a particular religious practice or symbol. Just as majoritarian perspectives may fail to take into account the effect of majoritarian attitudes and practices on religious minorities, minority perspectives may fail to appreciate the meaning of minority expressions of religion for those with different religious perspectives.

Moreover, the growing religious diversity in American society, accompanied by increasing numbers of self-identified secularists or nonbelievers, adds another level of complexity to an Establishment Clause analysis.⁹ Though relevant to free exercise adjudication as well, these changes in society likely have a more profound impact on Establishment Clause cases. Courts have to determine whether, and to what extent, the adjudication of an Establishment Clause challenge requires a consideration of the perspectives of all of the various religious traditions represented in American society, as well as those of secularists or atheists. Thus, while free exercise cases involve the interests of two parties—the religious adherent, claiming the right to exercise religion, and the government, claiming the authority to restrict that right—one of the challenges in Establishment Clause cases involves threshold questions of whose interests are to be considered and protected.

In exploring these questions, this Article traces the Court's Establishment Clause jurisprudence through several decades, examining a number of landmark cases through the prism of religious minority perspectives. In so doing, the Article aims to demonstrate the significance of religious perspectives in the development of both the doctrine and rhetoric of the Establishment Clause.¹⁰ The Article then turns to the current state of the

9. Cf. Daniel O. Conkle, *Religious Truth, Pluralism, and Secularization: The Shaking Foundations of American Religious Liberty*, 32 CARDOZO L. REV. 1755 (2011); Caroline Mala Corbin, *Nonbelievers and Government Speech*, 97 IOWA L. REV. 347 (2012); Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111 (2011).

10. Cf. Angela C. Carmella, *Symbolic Religious Expression on Public Property: Implications for the Integrity of Religious Associations*, 38 FLA. ST. U. L. REV. 481 (2011); Garrett Epps, *Some Animals Are More Equal than Others: The Rehnquist Court and "Majority Religion"*, 21 WASH. U. J.L. & POL'Y 323 (2006); Feldman, *supra* note 4; Steven G. Gey, "Under God," *the Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. REV. 1865 (2003); Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503 (1992); Susan Hanley Kosse, *A Missed Opportunity to Abandon the Reasonable Observer Framework in Sacred Text Cases: McCreary County v. ACLU of Kentucky, and Van Orden v. Perry*, 4 FIRST AMEND. L. REV. 139

Establishment Clause, expanding upon these themes through a close look at the 2004 and 2005 cases *Elk Grove Unified School District v. Newdow*,¹¹ *Van Orden v. Perry*,¹² and *McCreary County v. American Civil Liberties Union of Kentucky*.¹³ The Article concludes that the ongoing debates among Supreme Court Justices over the relevance of religious minority perspectives contribute to more general divisions that continue to characterize the current state of the Court's Establishment Clause jurisprudence.

I. PRE-*LEMON* CASES: RECOGNIZING RELIGIOUS DIVERSITY

In the early 1960s, the Supreme Court decided a number of landmark cases that illustrate some of the Court's attempts to grapple with the increasing religious diversity in American society and the potential effect of these demographic changes on the interpretation and application of the Establishment Clause. In addition to setting the landscape for future development of Establishment Clause doctrine, these early cases evidence a realization among various Justices that effective adjudication of Establishment Clause cases requires a recognition of—if not an appreciation for—a wide range of perspectives on matters of religion.

A. *McGowan v. Maryland*

In the 1961 case *McGowan v. Maryland*, the Court upheld as constitutional the enactment of Sunday Closing Laws that prohibited the retail sale of various items on Sunday.¹⁴ In an impassioned dissenting opinion, Justice Douglas framed the issue in a manner that emphasized a distinctly minority perspective of religion: "The question is whether a State can impose criminal sanctions on those who, unlike the Christian majority that makes up our society, worship on a different day or do not share the religious scruples of the majority."¹⁵ As Justice Douglas explained:

If the "free exercise" of religion were subject to reasonable regulations, as it is under some constitutions, or if all laws "respecting the establishment of religion" were not proscribed, I could understand how rational men, representing a predominantly Christian civilization, might think these Sunday laws did not unreasonably interfere with anyone's free ex-

(2006); Douglas Laycock, *Government-Sponsored Religious Displays: Transparent Rationalization and Expedient Post-Modernism*, 61 CASE W. RES. L. REV. 1211 (2011).

11. 542 U.S. 1 (2004).

12. 545 U.S. 677 (2005).

13. 545 U.S. 844 (2005).

14. 366 U.S. 420, 453 (1961).

15. *Id.* at 561 (Douglas, J., dissenting).

ercise of religion and took no step toward a burdensome establishment of any religion. But that is not the premise from which we start.¹⁶

Instead, Justice Douglas offered an analysis that drew upon Felix Cohen's observation that "[f]or most judges, for most lawyers, for most human beings, we are as unconscious of our value patterns as we are of the oxygen that we breathe."¹⁷ To illustrate the significance of religious perspectives, Justice Douglas presented counterfactual hypotheticals highlighting the biases he uncovered underlying the decision to uphold the constitutionality of Sunday Closing Laws:

The issue of those cases would therefore be in better focus if we imagined that a state legislature, controlled by orthodox Jews and Seventh-Day Adventists, passed a law making it a crime to keep a shop open on Saturdays. Would a Baptist, Catholic, Methodist, or Presbyterian be compelled to obey that law or go to jail or pay a fine? Or suppose Moslems grew in political strength here and got a law through a state legislature making it a crime to keep a shop open on Fridays. Would the rest of us have to submit under the fear of criminal sanctions?¹⁸

Likewise, according to Justice Douglas, the Sunday Closing Laws were an expression of dominant religious perspectives: "No matter how much is written, no matter what is said, the parentage of these laws is the Fourth Commandment; and they serve and satisfy the religious predispositions of our Christian communities."¹⁹ Thus, he found, in upholding the Sunday Closing Laws, the majority of the Court improperly disregarded the effect of the laws on religious minorities: "[I]t is a strange Bill of Rights that makes it possible for the dominant religious group to bring the minority to heel because the minority, in the doing of acts which intrinsically are wholesome and not antisocial, does not defer to the majority's religious beliefs."²⁰ Indeed, he explained, "[a] legislature of Christians can no more make minorities conform to their weekly regime than a legislature of Moslems, or a legislature of Hindus."²¹

Therefore, Justice Douglas concluded:

[T]he Sunday laws . . . force minorities to obey the majority's religious feelings of what is due and proper for a Christian community; they provide a coercive spur to the "weaker brethren," to those who are indifferent to the claims of a Sabbath through apathy or scruple. Can there be any doubt that Christians, now aligned vigorously in favor of these laws, would be as strongly opposed if they were prosecuted under a Moslem

16. *Id.*

17. *Id.* at 565 (quoting FELIX COHEN, *LEGAL CONSCIENCE* 169 (1960)).

18. *Id.*

19. *Id.* at 572-73.

20. *Id.* at 575.

21. *Id.*

law that forbade them from engaging in secular activities on days that violated Moslem scruples? ²²

Somewhat ironically, the Court's decision to uphold the Sunday Closing Laws was, in part, similarly premised on an acknowledgment of the religious diversity that comprised American society. As Chief Justice Warren noted in his plurality opinion in the companion case, *Braunfeld v. Brown*, "we are a cosmopolitan nation made up of people of almost every conceivable religious preference. These denominations number almost three hundred."²³ However, rather than emphasizing the Court's responsibility to guard against laws that impose majoritarian perspectives, Chief Justice Warren instead seemed to view the prevalence and proliferation of religious minorities as a justification for neglecting minority perspectives. As he continued:

[I]t cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. We do not believe that such an effect is an absolute test for determining whether the legislation violates the freedom of religion protected by the First Amendment.²⁴

Significantly, just as Chief Justice Warren and Justice Douglas articulated very different approaches to the application of the Religion Clauses in light of the nation's religious diversity, a similar tension continues to underlie much of the Supreme Court's Religion Clause jurisprudence. In their ongoing efforts to confront these issues, Justices remain sharply divided over the extent to which the Court's jurisprudence should take into account religious minority perspectives.

