Religious Liberties

In Whose Name We Pray: Restoring the Establishment Clause in *Town of Greece v. Galloway*

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Note from the Editor:

This article is a discussion about the Establishment Clause issue in the *Town of Greece v. Galloway* case at the U.S. Supreme Court. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to further discussion about *Galloway*, the Establishment Clause, and the First Amendment in general. To this end, we offer links below to different perspectives on the issue, and we invite responses from our audience. To join this debate, please email us at info@fed-soc.org.

Related Links:

- Brief for Respondent-Appellee, Town of Greece v. Galloway, No. 12-696 (argued Nov. 6, 2013): http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-696_resp.authcheckdam.pdf
- Brief for Petitioner-Appellant, Town of Greece v. Galloway, No. 12-696 (argued Nov. 6, 2013): http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-696_pet.authcheckdam.pdfapp
- Brief for Erwin Chemerinsky and Alan Brownstein as Amici Curiae Supporting Respondents, Town of Greece v. Galloway, No. 12-696 (argued Nov. 6, 2013): http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-696_amici_chemerisk_Greece.authcheckdam.pdf
- Daniel March, *Prayer and the machinery of the state*, American Civil Liberties Union (Sept. 26, 2013): https://www.aclu.org/blog/religion-belief/symposium-prayer-and-machinery-state
- Town of Greece v. Galloway, Alliance Defending Freedom: https://www.alliancedefendingfreedom.org/page/free-to-pray/

Introduction

The Supreme Court heard arguments this Term in *Town of Greece v. Galloway*,[1] a significant constitutional case in which the parties presented two very different views of the what the Establishment Clause requires in the public square.

I. Town of Greece's Benign and Inclusive Legislative Prayer Practice

Greece is a town in New York that—like many—opens its town board meetings with a prayer. The practice of having invocations at the outset of deliberative government bodies is called legislative prayer.

Every house of worship in town is invited to volunteer; also any town resident may volunteer. Those who volunteer are placed in the queue on a first-come, first-served basis. In addition to the Christian majority of prayer-givers (reflecting the large Christian majority of the town), every non-Christian who volunteers has been welcomed, including not just adherents of common faiths like Judaism, but also a Wiccan (*i.e.*, witch) and adherents of other small-minority faiths.

Even an atheist was scheduled to pray when he volunteered, though he spared the town an awkward moment when he withdrew. The plaintiffs in this lawsuit were also invited to pray. People of any faith or no faith are allowed without discrimination. No one is turned away.

Two town residents—one Jewish and one atheist—filed suit. The Western District of New York sided with the town, but the U.S. Court of Appeals for the Second Circuit reversed. This is the eleventh reported appellate case since 2004 involving legislative prayer, with two of those opinions dismissing the case for lack of standing.

II. The Supreme Court Upholds Legislative Prayer in *Marsh v. Chambers*

In 1983 the Supreme Court upheld legislative prayer in *Marsh v. Chambers*.[2] At issue was Nebraska's practice, in which prayers were offered for sixteen years by Rev. Dr. Robert Palmer, a Presbyterian minister who was paid a salary for his services.

Chief Justice Warren Burger noted for the 6-3 majority that the very same week the First Congress wrote the Establishment Clause, it also passed a law creating the offices of House Chaplain and Senate Chaplain, who would be ordained clergymen paid a federal salary, and whose most public duty would be to offer daily prayers during Congress' sessions.[3]

The Court declined to apply the *Lemon* test (discussed below), reasoning that this history—conjoined with the ubiquity of legislative prayer at the federal, state, and local levels, and its unbroken history from before the Framing to the present—demonstrates it does not violate the Establishment Clause. Chief Justice Burger wrote that so long as the prayer opportunity is not exploited to proselytize one faith (or exceptionally aggressive advocacy absent an explicit call to convert), or disparage other faiths, legislative prayers are constitutional, and courts should

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not parse their content.[4]

Three liberal Justices dissented. They would have applied *Lemon*, and said in doing so that any group of law students would conclude legislative prayer is unconstitutional.[5] And they were correct, because the *Lemon* test is so hostile to religion that many state actions intersecting religion—including prayer—violate it.