B. *Torcaso v. Watkins*

Notwithstanding the Court's holdings in *McGowan* and *Braunfeld*, in a number of Establishment Clause cases that soon followed, the Court demonstrated a willingness to appreciate the perspectives of religious minorities and nonbelievers. Just a few weeks later, the Court decided *Torcaso v. Watkins*, unanimously striking down a Maryland law that required "a declaration of belief in the existence of God" as a prerequisite for holding "office of profit or trust in this State."²⁵ Writing for seven of the Justices, Justice Black's majority opinion emphasized the need to protect the interests of both religious minorities and nonbelievers: "Neither [a State

22. *Id.* at 576.

23. 366 U.S. 599, 606 (1961) (plurality opinion).

24. *Id.* at 606–07.

25. 367 U.S. 488, 489, 496 (1961).

nor the Federal Government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.”²⁶

C. Engel v. Vitale

One year later almost to the date, in *Engel v. Vitale*, the Court struck down a practice adopted by a New York public school district to recite a prayer in class at the start of each school day.²⁷ Again writing for the majority, Justice Black further expressed his concern for the perspectives of religious minorities: “When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.”²⁸

In a dissenting opinion, Justice Stewart rejected these concerns, turning instead to “the history of the religious traditions of our people, reflected in countless practices of the institutions and officials of our government.”²⁹ Developing a theme that continues to play a central role in the Court’s divided Establishment Clause jurisprudence, Justice Stewart cited instances in which the Supreme Court, Congress, and the President have traditionally invoked references and petitions to God.³⁰ Insisting that “[c]ountless similar examples could be listed, but there is no need to belabor the obvious,” Justice Stewart concluded that “[i]t was all summed up by this Court just ten years ago in a single sentence.”³¹ Namely, he quoted from Justice Douglas’s opinion in the 1952 case *Zorach v. Clauson*, declaring that “[w]e are a religious people whose institutions presuppose a Supreme Being.”³²

Notably, in a concurring opinion in *Engel*, Justice Douglas likewise quoted from his own 1952 opinion,³³ but according to Justice Douglas, acknowledging the religious character of American society was merely the beginning of the analysis. Notwithstanding the Constitution’s allowance to “mak[e] religion an active force in our lives,”³⁴ he emphasized that the

26. *Id.* at 495.

27. 370 U.S. 421, 424 (1962).

28. *Id.* at 431.

29. *Id.* at 446 (Stewart, J., dissenting).

30. *Id.* at 446–49.

31. *Id.* at 450.

32. *Id.* (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)).

33. *Id.* at 447 (Douglas, J., concurring) (quoting *Zorach*, 343 U.S. at 313).

34. *Id.* at 442–43.

Constitution protects other perspectives and positions as well: “the atheist or agnostic—the nonbeliever—is entitled to go his own way.”³⁵ In short, “a government neutral in the field of religion better serves all religious interests.”³⁶ Indeed, whatever the merit, as a descriptive matter, of depicting the United States as a “religious people” that accepts a Supreme Being, Justice Stewart’s focus on majoritarian religious practice and belief excludes from Establishment Clause adjudication any consideration of the perspectives of nonbelievers and religious minorities.

D. School District of Abington Township v. Schempp

Finally, yet one more year later—again nearly to the date, and again over the dissent of Justice Stewart—in *School District of Abington Township v. Schempp*, the Court struck down state laws that mandated reading from the Bible at the start of each school day.³⁷ In a lengthy concurring opinion, Justice Brennan emphasized the perspectives of religious minorities and nonbelievers. For example, refusing to accept the historical record as proof of the constitutionality of religious practices in American public schools, Justice Brennan noted the demographic changes that had taken place in the religious makeup of American society:

[O]ur religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all. In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike.³⁸

Similarly, rejecting the argument that reading from the Bible should be allowed because the school varied the version of the Bible that it used on different days, Justice Brennan further observed:

[A]ny version of the Bible is inherently sectarian. . . . To vary the version as the Abington and Baltimore schools have done may well be less offensive than to read from the King James version every day, as once was the practice. But the result even of this relatively benign procedure is that majority sects are preferred in approximate proportion to their representation in the community and in the student body, while the smaller sects suffer commensurate discrimination. So long as the subject matter of the

35. *Id.* at 443.

36. *Id.*

37. 374 U.S. 203, 205 (1963).

38. *Id.* at 240–41 (Brennan, J., concurring) (citation omitted).

exercise is sectarian in character, these consequences cannot be avoided.³⁹

Thus, in three consecutive years in the early 1960s, the Supreme Court relied, in part, on the perspectives of religious minorities and nonbelievers as grounds for finding Establishment Clause violations. The Court thus demonstrated a willingness and ability to appreciate the extent to which laws may impermissibly reflect dominant and majoritarian religious perspectives. Accordingly, the Court interpreted the Establishment Clause not only to prohibit the establishment of the practices or beliefs of a particular religious sect, but also to preclude more general governmental support of religious practices and expressions that marginalize non-adherents and nonbelievers.

II. POST-*LEMON* CASES: RELIGIOUS DIVERSITY AND JURISPRUDENTIAL DIVISION

In 1971, the Court decided *Lemon v. Kurtzman*, setting forth a three-pronged test for adjudicating Establishment Clause cases: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”⁴⁰ In practice, rather than providing a clear standard for interpreting the Establishment Clause, *Lemon* quickly became the source of disagreement among Supreme Court Justices, who differed substantially over the appropriate application of the *Lemon* test.

Although many factors have contributed to these divisions, questions revolving around the relevance of religious perspectives serve as a central point of contention in the adjudication of Establishment Clause cases. A number of Supreme Court decisions between the years 1983 and 1995 illustrate the continuing and increasing disputes among Justices over whether, and to what extent, the Establishment Clause should be viewed through the perspectives of religious minorities and nonbelievers.

A. *Marsh and Lynch—Setting the Stage*

1. *Marsh v. Chambers*

In 1983, the Court decided *Marsh v. Chambers*, upholding the Nebraska Legislature’s practice of opening each day’s session with a prayer

39. *Id.* at 282–83.

40. 403 U.S. 602, 612–13 (1971) (citation omitted).

by a chaplain paid by the state.⁴¹ Much of Chief Justice Burger's majority opinion documented what he termed "the unambiguous and unbroken history of more than 200 years" during which "the practice of opening legislative sessions with prayer has become part of the fabric of our society."⁴² Accordingly, he found, "[to] invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country."⁴³ Finally, he quoted from Justice Douglas's 1952 declaration that the United States was "a religious people whose institutions presuppose a Supreme Being."⁴⁴

Although Chief Justice Burger portrayed his approach as merely recognizing the place of religion in American society, the rhetoric he used and the conclusions he reached betray an attitude that favors dominant religious views while disregarding others. Indeed, the opinion adopts an expressly majoritarian perspective, stating that legislative prayer is simply the government's "acknowledgment of beliefs *widely held among the people* of this country."⁴⁵ Of course, the unstated corollary to this statement is that the government is free to ignore the religious views and sensitivities of those among the American people who do *not* share these beliefs.

Likewise, the opinion does not identify which segments of society are included as part of "[w]e" who "are a religious people"⁴⁶ and does not explain on what grounds those who do not believe in a Supreme Being should be excluded. Moreover, while Justice Douglas might have accurately depicted the United States as "a religious people" in 1952, demographic changes that had taken place in the course of thirty years rendered questionable Chief Justice Burger's abiding reliance on this observation. In any event, as Justice Douglas made clear in *Engel*, observations about prevailing religious beliefs of the United States are but the beginning of the Establishment Clause analysis, and do not permit the government to act in a way that disregards the interests of religious minorities or nonbelievers.

In a lengthy dissent joined by Justice Marshall, Justice Brennan offered two primary critiques of the majority opinion, drawing upon themes that continue to play a central role in the fault lines underlying the Court's current Establishment Clause jurisprudence. First, Justice Brennan chided

41. 463 U.S. 783, 786 (1983).

42. *Id.* at 792.

43. *Id.*

44. *Id.* at 792 (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)).

45. *Id.* (emphasis added).

46. *Id.* (quoting *Zorach*, 343 U.S. at 313).

the majority for appealing to the history of legislative prayer in place of an analysis based on *Lemon*. As he put it, “[t]he Court makes no pretense of subjecting Nebraska’s practice of legislative prayer to any of the formal ‘tests’ that have traditionally structured our inquiry under the Establishment Clause.”⁴⁷ “In effect,” he argued, “the Court holds that officially sponsored legislative prayer, primarily on account of its ‘unique history,’ is generally exempted from the First Amendment’s prohibition against ‘an establishment of religion.’”⁴⁸

According to Justice Brennan, it “should be obvious [] that, if the Court were to judge legislative prayer through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause.”⁴⁹ In fact, he declared sharply, “I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional.”⁵⁰

Second, Justice Brennan rejected the majority’s attempts to minimize the religious nature of the legislative prayer, responding with a brief primer on the various objections legislative prayer might elicit. As a threshold matter, he “put to one side, not because of its irrelevance, but because of its obviousness, the fact that any official prayer will pose difficulties both for nonreligious persons and for religious persons whose faith does not include the institution of prayer.”⁵¹

Yet even for those whose religious beliefs include prayer, he argued, “any practice of legislative prayer, even if it might look ‘non-sectarian’ to nine Justices of the Supreme Court, will inevitably and continuously involve the State in one or another religious debate.”⁵² For example:

Some religious individuals or groups find it theologically problematic to engage in joint religious exercises predominantly influenced by faiths not their own. Some might object even to the attempt to fashion a “non-sectarian” prayer. . . . Some might find any petitionary prayer to be improper. Some might find any prayer that lacked a petitionary element to be deficient. Some might be troubled by what they consider shallow public prayer, or nonspontaneous prayer, or prayer without adequate spiritual preparation or concentration. Some might, of course, have *theological* objections to any prayer sponsored by an organ of government . . . And

47. *Id.* at 796 (Brennan, J., dissenting).

48. *Id.* at 795 (citation omitted).

49. *Id.* at 796.

50. *Id.* at 800–01.

51. *Id.* at 819 n.40.

52. *Id.* at 819.

some might object on theological grounds to the Court's requirement that prayer, even though religious, not be proselytizing.⁵³

In a brief dissenting opinion, Justice Stevens added the concern that the chaplains selected to conduct legislative prayers will typically be drawn from the ranks of a majoritarian religion, while some religious minorities will almost always be excluded:

In a democratically elected legislature, the religious beliefs of the chaplain tend to reflect the faith of the majority of the lawmakers' constituents. Prayers may be said by a Catholic priest in the Massachusetts Legislature and by a Presbyterian minister in the Nebraska Legislature, but I would not expect to find a Jehovah's Witness or a disciple of Mary Baker Eddy or the Reverend Moon serving as the official chaplain in any state legislature. . . . [I]t seems plain to me that the designation of a member of one religious faith to serve as the sole official chaplain of a state legislature for a period of 16 years constitutes the preference of one faith over another in violation of the Establishment Clause of the First Amendment.⁵⁴

2. *Lynch v. Donnelly*

One year later, in *Lynch v. Donnelly*, a deeply divided Court upheld a city's inclusion of a crèche as part of a public Christmas display.⁵⁵ Writing for the majority, Chief Justice Burger again invoked the reference to the United States as a "religious people"⁵⁶ and, in place of a formal application of the *Lemon* test, he premised his analysis on the historical record of governmental involvement in practices that were religious in nature. Accordingly, he concluded:

It would be ironic . . . if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for 2 centuries, would so "taint" the city's exhibit as to render it violative of the Establishment Clause.⁵⁷

In another extensive dissenting opinion, this time joined by three other Justices, Justice Brennan again focused, in large part, on "our remarkable and precious religious diversity as a Nation, which the Establishment Clause seeks to protect."⁵⁸ Indeed, according to Justice Brennan, the facts in *Lynch* proved particularly challenging precisely because of majoritarian

53. *Id.* at 819–21 (citation omitted).

54. *Id.* at 823–24 (Stevens, J., dissenting).

55. 465 U.S. 668, 671 (1984).

56. *Id.* at 675 (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)).

57. *Id.* at 686.

58. *Id.* at 697 (Brennan, J., dissenting) (citations omitted).

acceptance of the crèche and, more generally, the Christmas holiday. As he put it, “[a]fter reviewing the Court’s opinion, I am convinced that this case appears hard not because the principles of decision are obscure, but because the Christmas holiday seems so familiar and agreeable.”⁵⁹

For this reason, Justice Brennan found it necessary to articulate, at length, the religious nature of the crèche and the message conveyed in its display by the government. Once again, Justice Brennan emphasized the potential of the display to carry a variety of very different meanings, depending on the religious perspective of the beholder:

Those who believe in the message of the nativity receive the unique and exclusive benefit of public recognition and approval of their views. For many, the city’s decision to include the crèche as part of its extensive and costly efforts to celebrate Christmas can only mean that the prestige of the government has been conferred on the beliefs associated with the crèche. . . . The effect on minority religious groups, as well as on those who may reject all religion, is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support. It was precisely this sort of religious chauvinism that the Establishment Clause was intended forever to prohibit.⁶⁰

Moreover, Justice Brennan noted that

[T]he crèche retains a specifically Christian religious meaning. I refuse to accept the notion implicit in today’s decision that non-Christians would find that the religious content of the crèche is eliminated by the fact that it appears as part of the city’s otherwise secular celebration of the Christmas holiday It is the chief symbol of the characteristically Christian belief that a divine Savior was brought into the world and that the purpose of this miraculous birth was to illuminate a path toward salvation and redemption. For Christians, that path is exclusive, precious and holy. But for those who do not share these beliefs, the symbolic reenactment of the birth of a divine being who has been miraculously incarnated as a man stands as a dramatic reminder of their differences with Christian faith To be so excluded on religious grounds by one’s elected government is an insult and an injury that, until today, could not be countenanced by the Establishment Clause.⁶¹

In the face of Justice Brennan’s dissent, Chief Justice Burger acknowledged that “[o]f course the crèche is identified with one religious faith.”⁶² Yet, relying on the precedential authority and doctrinal analysis of

59. *Id.*

60. *Id.* at 701.

61. *Id.* at 708–09; *cf. id.* at 727 (Blackmun, J., dissenting) (“The import of the Court’s decision is to encourage use of the crèche in a municipally sponsored display, a setting where . . . non-Christians feel alienated by its presence.”); *id.* at 688 (O’Connor, J., concurring) (“[E]ndorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.”).

62. *Id.* at 685.

McGowan and *Marsh*, he found the distinctly Christian character of the crèche to be “no more so than the examples we have set out from prior cases in which we found no conflict with the Establishment Clause.”⁶³

B. 1985–1995: “Shards of Lemon”

Over the course of the ten years following *Lynch*, the Court decided a number of other cases addressing instances of public prayer and the public display of religious symbols. The Court would remain sharply divided in many of these cases, producing the “shards of *Lemon*” Kent Greenawalt so vividly portrayed to depict the state of the Court’s Establishment Clause jurisprudence.⁶⁴ A close look at four of these cases illustrates not only doctrinal divisions among the Justices, but also a deep and abiding division with respect to the relevance of the perspectives of religious minorities for the adjudication of Establishment Clause cases.

1. *Wallace v. Jaffree*

In the 1985 case *Wallace v. Jaffree*, the Court considered the constitutionality of Alabama statutes authorizing moments of silence in public schools for meditation and forms of prayer.⁶⁵ Emblematic of the continued splintering of the Court’s Establishment Clause jurisprudence, the case engendered a majority opinion, two concurring opinions, and three dissenting opinions. Beyond the doctrinal divisions, the different opinions offer alternate views on a number of crucial issues, including, among others, historical matters and the relevance of minority perspectives.

In the majority opinion striking down the prayer statutes, Justice Stevens relied, in part, on the historical development of the meaning of the Establishment Clause, including the evolving sensitivity the Court had demonstrated toward perspectives of religious minorities and nonbelievers. In particular, Justice Stevens noted that:

At one time it was thought that [the Establishment Clause] merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives . . . from

63. *Id.* at 685–86.