III. The Second Circuit Invalidated Town of Greece's Legislative Prayer Practice with an Analysis that Would Invalidate Congress' Practice

Writing for the Second Circuit, Judge Guido Calabresi crafted a multifactor test for legislative prayers, saying the court must consider the totality of the circumstances, and concluding that the prayer practice endorsed religion in violation of the Establishment Clause.[6] In applying the endorsement test, Judge Calabresi employed a version of the very same *Lemon* test that the Supreme Court refused to use for legislative prayer.

This built upon a trend growing since 2004, when legislative prayer cases began in earnest, invariably because someone invoked the name of Jesus Christ during their prayer. Some courts have held that praying "in Jesus' name" is an unconstitutional endorsement of Christianity, creating a circuit split. These courts have allowed no exception for those whose faith requires uttering such words, as some Christians' faiths require even in public prayer before mixed audiences.[7]

The Second Circuit found problematic that (1) most prayers used identifiably Christian content (which the court called "sectarian"—most especially praying in Jesus' name), (2) that most volunteer prayer-givers were Christian (it would be surprising if they were not, given the town's demographics), and (3) prayer-givers used first-person plural pronouns when praying (*e.g.*, "Let us pray," "Lord, we ask").[8]

As I argue in a 2008 law review article, no federal judge can formulate a rule to distinguish sectarian prayer from nonsectarian prayer *ex ante*, because all prayer content is premised on theological propositions, and there are no neutral legal principles upon which a judge can draw a line to say which theological concepts are so inclusive as to be nonsectarian and therefore constitutional, versus which concepts are so narrow that the Constitution forbids their utterance.[9] Courts have neither the training nor the mandate to act as theological review boards.

The Second Circuit disagreed. The court designated "sectarian" prayers that referenced (1) Jesus, (2) the Holy Spirit, (3) the Trinity, (4) salvation, and (5) Christian holidays.[10] Many prayers included at least one such feature, and coupled with the other factors discussed, invalidated the prayer practice.

Yet the Town of Greece's prayer practice is far more religiously diverse and ecumenical than Congress'. I represent Members of Congress as *amici curiae* in this case. In my cert-stage brief for Members of Congress, I examined Congress' modern prayer practice (*i.e.*, all House prayers from the 112th Congress, which was 2011–2012). A majority of those prayers had sectarian references,[11] 97% were offered by Christians,[12] and (again) 97% used plural pronouns.[13]

If the Second Circuit is correct, then Congress has been violating the Constitution since the Establishment Clause was ratified in 1791.

IV. The *Lemon*/Endorsement Test Should Be Abandoned

In 1947 the Supreme Court fundamentally reinterpreted the First Amendment's Establishment Clause in *Everson v. Board of Educ.*,[14] where Justice Hugo Black for the Court (1) incorporated the Establishment Clause against the states through the Fourteenth Amendment (incorrectly, since unlike most of the Bill of Rights, the Clause is a federalism provision pertaining only to a national church), and (2) held the Establishment Clause requires a principle of neutrality, both between religions and concerning religion generally. This latter part is where the Court quoted a private letter by Thomas Jefferson to adopt the metaphor of the wall of separation between church and state, described by Chief Justice William Rehnquist as "a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned."[15]

In the twenty-four years subsequent to *Everson*, the Court reevaluated numerous government actions under this new neutrality principle. Initially the Court was broadly accommodationist, proclaiming Americans "are a religious people whose institutions presuppose a Supreme Being . . . When the state *encourages religious instruction* or cooperates with religious authorities . . . [it] respects the religious nature of our people. . . . [W]e find no constitutional requirement for government . . . to throw its weight against efforts to *widen* the scope of religious influence."[16]

Then came the Warren Court, with a sea change toward strict separation. More than a decade of separationist decisions followed, reaching its furthest extent in 1968 when the Court made an exception for Establishment Clause cases to the bar on taxpayer standing,[17] and emphasized that the Constitution does not allow government to prefer religious faith to atheism.[18]