64. See Greenawalt, *supra* note 1.

65. 472 U.S. 38, 41–42 (1985).

recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among “religions”—to encompass intolerance of the disbeliever and the uncertain.⁶⁶

In a concurring opinion, Justice O'Connor likewise emphasized the perspective of the nonadherent. Building on a similar argument she had raised in a concurring opinion in *Lynch*, Justice O'Connor asserted that the *Lemon* test should be “refine[d]” through an analysis of whether the government’s action constituted an “endorsement” of religion or a religious practice or belief.⁶⁷ Relying on both her concurrence in *Lynch* and the Court’s opinion in *Engel*, Justice O'Connor explained that:

The endorsement test . . . does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred. Such an endorsement infringes the religious liberty of the nonadherent, for “[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.”⁶⁸

Justice Rehnquist issued a lengthy dissenting opinion, premised on the argument that “[t]he true meaning of the Establishment Clause can only be seen in its history.”⁶⁹ Of course, Justice Rehnquist’s view of history differed, substantially and fundamentally, from Justice Stevens’ historical analysis, which focused on the evolution of the Court’s Establishment Clause jurisprudence. Instead, relying exclusively on what he characterized as the intention of the Framers of the Constitution, Justice Rehnquist concluded that, “[a]s its history abundantly shows . . . nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion.”⁷⁰ Explicitly disregarding the perspectives of nonbelievers, Justice Rehnquist thus exposed yet another fault line in the Court’s interpretation of the Establishment Clause.

2. *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*

The Court was even more divided in a 1989 case, *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, which gave rise to a plethora of opinions, including: an opinion by Justice Blackmun, joined in part by a majority of the Court, a concurring opinion by Justice

66. *Id.* at 52–54.

67. *Id.* at 69 (O'Connor, J., concurring).

68. *Id.* at 70 (quoting *Engel v. Vitale*, 370 U.S. 421, 431 (1962)).

69. *Id.* at 113 (Rehnquist, J., dissenting).

70. *Id.*

O'Connor, joined in part by two other Justices, and three additional opinions, each of which concurred and dissented in part and was joined, in part, by two or three other Justices.⁷¹ Returning to the issue of religious symbols, the Court considered the constitutionality of the city's display of a crèche and a menorah.⁷²

In one of the sections of his opinion that commanded a majority of the Court, Justice Blackmun noted the prevalence and significance of religious diversity within American society:

This Nation is heir to a history and tradition of religious diversity that dates from the settlement of the North American Continent. Sectarian differences among various Christian denominations were central to the origins of our Republic. Since then, adherents of religions too numerous to name have made the United States their home, as have those whose beliefs expressly exclude religion.⁷³

Accordingly, Justice Blackmun emphasized the importance of interpreting the Constitution in a way that recognizes and protects diverse perspectives toward religion:

Precisely because of the religious diversity that is our national heritage, the Founders added to the Constitution a Bill of Rights, the very first words of which declare: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." Perhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to "the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism."⁷⁴

In another part of his opinion, joined only by Justice Stevens, Justice Blackmun again focused on differences in religious perspectives, and the need to protect the rights of nonadherents:

[T]he Court has made clear that, when evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."⁷⁵

Justice O'Connor expressed similar concerns. Building yet again on her concurrence in *Lynch*, Justice O'Connor found that:

71. 492 U.S. 573, 577 (1989).

72. *Id.* at 578.

73. *Id.* at 589.

74. *Id.* at 589–90 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985)).

75. *Id.* at 597 (opinion of Blackmun, J.) (quoting *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985)).

[T]he crèche displayed on the Grand Staircase of the Allegheny County Courthouse, the seat of county government, conveys a message to nonadherents of Christianity that they are not full members of the political community, and a corresponding message to Christians that they are favored members of the political community.⁷⁶

Significantly, in considering the constitutionality of the menorah display, Justice O'Connor raised the broader issue of "whether the governmental display of a minority faith's religious symbol could ever reasonably be understood to convey a message of endorsement of that faith."⁷⁷ In an analysis that highlighted the extent to which the meaning of religious symbols depends on the religious perspective of the beholder, Justice O'Connor acknowledged that, in principle, "[a] menorah standing alone at city hall may well send such a message to nonadherents, just as in this case the crèche standing alone at the Allegheny County Courthouse sends a message of governmental endorsement of Christianity."⁷⁸ Although, given the context of the menorah's display, Justice O'Connor found no such endorsement in this case, her analysis demonstrates a consistent willingness on her part to take into account different religious perspectives when applying the Establishment Clause.

In an opinion joined by Justices Brennan and Marshall, Justice Stevens likewise considered a range of religious perspectives, reaching the conclusion that "the Establishment Clause should be construed to create a strong presumption against the display of religious symbols on public property."⁷⁹ As he noted, "[t]here is always a risk that such symbols will offend nonmembers of the faith being advertised as well as adherents who consider the particular advertisement disrespectful."⁸⁰ For example, "[s]ome devout Christians believe that the crèche should be placed only in reverential settings, such as a church or perhaps a private home[.]" while "[i]n this very suit, members of the Jewish faith firmly opposed the use to which the menorah was put by the particular sect that sponsored the display at Pittsburgh's City-County Building."⁸¹ In short, "displays of this kind inevitably have a greater tendency to emphasize sincere and deeply felt differences among individuals than to achieve an ecumenical goal. The Establishment Clause does not allow public bodies to foment such disagreement."⁸²

76. *Id.* at 626 (O'Connor, J., concurring in part and concurring in the judgment).

77. *Id.* at 634.

78. *Id.*

79. *Id.* at 650 (Stevens, J., concurring in part and dissenting in part).

80. *Id.* at 650-51.

81. *Id.* at 651.

82. *Id.*

For Justice Brennan, the inclusion of the menorah only added to the religious—and particularly Christian—message the display sent to both adherents of other religious traditions and nonadherents. Responding to Justices Blackmun and O'Connor, in an opinion joined by Justices Marshall and Stevens, Justice Brennan declared: "I know of no principle under the Establishment Clause . . . that permits us to conclude that governmental promotion of religion is acceptable so long as one religion is not favored. We have, on the contrary, interpreted that Clause to require neutrality, not just among religions, but between religion and nonreligion."⁸³ Moreover, Justice Brennan found, the government's exclusive participation in Chanukah among all of the Jewish holidays "has the effect of promoting a Christianized version of Judaism. The holiday calendar they appear willing to accept revolves exclusively around a Christian holiday."⁸⁴ Finally, he concluded, "those religions that have no holiday at all during the period between Thanksgiving and New Year's Day will not benefit, even in a second-class manner, from the city's once-a-year tribute to 'liberty' and 'freedom of belief.' This is not 'pluralism' as I understand it."⁸⁵

In sharp contrast to the majority of Justices, who—though they differed somewhat in result—carefully considered religious minority perspectives, Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Scalia, found the focus on the perspectives of nonadherents irreconcilable with the nation's history of religious practice. As Justice Kennedy put it:

If the endorsement test, applied without artificial exceptions for historical practice, reached results consistent with history, my objections to it would have less force. But, as I understand that test, the touchstone of an Establishment Clause violation is whether nonadherents would be made to feel like "outsiders" by government recognition or accommodation of religion. Few of our traditional practices recognizing the part religion plays in our society can withstand scrutiny under a faithful application of this formula.⁸⁶

Notably, Justice Kennedy did not dispute the contention that the displays might offend the sensitivities of both nonadherents and religious adherents:

It must be conceded that, however neutral the purpose of the city and county, the eager proselytizer may seek to use these symbols for his own ends. The urge to use them to teach or to taunt is always present. It is also true that some devout adherents of Judaism or Christianity may be as

83. *Id.* at 644 (Brennan, J., concurring in part and dissenting in part).

84. *Id.* at 645.

85. *Id.* at 645–46.

86. *Id.* at 670 (Kennedy, J., concurring in the judgment in part and dissenting in part).

offended by the holiday display as are nonbelievers, if not more so. To place these religious symbols in a common hallway or sidewalk, where they may be ignored or even insulted, must be distasteful to many who cherish their meaning.⁸⁷

Instead, Justice Kennedy rejected outright the relevance of these considerations to the application of the Establishment Clause. Indeed, turning on its head the view that dedication to religious pluralism and diversity renders such displays impermissible, he concluded that:

Our role is enforcement of a written Constitution. In my view, the principles of the Establishment Clause and our Nation's historic traditions of diversity and pluralism allow communities to make reasonable judgments respecting the accommodation or acknowledgment of holidays with both cultural and religious aspects. No constitutional violation occurs when they do so by displaying a symbol of the holiday's religious origins.⁸⁸

3. *Lee v. Weisman*

In the 1992 case, *Lee v. Weisman*, Justice Kennedy again acknowledged the sensitivities of religious minorities and nonbelievers.⁸⁹ This time, however, Justice Kennedy wrote the Court's majority opinion striking down the practice of offering "nonsectarian" prayers by a member of a clergy at public high school graduation ceremonies. Justice Kennedy's analysis emphasized the relevance of religious minority perspectives and perceptions in interpreting and applying the Establishment Clause:

What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy. . . . There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer. That was the very point of the religious exercise. It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.⁹⁰

Accordingly, Justice Kennedy found the "nonsectarian" nature of the prayer to no avail: "That the intrusion was in the course of promulgating religion that sought to be civic or nonsectarian rather than pertaining to one sect does not lessen the offense or isolation to the objectors. At best it nar-

87. *Id.* at 678.

88. *Id.* at 679.

89. 505 U.S. 577 (1992).

90. *Id.* at 592-93.

rows their number, at worst increases their sense of isolation and affront.”⁹¹ Thus, Justice Kennedy concluded:

While in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects the balance urged upon us. The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. This is the calculus the Constitution commands.⁹²

Justice Scalia dissented, along with Chief Justice Rehnquist and Justices White and Thomas. Contrasting Justice Kennedy’s opinion in *County of Allegheny*, which he had joined, with the majority opinion in *Lee*, Justice Scalia highlighted what he saw as a fundamental change in Justice Kennedy’s Establishment Clause jurisprudence. As Justice Scalia recalled, the opinion in *County of Allegheny* recognized

that the Establishment Clause must be construed in light of the “[g]overnment policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage.” That opinion affirmed that “the meaning of the Clause is to be determined by reference to historical practices and understandings.” It said that “[a] test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause.”⁹³

In contrast, Justice Scalia characterized the majority opinion in *Weisman* as “conspicuously bereft of any reference to history.”⁹⁴

Responding directly to the majority’s focus on the perspectives of religious minorities, Justice Scalia countered that “[t]he reader has been told . . . very little about the personal interests on the other

91. *Id.* at 594.

92. *Id.* at 596; *cf. id.* at 606 (Blackmun J., concurring) (“The mixing of government and religion can be a threat to free government, even if no one is forced to participate. When the government puts its *imprimatur* on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs.”).

Many Americans who consider themselves religious are not theistic; some, like several of the Framers, are deists who would question Rabbi Gutterman’s plea for divine advancement of the country’s political and moral good. Thus, a nonpreferentialist who would condemn subjecting public school graduates to, say, the Anglican liturgy would still need to explain why the government’s preference for theistic over nontheistic religion is constitutional.

Nor does it solve the problem to say that the State should promote a “diversity” of religious views; that position would necessarily compel the government and, inevitably, the courts to make wholly inappropriate judgments about the number of religions the State should sponsor and the relative frequency with which it should sponsor each. In fact, the prospect would be even worse than that.

Id. at 617 (Souter, J., concurring).

93. *Id.* at 631 (Scalia, J., dissenting) (quoting *County of Allegheny v. Am. Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 657, 670 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part)).

94. *Id.* at 631.

side . . . [, which] are not inconsequential.”⁹⁵ Thus, Justice Scalia proceeded to consider the meaning of public prayer from the perspective of believers, which in his view embodied the historical traditions of the United States and the proper understanding of the Constitution:

Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals, because they believe in the “protection of divine Providence,” as the Declaration of Independence put it, not just for individuals but for societies; because they believe God to be, as Washington’s first Thanksgiving Proclamation put it, the “Great Lord and Ruler of Nations.” One can believe in the effectiveness of such public worship, or one can deprecate and deride it. But the longstanding American tradition of prayer at official ceremonies displays with unmistakable clarity that the Establishment Clause does not forbid the government to accommodate it.⁹⁶

On the basis of this historical analysis, Justice Scalia did not hesitate to favor majoritarian religious perspectives over those of religious minorities and nonbelievers:

The narrow context of the present case involves a community’s celebration of one of the milestones in its young citizens’ lives, and it is a bold step for this Court to seek to banish from that occasion, and from thousands of similar celebrations throughout this land, the expression of gratitude to God that a majority of the community wishes to make. The issue before us today is not the abstract philosophical question whether the alternative of frustrating this desire of a religious majority is to be preferred over the alternative of imposing “psychological coercion,” or a feeling of exclusion, upon nonbelievers. Rather, the question is *whether a mandatory choice in favor of the former has been imposed by the United States Constitution*. As the age-old practices of our people show, the answer to that question is not at all in doubt.⁹⁷

Finally, placing his own gloss on the issue of American religious diversity, Justice Scalia insisted that the interests in promoting joint communal prayer among religions outweighed the interests of nonbelievers:

The Founders of our Republic knew the fearsome potential of sectarian religious belief to generate civil dissension and civil strife. And they also knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration—no, an affection—for one another than voluntarily joining in prayer together, to the God whom they all worship and seek. . . . The Baptist or Catholic who heard and joined in the simple and inspiring prayers of Rabbi Gutterman on this official and patriotic occasion was inoculated from religious bigotry and prejudice in a manner that cannot be replicated. To deprive our society of that important unifying mechanism, in order to spare the nonbeliever

95. *Id.* at 645.

96. *Id.*

97. *Id.* at 645–46 (emphasis in original).

what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law.⁹⁸

4. *Capitol Square Review and Advisory Board v. Pinette*

Finally, in the 1995 case *Capitol Square Review and Advisory Board v. Pinette*, addressing yet another religious display, the Court responded with a variety of opinions, written and joined by numerous combinations of Justices, reflecting the entrenched divisions that had taken hold of the Court's Establishment Clause jurisprudence.⁹⁹ In an opinion written by Justice Scalia, the Court upheld the constitutionality of a display of a Latin cross by a private organization on state capitol grounds.¹⁰⁰ In a section of his opinion joined by three other Justices, Justice Scalia rejected as unworkable the principle that, in allowing the display of the cross, the state could reasonably be perceived as endorsing religion.¹⁰¹ According to Justice Scalia, such an approach, if applied in the context a public school, would require a school district "to guess whether some undetermined critical mass of the community might . . . perceive the district to be advocating a religious viewpoint."¹⁰²

In a dissenting opinion, Justice Stevens relied on *County of Allegheny* and *Lynch* to once again focus on the perspective of the nonadherent:

It is especially important to take into account the perspective of a reasonable observer who may not share the particular religious belief it expresses. A paramount purpose of the Establishment Clause is to protect such a person from being made to feel like an outsider in matters of faith, and a stranger in the political community. If a reasonable person could perceive a government endorsement of religion from a private display, then the State may not allow its property to be used as a forum for that display. No less stringent rule can adequately protect nonadherents from a well-grounded perception that their sovereign supports a faith to which they do not subscribe.¹⁰³

98. *Id.* at 646.

99. 515 U.S. 753 (1995). The opinions included: Justice Scalia's opinion, parts of which constituted the opinion of the Court, joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, Souter, Thomas, and Breyer, and part of which was joined by Chief Justice Rehnquist and Justices Kennedy and Thomas; Justice Thomas's concurring opinion; Justice O'Connor's opinion concurring in part and concurring in the judgment, joined by Justices Souter and Breyer; Justice Souter's opinion concurring in part and concurring in the judgment, joined by Justices O'Connor and Breyer; Justice Stevens' dissenting opinion; and Justice Ginsburg's dissenting opinion.

100. *Id.* at 770.

101. *Id.* at 767 (opinion of Scalia, J.).

102. *Id.*

103. *Id.* at 799–800 (Stevens, J., dissenting) (citation omitted).