In 1971 the Court tried to synthesize these disparate decisions into a unified framework that effectively exiled the original Establishment Clause. In *Lemon v. Kurtzman*, the Court held that government action touching upon religion is unconstitutional unless it (1) has a primarily secular purpose, (2) has an effect that neither advances nor inhibits religion, and (3) does not excessively entangle government with religion.[19]

To say the least, the *Lemon* test was confusing *ab initio*. Courts could not reliably determine whether policymakers' secular purposes predominated over religious motivations; no government action was ever invalidated for having an effect that inhibited religion (which happens all the time), but manifold government actions were held to effectively advance religion; and no one could agree on whether entanglements were excessive. Sometimes the Court would say *Lemon* was only a series of "signposts" rather than a test,[20] and other times—like *Marsh*—the Court unceremoniously set *Lemon* aside.

Trying to salvage this malformed rule, the Court revised *Lemon* into the endorsement test. In *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, the Court by a 5-4 vote held that a crèche inside a Pittsburgh-area county courthouse was unconstitutional, but by a 6-3 vote held that a menorah

outside was permissible.[21] (Specifically, three Justices voted to strike down both, two voted to strike one and uphold the other, and four Justices said they were both constitutional.) In an opinion written by Justice Harry Blackmun, the Court narrowly adopted Justice Sandra Day O'Connor's endorsement theory as a revision of the *Lemon* test.[22]

Justice O'Connor created that test in her concurring opinion in *Lynch v. Donnelly*,[23] where (ironically) she voted to uphold a nativity display. Adopting this novel theory in *Allegheny*, five Justices held that the second prong of *Lemon* (the effects prong), is violated if a hypothetical, reasonable observer would conclude that government was endorsing religion.

Even though *Allegheny* said the Establishment Clause was violated if a challenged state action "either has the purpose or effect of endorsing religion,"[24] the test was originally construed as only revising *Lemon*'s effects prong. But in its 1997 *Agostini* case, the Court collapsed the third *Lemon* prong into the second, making entanglement just a factor in determining whether government is advancing religion.[25] Then in its 2005 *McCreary* case, the Court held that the purpose prong, too, is violated if the purpose is one that makes a reasonable person believe government is endorsing religion.[26] So by 2005, the endorsement test had subsumed all three prongs of *Lemon*.

The *Galloway* petitioner's brief argues exceptionally well that the endorsement test has proven an unmitigated failure.[27] Judges can never agree on whether a reasonable person would feel government is endorsing religion, or on what basis those feelings would arise. It is hopelessly subjective, so often a separationist judge finds that most challenged measures are an endorsement, while accommodationist judges often do not.

As I explained in my merits-stage brief for Members of Congress, the endorsement test has thrown the Establishment Clause into such disarray that the Court's jurisprudence borders on incoherence,[28] baffling the lower courts to such a degree that courts looking at similar facts can easily reach opposite results.[29] Ironically, one thing both separationist scholars and accommodationist scholars can agree upon is that the endorsement test is not a correct understanding of the Establishment Clause, nor does it provide a foundation for a workable jurisprudence.[30]

The Court has recently suggested it agrees. In another 2005 case, *Van Orden v. Perry*, the Court did not apply the endorsement test when it upheld a Ten Commandments display outside the Texas State Capitol.[31] This was a very rare victory for religious liberty under the Establishment Clause, but the Court could not agree on a majority opinion. Instead, Chief Justice Rehnquist wrote for four Justices (including Justice Kennedy) that *Lemon* should not apply to longstanding passive displays.[32] Justice Stephen Breyer concurred in the judgment, writing that for such "borderline cases," "I see no test-related substitute for the exercise of legal judgment."[33] This new "legal judgment" test will likely never be adopted, as it is the ultimate manifestation of Justice Potter Stewart's, "I know it when I see it." But the net result is that five Justices concluded the *Lemon*/endorsement test did not apply.