Although she concurred in the judgment and in some sections of Justice Scalia's opinion, Justice O'Connor did not concur with his dismissal of the endorsement test on the grounds that it would require the state to anticipate the seemingly unidentifiable perceptions of segments of the community.¹⁰⁴ At the same time, Justice O'Connor found that Justice Stevens' view placed too high a premium on the perspectives of nonadherents.¹⁰⁵

Instead, in further refinement of the endorsement test she had previously articulated in *Lynch* and *County of Allegheny*, Justice O'Connor proposed a standard that takes into account the perceptions of nonadherents, but also injects a higher degree of reasonableness into the analysis:

[T]he endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe. . . . In my view . . . the endorsement test creates a more collective standard to gauge "the 'objective' meaning of the [government's] statement in the community."¹⁰⁶

For Justice O'Connor, such a standard strikes an appropriate balance because it "neither chooses the perceptions of the majority over those of a 'reasonable nonadherent,' nor invites disregard for the values the Establishment Clause was intended to protect."¹⁰⁷ Rather, this approach "simply recognizes[,] . . . [t]here is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion."¹⁰⁸ Accordingly, under this rule, "[a] State has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable."¹⁰⁹

III. RECENT CASES: *ELK GROVE*, *VAN ORDEN*, AND *MCCREARY COUNTY*

As demonstrated in this brief survey of Supreme Court cases, deep and abiding divisions in the interpretation and application of the Establishment Clause often center, in part, on Justices' divergent views toward the relevance and significance of the perspectives of religious minorities and nonbelievers. Likewise, religious perspectives have played a crucial role in more recent Establishment Clause cases, as the Court has repeatedly revisited many of the themes that emerged in pre-*Lemon* cases and profoundly

104. *Id.*

105. *Id.* at 779.

106. *Id.* (O'Connor, J., concurring in part and concurring in the judgment) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor J., concurring)).

107. *Id.* at 780 (citation omitted).

108. *Id.*

109. *Id.*

influenced the Court's Establishment Clause jurisprudence in the decades that followed. The ever-increasing religious diversity in the United States, coupled with increased public attention to the views of nonbelievers, suggests that the future of the Establishment Clause will continue to involve fundamental questions about the impact of religious minority perspectives.

A. Elk Grove Unified School District v. Newdow

In 2004, in *Elk Grove Unified School District v. Newdow*, the Supreme Court finally addressed a practice that, for many years, had been a source of constitutional controversy and confusion: the recitation in public schools of the Pledge of Allegiance, containing the words "under God."¹¹⁰ Although a majority of the Court avoided a substantive Establishment Clause analysis, on the grounds that the plaintiff did not have standing to sue, Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas each filed a concurring opinion addressing many of the substantive constitutional issues raised by the case.

Turning again to historical instances of governmental declarations that invoked religious themes, Chief Justice Rehnquist rejected any concern that the inclusion of the words "under God" violated the Establishment Clause.¹¹¹ Distinguishing the Pledge of Allegiance from the kind of "religious exercise" the Court had struck down in *Lee*, Chief Justice Rehnquist stated that:

The phrase "under God" is in no sense a prayer, nor an endorsement of any religion, but a simple recognition of the fact noted in H.R.Rep. No. 1693, at 2: "From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God."¹¹²

Thus, he found, "[r]eciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one."¹¹³ Rather, he concluded, "participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church."¹¹⁴

Though she joined Chief Justice Rehnquist's concurrence in full, Justice O'Connor issued a concurring opinion of her own, once again clarifying and refining the endorsement test. Perhaps surprisingly, while acknowledging the broad range of religious perspectives that characterize

110. 542 U.S. 1, 5 (2004).

111. *Id.* at 26–31 (Rehnquist, C.J., concurring).

112. *Id.* at 31.

113. *Id.*

114. *Id.*

American society, Justice O'Connor seemed to view religious diversity as a reason for limiting the scope of the endorsement test. Quoting from her concurrence in *Pinette*, Justice O'Connor explained that "because the endorsement test seeks 'to identify those situations in which government makes adherence to a religion relevant . . . to a person's standing in the political community,' it assumes the viewpoint of a reasonable observer."¹¹⁵ Accordingly, "[g]iven the dizzying religious heterogeneity of our Nation, adopting a subjective approach would reduce the test to an absurdity. Nearly any government action could be overturned as a violation of the Establishment Clause if a 'heckler's veto' sufficed to show that its message was one of endorsement."¹¹⁶

In addition, like Chief Justice Rehnquist, Justice O'Connor minimized the religious significance and potential Establishment Clause implications of the phrase "under God." Developing at length a concept that had been mentioned only passingly in two previous Supreme Court cases, Justice O'Connor found that the inclusion of the phrase "under God" represented a permissible form of "ceremonial deism."

Specifically, she declared that:

I believe that government can, in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution. This category of "ceremonial deism" most clearly encompasses such things as the national motto ("In God We Trust"), religious references in traditional patriotic songs such as The Star-Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions ("God save the United States and this honorable Court"). These references are not minor trespasses upon the Establishment Clause to which I turn a blind eye. Instead, their history, character, and context prevent them from being constitutional violations at all.¹¹⁷

Therefore, she continued "[t]his case requires us to determine whether the appearance of the phrase 'under God' in the Pledge of Allegiance constitutes an instance of such ceremonial deism."¹¹⁸ Through an evaluation of the Pledge's "history and ubiquity," "[a]bsence of worship or prayer," "[a]bsence of reference to a particular religion," and "[m]inimal religious content," Justice O'Connor concluded that "[a]lthough it is a close question," the Pledge of Alliance qualifies as permissible under the category of ceremonial deism.¹¹⁹

115. *Id.* at 34 (O'Connor, J., concurring) (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 772 (1995) (O'Connor, J., concurring)).

116. *Id.* at 34-35.

117. *Id.* at 37 (citation omitted).

118. *Id.*

119. *Id.* at 37-43.

Justice O'Connor's analysis is particularly notable for an acceptance of a phrase that arguably reflects a majoritarian religious perspective unlikely to be shared by nonbelievers and many religious minorities. For example, Justice O'Connor reasoned that "[e]ven if taken literally, the phrase [under God] is merely descriptive; it purports only to identify the United States as a Nation subject to divine authority."¹²⁰ However, as Justice Thomas noted in a critique directed at Chief Justice Rehnquist's analysis, "[i]t is difficult to see how this does not entail an affirmation that God exists. Whether or not we classify affirming the existence of God as a 'formal religious exercise' akin to prayer, it must present the same or similar constitutional problems."¹²¹ Moreover, even Justice O'Connor's understanding of the phrase as a "descriptive" declaration of the United States as "a Nation subject to divine authority" excludes the perspective of both the nonbeliever and some religious minorities.

Likewise, the nonbeliever and many religious minorities would find unconvincing Justice O'Connor's further explanation that the Pledge of Allegiance does not violate the Establishment Clause because "[i]t does not refer to a nation 'under Jesus' or 'under Vishnu,' but instead acknowledges religion in a general way: a simple reference to a generic 'God.'"¹²² Indeed, Justice O'Connor was quick to note that "[o]f course, some religions—Buddhism, for instance—are not based upon a belief in a separate Supreme Being."¹²³ The same is true for other minority religions as well, and of course, for nonbelievers.¹²⁴

Yet, rather than finding that, whatever its origins, the phrase "under God" currently sends a message of exclusion, Justice O'Connor instead defended the use of the phrase on the grounds that "one would be hard pressed to imagine a brief solemnizing reference to religion that would adequately encompass every religious belief expressed by any citizen of this Nation."¹²⁵ Under this logic, rather than serving as an impetus for greater sensitivity to different systems of belief or nonbelief, increased religious diversity serves to allow a plainly religious phrase, expressing a particular form of religious belief, to escape constitutional scrutiny. As Justice O'Connor concluded: "The phrase 'under God,' conceived and

120. *Id.* at 40.

121. *Id.* at 48 (Thomas, J., concurring).

122. *Id.* at 42 (O'Connor, J., concurring).

123. *Id.*

124. *Cf.* Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545 (2010). *See also* Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083 (1996); B. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning Over Time*, 59 DUKE L.J. 705 (2010).

125. *Id.*

added at a time when our national religious diversity was neither as robust nor as well recognized as it is now, represents a tolerable attempt to acknowledge religion and to invoke its solemnizing power without favoring any individual religious sect or belief system.”¹²⁶

B. Van Orden v. Perry and McCreary County v. American Civil Liberties Union of Kentucky

In the 2005 companion cases *Van Orden v. Perry*¹²⁷ and *McCreary County v. American Civil Liberties Union of Kentucky*,¹²⁸ the Supreme Court confronted directly many of the issues left unaddressed and unresolved in the opinions in *Elk Grove*, providing a pronounced roadmap for the future of the Establishment Clause. In particular, bringing together many of the themes that had dominated the doctrinal and rhetorical tensions characterizing the Court’s Establishment Clause jurisprudence for nearly half a century, the numerous opinions issued in *Van Orden* reflect a Supreme Court that remains as sharply divided as ever in its understanding of the proper role of governmental participation in religious practices and displays. As a further indication of these divisions, although both cases involved the displays of the Ten Commandments on public grounds and both cases resulted in five-to-four rulings, the Court held that the display in *Van Orden* was constitutionally permissible¹²⁹ and the display in *McCreary* violated the Establishment Clause.¹³⁰

In *Van Orden*, the Court considered the constitutionality of a display, on the Texas State Capitol grounds, of a monument inscribed with the Ten Commandments.¹³¹ In a plurality opinion joined by Justices Scalia, Kennedy, and Thomas, Chief Justice Rehnquist found that the display did not violate the Establishment Clause.¹³² Chief Justice Rehnquist introduced his analysis by posing a dichotomy between “the strong role played by religion and religious traditions throughout our Nation’s history [and] . . . the principle that governmental intervention in religious matters can itself endanger religious freedom.”¹³³

On the basis of this supposed dichotomy, he further posited that some of the Court’s Establishment Clause decisions “pointed to *Lemon v.*

126. *Id.*

127. 545 U.S. 677 (2005).

128. 545 U.S. 844 (2005).

129. *Van Orden*, 545 U.S. at 692.

130. *McCreary*, 545 U.S. at 881.

131. *Van Orden*, 545 U.S. at 681.

132. *Id.*

133. *Id.* at 683.

Kurtzman as providing the governing test” while others “simply have not applied the *Lemon* test [or] . . . have applied it only after concluding that the challenged practice was invalid under a different Establishment Clause test.”¹³⁴ Finally, after casting additional doubt on the abiding vitality of *Lemon*,¹³⁵ Chief Justice Rehnquist asserted, without elaboration, that the *Lemon* test was simply “not useful in dealing with the sort of passive monument” at issue in *Van Orden*.¹³⁶ In rejecting *Lemon*, the plurality opinion rendered irrelevant any consideration of the impact the monument of the Ten Commandments might have on the perceptions and sensitivities of religious minorities and nonbelievers.

Relying instead on an approach that, in earlier cases, both he and a number of other Justices had substituted for the *Lemon* test, Chief Justice Rehnquist concluded that “our analysis is driven both by the nature of the monument and by our Nation’s history.”¹³⁷ Accordingly, after quoting *Lynch*’s depiction of an “unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789,” the opinion proceeded to survey examples of governmental involvement in religious statements and activities.¹³⁸ Yet, while majoritarian—or even some minority—religious perspectives may find unremarkable such forms of governmental support of religion, to nonbelievers and many religious minorities, the government’s endorsement of the Ten Commandments sends a message of exclusion.

Indeed, this concern did not escape Chief Justice Rehnquist, who returned to another approach previously developed in opinions permitting public religious displays or prayer. Without denying the religious origins and substance of the Ten Commandments, Chief Justice Rehnquist attempted to minimize the religious function of the Ten Commandments within American society.

Thus, on the one hand, he conceded: “Of course, the Ten Commandments are religious—they were so viewed at their inception and so remain. The monument, therefore, has religious significance. According to Judeo-Christian belief, the Ten Commandments were given to Moses by God on Mt. Sinai.”¹³⁹ Nevertheless, he added that “Moses was a lawgiver as well as a religious leader. And the Ten Commandments have an undeniable

134. *Id.* at 685–86 (citations omitted).

135. *Id.* at 686 (“Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence.”).

136. *Id.*

137. *Id.*

138. *Id.* at 686–90 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984)).

139. *Id.* at 690.

historical meaning.”¹⁴⁰ Moreover, as he put it, the Ten Commandment display in this case “has a dual significance, partaking of both religion and government.”¹⁴¹ Therefore, he concluded, “[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.”¹⁴² Though Chief Justice Rehnquist supported this conclusion with citations to cases such as *Lynch*, *Marsh*, and *McGowan*, to the nonadherent, his efforts to downplay the religious nature of the Ten Commandments on the basis of their historical value to the contrary rings unconvincing, if not disingenuous.¹⁴³

Somewhat ironically, in responding to the plurality opinion, Justice Thomas delineated at some length the religious significance of the Ten Commandments and the effect of the display on the sensitivities of the nonadherent. Repeating his critique of Chief Justice Rehnquist’s analysis in *Elk Grove*, Justice Thomas bluntly portrayed the Court’s precedents as “attempt[ing] to avoid declaring all religious symbols and words of longstanding tradition unconstitutional, by counterfactually declaring them of little religious significance.”¹⁴⁴ Justice Thomas rejected these attempts as unappealing and unsuccessful, finding it undeniable that “words such as ‘God’ have religious significance.”¹⁴⁵ Indeed, returning to the theme he had developed in *Elk Grove*, Justice Thomas considered the Pledge of Allegiance from the perspective of a nonadherent, finding the phrase “under God” to be “anathema to those who reject God’s existence and a validation of His existence to those who accept it.”¹⁴⁶ Further, he argued, “[t]elling either nonbelievers or believers that the words ‘under God’ have no meaning contradicts what they know to be true. Moreover, repetition does not deprive religious words or symbols of their traditional meaning.”¹⁴⁷

Likewise, Justice Thomas rejected as unavailing the “reasonable observer” standard that Justice O’Connor had applied to evaluate the nonadherent’s perceptions of governmental involvement in a religious practice or display.¹⁴⁸ Instead, he considered the perspective of the

140. *Id.*

141. *Id.* at 692.

142. *Id.* at 690.

143. *Cf.* Laycock, *supra* note 10, at 1220–21. In addition, religious adherents may likewise take offense at attempts to downplay the religious significance of symbols and activities they consider sacred. *See, e.g.,* David M. Cobin, *Crèches, Christmas Trees and Menorahs: Weeds Growing in Roger Williams’ Garden*, 1990 WIS. L. REV. 1597 (1990); Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831 (2009).

144. *Van Orden*, 545 U.S. at 694 (Thomas, J., concurring).

145. *Id.* at 695.

146. *Id.* at 696.

147. *Id.*

148. *Id.*

nonadherent who “may well be more sensitive than the hypothetical ‘reasonable observer,’ or who may not know all the facts.”¹⁴⁹ For such an individual, the reasonableness standard “fails to capture completely the honest and deeply felt offense he takes from the government conduct.”¹⁵⁰

However, notwithstanding the careful focus Justice Thomas placed on the sensitivities of the nonadherent, he joined the plurality opinion, praising Chief Justice Rehnquist for “properly recogniz[ing] the role of religion in this Nation’s history and the permissibility of government displays acknowledging that history.”¹⁵¹ In fact, according to Justice Thomas, “[t]here is no question that, based on the original meaning of the Establishment Clause, the Ten Commandments display at issue here is constitutional” because “[i]n no sense does Texas compel petitioner Van Orden to do anything. The only injury to him is that he takes offense at seeing the monument.”¹⁵² Effectively, then, though he emphasized the perspective of the nonadherent, Justice Thomas ultimately found that perspective irrelevant to his understanding of the Establishment Clause.

Though he likewise joined Chief Justice Rehnquist’s plurality opinion, Justice Scalia added a two-sentence concurrence of his own, articulating an approach wholly dismissive of the relevance of religious minority perspectives. Justice Scalia stated categorically that “there is nothing unconstitutional in a State’s favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.”¹⁵³ Finally, though he did not join the plurality opinion, Justice Breyer cast the deciding vote in favor of allowing the display, on the grounds that it held a “mixed but primarily nonreligious purpose.”¹⁵⁴

In sharp contrast to these views, again illustrating the deep and fundamental divisions among the Justices in their understanding of the Establishment Clause, the dissenters in *Van Orden* characterized the display of the Ten Commandments as an unquestionably impermissible endorsement of a sectarian religious position. As Justice Stevens stated succinctly: “The message transmitted by Texas’ chosen display is quite plain: This State endorses the divine code of the ‘Judeo-Christian’ God.”¹⁵⁵

149. *Id.*

150. *Id.* at 696–97.

151. *Id.* at 692.

152. *Id.* at 694.

153. *Id.* at 692 (Scalia, J., concurring).

154. *Id.* at 703 (Breyer, J., concurring).

155. *Id.* at 707 (Stevens, J., dissenting).