The endorsement test is the archetypal unworkable test, which alone is sufficient to hold that *stare decisis* does not require continued adherence to it.[34] But beyond that, it satisfies all the elements for overruling precedent that Justice Kennedy reaffirmed for the Court in *Citizens United v. FEC*,[35] and that Chief Justice John Roberts discussed in his concurrence[36]—a particularly relevant case as a modern restatement of *stare decisis* in a First Amendment context. The endorsement test has engendered no reliance, does not allow the law to develop in a consistent and predictable fashion, and does more to degrade the rule of law than to build respect for the judicial process.

A quarter-century of experience confirms Justice Kennedy's prescient assessment that the endorsement test is illegitimate in part because it "border[s] on latent hostility toward religion."[37] The Constitution contains no such hostility; rather the opposite. *Lemon* and *Allegheny* should be overruled.

V. The Court Should Adopt Kennedy's Coercion Test from the *Allegheny* Dissent—the Original Meaning of the Establishment Clause

The Court should replace the *Lemon*/endorsement test with the coercion test that Justice Kennedy articulated in his partial dissenting opinion in *Allegheny*, joined by Chief Justice Rehnquist and Justices Byron White and Antonin Scalia. "Government may not coerce anyone to support or participate in any religion or its exercise [or] give direct benefits to religion to such a degree that it in fact establishes a state religion, or tends to do so."[38]

This is the only test that should be acceptable to originalists. The Establishment Clause was written to prohibit an official national religion similar to the Church of England.[39] Such establishments have features like imposing dedicated taxes for church revenues and mandatory church attendance.[40] The worldwide bestseller *The Pilgrim's Progress* was written by John Bunyan during the years he was imprisoned for preaching the gospel of Jesus Christ without a government license.

That is what real coercion looks like, and beyond that, all the Clause forbids is government action that is so extreme that it amounts to direct and actual establishment. Examples of that would include the licensing system Bunyan was violating, or the British head of state also serving as head of the Church of England, such as appointing the Archbishop of Canterbury and other top clergy, and the Crown or Parliament formally adopting a religious doctrinal creed to make an elaborate system of theological beliefs official national policy.

As with other provisions in the Bill of Rights, these historically-based infringements on liberty are what the Framers were codifying a right against. As James Madison wrote in his *Remonstrance* to address both establishment and free exercise (foreshadowing how the Constitution would codify them as separate First Amendment rights), "The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."[41]

The debates in the First Congress following James Madison's introduction of the original version of this provision continue this theme:

> Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience . . . [that

> is,] laws of such a nature as might infringe the rights of conscience, and establish a national religion … therefore, the amendment would be made in such a way as to secure the rights of conscience . . . but not to patronise those who professed no religion at all . . . the people feared one sect might . . . establish a religion to which they would compel others to conform.[42]

The Framing-era discussion revolved around these anti-coercion sentiments.[43] It was clearly the original meaning of the Establishment Clause. It was never to create a secular society.

While there is not a majority of originalists on the Supreme Court, there appears to be a majority for the coercion test on the current Court. Although Justice Kennedy also considers peer pressure coercive when children are involved[44] (over Justice Scalia's energetic dissent for a 5-4 Court[45]), it is very likely that a majority will reject respondent's new argument (raised for the first time in their brief at the High Court) that Greece's practice is unconstitutional because objectors could receive unwelcome attention for refusing to participate in the prayer before presenting a request before the town board, and that such peer pressure is coercive for adults, just as for children.

Yet as the petitioner's lawyer argued during oral arguments, such requests are made in a separate meeting session where there are no prayers, and citizens freely come and go during the meeting, making it unlikely that anyone would track who was present and who was not during invocations. It is unlikely either Chief Justice Roberts or Justice Kennedy would accept such an argument that necessarily rejects the premise that, in America's free society, participation in the democratic process requires adult citizens to have the courage of their convictions to stand and be counted.