Indeed, in the course of his lengthy dissenting opinion, joined by Justice Ginsburg, Justice Stevens forcefully emphasized the religious nature of the Ten Commandments and the corresponding effect of the display on nonbelievers and various religious minorities. Noting “[t]he profoundly sacred message embodied by the text” of the Ten Commandments, Justice Stevens declared that the display “projects not just a religious, but an inherently sectarian, message.”¹⁵⁶ Moreover, he argued:

Even if . . . the message of the monument, despite the inscribed text, fairly could be said to represent the belief system of all Judeo-Christians, it would still run afoul of the Establishment Clause by prescribing a compelled code of conduct from one God, namely a Judeo-Christian God, that is rejected by prominent polytheistic sects, such as Hinduism, as well as nontheistic religions, such as Buddhism. And, at the very least, the text of the Ten Commandments impermissibly commands a preference for religion over irreligion.¹⁵⁷

Reflecting upon increasingly diverse approaches to religion within American society, Justice Stevens insisted that the Establishment Clause demands careful attention to the perspectives of those who do not share the message expressed by the display of the Ten Commandments:

Recognizing the diversity of religious and secular beliefs held by Texans and by all Americans, it seems beyond peradventure that allowing the seat of government to serve as a stage for the propagation of an unmistakably Judeo-Christian message of piety would have the tendency to make nonmonotheists and nonbelievers “feel like [outsiders] in matters of faith, and [strangers] in the political community.”¹⁵⁸

Instead, according to Justice Stevens, the interpretation and application of the Establishment Clause evolves along with the changes in the religious makeup of the United States.¹⁵⁹ Thus, he acknowledged that “the requirement that government must remain neutral between religion and irreligion would have seemed foreign to some of the Framers; so too would a requirement of neutrality between Jews and Christians.”¹⁶⁰ However:

As religious pluralism has expanded, so has our acceptance of what constitutes valid belief systems. The evil of discriminating today against atheists, ‘polytheists[,] and believers in unconcerned deities,’ is in my view a direct descendent of the evil of discriminating among Christian sects. The Establishment Clause thus forbids it and, in turn, prohibits Texas from displaying the Ten Commandments monument the plurality so casually affirms.¹⁶¹

156. *Id.* at 717.

157. *Id.* at 719 (citation omitted).

158. *Id.* at 720.

159. *Id.* at 734–35.

160. *Id.* at 734.

161. *Id.* at 734–35 (citation omitted).

In short, he declared, “the Establishment Clause requires the same respect for the atheist as it does for the adherent of a Christian faith.”¹⁶²

The debates between the Justices in *Van Orden* carried over into its companion case, *McCreary County v. American Civil Liberties Union of Kentucky*.¹⁶³ This time, the majority of the Court held that displays of the Ten Commandments in courthouses violated the Establishment Clause.¹⁶⁴ Justice Scalia dissented, expounding upon the themes he developed in *Van Orden*. After once again casting serious doubt over the abiding viability of *Lemon v. Kurtzman*, Justice Scalia labeled “demonstrably false” the majority’s conclusion that “the government cannot favor religion over irreligion,” and challenged the suggestion that “the posting of the Ten Commandments violates the principle that the government cannot favor one religion over another.”¹⁶⁵

In addition, Justice Scalia took the opportunity in his dissent in *McCreary* to respond to Justice Stevens’ dissenting opinion in *Van Orden*. In a passage that exemplifies the divide that permeates the Justices’ views of the relevance of religious minority perspectives to the Establishment Clause, Justice Scalia highlighted Justice Stevens’ assertion that Justice Scalia’s position would “marginaliz[e] the belief systems of more than 7 million Americans who adhere to religions that are not monotheistic.”¹⁶⁶ In a stark expression of his willingness to allow the government to favor majoritarian religious perspectives, Justice Scalia argued that

in the context of public acknowledgments of God there are legitimate *competing* interests: On the one hand, the interest of that minority in not feeling “excluded”; but on the other, the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication *as a people*, and with respect to our national endeavors. Our national tradition has resolved that conflict in favor of the majority.¹⁶⁷

Finally, Justice O’Connor, once again noting the increasing religious diversity in the United States, called for increasing attention to the perspectives of religious minorities:

It is true that many Americans find the Commandments in accord with their personal beliefs. But we do not count heads before enforcing the First Amendment. Nor can we accept the theory that Americans who do not accept the Commandments’ validity are outside the First Amendment’s protections. . . . It is true that the Framers lived at a time when

162. *Id.* at 711.

163. 545 U.S. 844 (2005).

164. *Id.* at 881.

165. *Id.* at 893.

166. *Id.* at 899 (quoting *Van Orden*, 545 U.S. at 719 n.18 (Stevens, J., dissenting)).

167. *Id.* at 900.

our national religious diversity was neither as robust nor as well recognized as it is now. They may not have foreseen the variety of religions for which this Nation would eventually provide a home. They surely could not have predicted new religions, some of them born in this country. But they did know that line-drawing between religions is an enterprise that, once begun, has no logical stopping point. They worried that “the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects.” The Religion Clauses, as a result, protect adherents of all religions, as well as those who believe in no religion at all.¹⁶⁸

CONCLUSION

As Kent Greenawalt has observed, “since feelings of exclusion among members of minorities are so important, and since the majority (Christians) take cultural dominance so much for granted that they may not perceive endorsement of their position, judges should attend especially to how reasonable members of minorities may react.”¹⁶⁹ Reflecting on his own experiences and perspectives, Greenawalt added that “[w]hen I was a child and we gathered around a tree in our public school to sing Christmas carols, it did not occur to me that this was anything other than natural.”¹⁷⁰

Greenawalt’s thoughtful reflections prove valuable in uncovering some of the latent majoritarian religious perspectives that continue to characterize the Supreme Court’s Establishment Clause jurisprudence. Most recently, in the 2010 case *Salazar v. Buono*, the Supreme Court decided another case involving the meaning of a public religious symbol.¹⁷¹ This time, the religious symbol was a Latin cross that was placed on public land in the Mojave Desert to honor American soldiers who fell in World War I.¹⁷²

In his plurality opinion, Justice Kennedy noted that the cross is “certainly a Christian symbol,” but he asserted that “the cross was not emplaced on Sunrise Rock to promote a Christian message”¹⁷³ Instead, he found, the cross was “intended simply to honor our Nation’s fallen soldiers.”¹⁷⁴ In a concurring opinion, Justice Alito likewise acknowledged that “[t]he cross

168. *Id.* at 884 (O’Connor, J., concurring) (citations omitted).

169. Greenawalt, *supra* note Error! Bookmark not defined., at 374.

170. *Id.* at 374 n.207.

171. 130 S. Ct. 1803, 1811 (2010).

172. *Id.*

173. *Id.* at 1816.

174. *Id.* at 1816–17.

is of course the preeminent symbol of Christianity, and Easter services have long been held on Sunrise Rock.”¹⁷⁵ Nevertheless, he concluded that

. . . the original reason for the placement of the cross was to commemorate American war dead and, particularly for those with searing memories of The Great War, the symbol that was selected, a plain unadorned white cross, no doubt evoked the unforgettable image of the white crosses, row on row, that marked the final resting places of so many American soldiers who fell in that conflict.¹⁷⁶

Once again, however, other Justices expressed a very different understanding of the meaning of the cross. In a dissenting opinion joined by Justices Ginsburg and Sotomayor, Justice Stevens responded:

I cannot agree that a bare cross such as this conveys a nonsectarian meaning simply because crosses are often used to commemorate “heroic acts, noble contributions, and patient striving” and to honor fallen soldiers. The cross is not a universal symbol of sacrifice. It is the symbol of one particular sacrifice, and that sacrifice carries deeply significant meaning for those who adhere to the Christian faith. The cross has sometimes been used, it is true, to represent the sacrifice of an individual, as when it marks the grave of a fallen soldier or recognizes a state trooper who perished in the line of duty. Even then, the cross carries a religious meaning. But the use of the cross in such circumstances is linked to, and shows respects for, the individual honoree’s faith and beliefs.¹⁷⁷

As Justice Stevens reminds us, in current cases and for the foreseeable future, different approaches to the relevance and significance of religious perspectives, including those of religious minorities and nonbelievers, will continue to play a central role in the interpretation and application of the Establishment Clause.

175. *Id.* at 1822 (Alito, J., concurring).

176. *Id.* at 1822.

177. *Id.* at 1836 n.8 (Stevens, J., dissenting) (quoting *id.* at 1820 (majority opinion)).