VI. A Valuable Debate for the Federalist Society on Religious Liberty and Principled Constitutional Interpretation

Secularists are not the only ones opposing the original meaning of the Establishment Clause. This original meaning also causes consternation for some libertarians who are evidently uncomfortable with expressions or displays of traditional religious faith. Some are even willing to push for banishing vibrant religiosity from public life. This is a worthy topic of discussion for the Federalist Society, as it allows for an energetic and hopefully beneficial debate within our own ranks.

The Framers adhered to the classical view of humanity—which is also the biblical view—that human beings are deeply flawed (*i.e.*, sinners), and as such governmental power is necessary to protect the rights of the weak and poor against the powerful. But because those who serve in government are as morally flawed as those they govern, the power of the state must be strictly limited. As James Madison put it in *The Federalist*, "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary… you must first enable the government to control the governed; and in the next place oblige it to control itself."[46]

The Constitution is primarily about limited government, not about maximizing personal liberty or equality. It is limited both in the powers of government that it enumerates and structures, as well as in those few matters that it takes out of the hands of the voters, foreclosing the usual democratic process by declaring them constitutional mandates. Then—and only then—are judges empowered to supersede the actions of the political branches.

The Framers believed that limited government only endures when people govern themselves. This self-government was portrayed as living consistent with Judeo-Christian moral philosophy (which to a large extent a person can do without personally believing many of the theological doctrines of those faiths, as we see with several Founders who were not particularly religious).[47] The constitutional order is premised both on a profound mistrust of government power and an equally profound mistrust of how human beings act when unconstrained by concern over government-imposed consequences for wrong choices.

These beliefs were ubiquitous at the Framing. The same year the First Congress wrote the First Amendment, it also reenacted the Northwest Ordinance, which reads in part, "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[48]

These concepts were so prominent in early American political thought that George Washington's Farewell Address dedicated space to extol "religion and morality" as the twin indispensable "great pillars" for civil government and economic prosperity. His successor John Adams wrote, "Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."[49] And his successor Thomas Jefferson (one of the most secular Founders) believed that republican self-government could persist only if America had a virtuous citizenry, manifested in their personal and family lives.[50]

In fact, such presidential sentiments were ubiquitous for two centuries. As strange of such concepts seem to some today, it was only in recent years that they have ebbed from the seat of government.[51] America's fortieth president not only echoed our first, second, and third presidents—he expanded upon them. As President Ronald Reagan, whose judicial appointments gave rise to originalism in our time, said:

> The truth is, politics and morality are inseparable. And as morality's foundation is religion, religion and politics are necessarily related. We need religion as a guide. We need it because we are imperfect, and our government needs the church, because only those humble enough to admit they're sinners can bring to democracy the tolerance it requires in order to survive.
>
> The state is nothing more than a reflection of its citizens; the more decent the citizens, the more decent the state. If you practice a religion, whether you're Catholic, Protestant, Jewish, or guided by some other faith, then your private life will be influenced by a sense of moral obligation, and so, too, will your pubic life. . . .
>
> Without God, there is no virtue, because there's no prompting of the conscience. Without God, we're mired

> in the material. . . . Without God, there is a coarsening of society. And without God, democracy will not and cannot long endure. If we ever forget that we're one nation under God, then we will be a nation gone under.[52]

Some may say that these are outdated concepts, even if Reagan believed in them. But they were not outdated in 1791 when the Establishment Clause was adopted.

For those who advocate fidelity to the Constitution, the course is clear: If someone finds a government display or expression involving faith objectionable, they can avail themselves of the democratic process to pressure elected leaders to change, or to replace those leaders with ones more to the objector's liking. That is how citizens bring about change regarding expressions of belief in politics, economics, and other issues, including religious viewpoints.

If these objectors are unable to succeed through democracy, there is no warrant in the Establishment Clause for a federal judge to supersede those elected leaders, unless the challenged action is coercive or a true religious establishment (which is extremely unlikely in modern America). That is what limited government looks like, enabling citizens to exercise self-rule through republican government by politicians answerable to the voters, with the courts only able to act when We the People enshrine a particular rule in the constitutional text.

VI. Conclusion

This is an important case. You must look back many years to find a case decided on the merits on purely Establishment Clause grounds that originalists would call a victory. Given that the U.S. Solicitor General also weighed in with a very friendly brief supporting petitioners,[53] this case seems poised to be at minimum a victory reaffirming *Marsh*.

But *Galloway* is an appropriate vehicle for also revisiting the endorsement test, and even *Lemon* (if those two can be distinguished at all). The facts are clean. The lower court invalidated the town's prayers under *Lemon*/endorsement, and now both parties are arguing that the applicable rule is coercion. Beyond that, the Alliance Defending Freedom (ADF)—representing the petitioner—recruited Thomas Hungar of Gibson Dunn & Crutcher as lead counsel in the case, one of the finest Supreme Court litigators in the nation, appearing in this case for his twenty-sixth time before the Justices. His style and approach are well-suited to making the broader argument on this issue while ensuring the Court can recur to *Marsh* if a majority of the Justices are unwilling to go further.

Not a single question from the Justices during oral argument on November 6, 2013, directly discussed overruling *Lemon* or *Allegheny*,[54] so it is unlikely that the Court will do so in this case. It would be easy for a judicial minimalist to note simply that neither party is asking the Court to overrule *Marsh*, that *Marsh* eschewed *Lemon* when legislative prayer is at bar, and that this case can easily be resolved in petitioner's favor by reaffirming *Marsh*. But the broader issue was fully briefed, so there could be a helpful concurring opinion forthcoming advocating that position. And at minimum, in articulating the reasons for its judgment, the Court in its majority opinion is very likely to embrace principles that are inconsistent with the endorsement test, shaping the battlefield for a follow-up case where the Court could jettison the endorsement concept once and for all.[55]

Endnotes

1 681 F.3d 20 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 2388 (2013), *argued*, Nov. 6, 2013 (No. 12-696).

2 463 U.S. 783 (1983).

3 *Id.* at 791.

4 *Id.* at 795.

5 *Id.* at 800–01 (Brennan, J., dissenting).

6 *Galloway*, 681 F.3d at 30.

7 *See Marsh*, 463 U.S. at 820 & n.44 (Brennan, J., dissenting) (citing various sources). This point from *Marsh* came up during oral argument when Justice Stephen Breyer asked respondents' counsel how the Court should deal with devout Christians whose denominational faith requires them to invoke Jesus' name, and respondents said that such people must be disallowed from participating in legislative prayer. *See* Ken Klukowski, *Supreme Court Likely to Restore Freedom to Pray at Public Events*, Breitbart News, Nov. 7, 2013, http://www.breitbart.com/Big-Government/2013/11/07/Supreme-Court-Likely-to-Restore-Freedom-to-Pray-at-Public-Events.

8 *See Galloway*, 681 F.3d at 24–25.

9 *See* Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 Geo. J.L. & Pub. Pol'y 219, 249–52 (2008).

10 *Galloway*, 681 F.3d at 24.

11 Brief of Members of Congress as *Amici Curiae* Supporting Petitioner 20 (No. 12-696) (Jan. 7, 2013) [Cert-Stage]. I used the Second Circuit's five content factors, plus proclamations of religious devotion to God and prayers that explicitly quoted the Bible, both of which cross the Court of Appeals' line of affiliating government with particular religious beliefs.

12 *Id.* at 9.

13 *Id.* at 22.

14 330 U.S. 1 (1947).

15 Wallace v. Jaffree, 472 U.S. 38, 108 (1985) (Rehnquist, J., dissenting).

16 Zorach v. Clauson, 343 U.S. 306, 313–14 (1952).

17 Flast v. Cohen, 392 U.S. 83, 103–04 (1968).

18 Epperson v. Arkansas, 393 U.S. 97, 104, 106 (1968).

19 403 U.S. 602, 612–13 (1971).

20 Hunt v. McNair, 413 U.S. 734, 741 (1973).

21 492 U.S. 573, 578–79, 601–02, 620 (1989).

22 *Id.* at 592.

23 465 U.S. 668, 687 (1984).

24 *Allegheny*, 492 U.S. at 592.

25 Agostini v. Felton, 521 U.S. 203, 232–33 (1997).

26 McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 860 (2005).

27 Brief for Petitioner 40–50.

28 Brief for Members of Congress as *Amici Curiae* Supporting Petitioner 8–12, 16–18 (No. 12-696) (Aug. 2, 2013) [Merits-Stage].

29 *Id.* at 18–20.

30 *Id.* at 20–25 (collecting sources).

31 545 U.S. 677 (2005).

32 *Id.* at 686 (plurality).

33 *Id.* at 700 (Breyer, J., concurring in the judgment).

34 *See* Montejo v. Louisiana, 556 U.S. 778, 792 (2009).

35 558 U.S. 310, 319, 362–63 (2010).

36 *Id.* at 375–79 (Roberts, C.J., concurring).

37 *Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in the judgment in part and dissenting in part).

38 *Id.* at 659.

39 *See* Edwards v. Aguillard, 482 U.S. 578, 605 (1987) (Powell, J., concurring).

40 *Everson*, 330 U.S. at 8–14.

41 James Madison, Memorial and Remonstrance Against Religious Assessments (1985).

42 1 Annals of Cong. 757–59 (1789).

43 *See* Michael W. McConnell et al., Religion and the Constitution 36–43 (2d ed. 2006) (collecting sources).

44 Lee v. Weisman, 505 U.S. 577, 593–94 (1992).

45 *See id.* at 631–46 (Scalia, J., dissenting).

46 The Federalist No. 51 (Madison).

47 Ken Blackwell & Ken Klukowski, Resurgent: How Constitutional Conservatism Can Save America 82–95, 110–15, 256–81 (Simon & Schuster 2011).

48 Northwest Ordinance art. III (U.S. 1787). After the Constitution's ratification, Congress reenacted the Northwest Ordinance. It was signed by President Washington on Aug. 7, 1789. 1 Stat. 51 (1789).

49 Letter to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798), *in* 9 The Works of John Adams 266 (Boston, 1854).

50 *See generally* Jean M. Yarbrough, American Virtues: Thomas Jefferson the Character of a Free People (2009).

51 *Cf.* Donald J. Devine, America's Way Back: Reclaiming Freedom, Tradition, and Constitution 135–58, 227–29 (2013).

52 Ronald Reagan, Remarks at the Ecumenical Prayer Breakfast, Dallas, Tex., Aug. 23, 1984.

53 *See* Brief for the United States as *Amicus Curiae* Supporting Petitioner (Aug. 2, 2013).

54 *See* Klukowski, *supra* note 7.

55 Although it is beyond the scope of this article, it should be noted here that an ideal vehicle for replacing the endorsement test with the coercion test is now pending before the Ninth Circuit. The case is a challenge to the Latin cross atop the Mt. Soledad Veterans Memorial in San Diego that has been through five rounds of ceaseless litigation that began in 1989. *See* Trunk v. San Diego, 629 F.3d 1099 (9th Cir. 2011). *En banc* review was denied over a vigorous dissent, *see* 660 F.3d 1091 (Bea, J., dissenting from denial of rehearing en banc), and the Supreme Court has twice signaled its interest in the case through Justice Kennedy in 2006 and Justice Samuel Alito in 2012, once litigation reached a definitive end. That point has now been reached, and the case will again petition for certiorari in 2014 or 2015. Mt. Soledad Memorial Association is represented by Allyson Ho at Morgan, Lewis & Bockius, and Kelly Shackelford, Jeffrey Mateer, and Hiram Sasser at Liberty Institute. *See generally* Ken Klukowski, *Mt. Soledad Cross will be Purged from Veterans Memorial*, Breitbart News, Dec. 12, 2013, http://www.breitbart.com/Big-Government/2013/12/12/Famous-Cross-Ordered-Removed-from-Memorial-Fed-Judge-Emotional.