

Can a New Establishment Clause Jurisprudence Succeed in Protecting Religious Minorities Where *Lemon* Has Failed?

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Other Views:

- Brief amicus curiae of Kamal S. Kalsi, *American Legion v. Am. Humanist Ass'n*, https://www.supremecourt.gov/DocketPDF/17/17-1717/77563/20181226122220352_17-1717tsac.pdf.
- Brief amicus curiae of Muslim Advocates, *American Legion v. Am. Humanist Ass'n*, https://www.supremecourt.gov/DocketPDF/17/17-1717/82327/20190130160942323_Brief.pdf.
- Eugene Volokh, *Cleaning Up the Lemon Mess*, VOLOKH CONSPIRACY (Feb. 28, 2019), <https://reason.com/volokh/2019/02/28/cleaning-up-the-lemon-mess> (quoting Prof. Michael McConnell's comments on *American Legion*).
- Garrett Epps, *Why Is This Cross-Shaped Memorial Constitutional?*, THE ATLANTIC (Feb. 19, 2019), <https://www.theatlantic.com/ideas/archive/2019/02/aha-v-american-legion-maryland-peace-cross-stake/583024/>.

Samantha Elauf was the face of the 2015 United States Supreme Court decision *EEOC v. Abercrombie & Fitch*,¹ which vindicated her right under Title VII to be free from religious discrimination in hiring because of her faith-based decision to wear a headscarf. In 1990, the Supreme Court decided that the Free Exercise Clause does not require exemptions from generally applicable laws in *Employment Division v. Smith*;² this decision, which denied Alfred Smith the right to use a controlled substance in a religious ceremony, resulted in the bipartisan passage of the Religious Freedom Restoration Act to protect religious actions like Smith's at the national level. More than a century earlier, in 1860, Rabbi Morris Raphall was the first rabbi to deliver a prayer opening Congress' legislative session. "[P]iously bedecked in a white tallit and a large velvet skullcap," he invoked the blessing of "Lord God of Abraham, of Isaac, and of Jacob," thanked God for "establish[ing] a Commonwealth after a model of . . . the tribes of Israel, in their best and purest days," and gave a traditional blessing in Hebrew.³ What do a Muslim millennial teenage girl, a middle-aged Klamath Native American man, and a nineteenth century rabbi have in common? They each exemplify the accommodation and acceptance of religious minorities in America under the law and in our nation's history.

In *American Legion v. American Humanist Association*, the Court is reviewing the U.S. Court of Appeals for the Fourth Circuit's holding that it is an Establishment Clause violation for a Maryland bi-county commission to own and maintain a cross-shaped veterans' memorial in Bladensburg, Maryland.⁴ Relying on the analytical framework set forth in *Lemon v. Kurtzman*,⁵ the panel majority concluded that because the memorial is forty feet tall, located in a high-traffic intersection, maintained with government funds, and in the shape of a cross, the memorial "has the primary effect of endorsing religion and excessively entangles the government in religion."⁶

1 *EEOC v. Abercrombie & Fitch*, 135 S. Ct. 2028 (2015).

2 *Employment Div. v. Smith*, 494 U.S. 872 (1990).

3 Brief of Nathan Lewin at 9, 10a, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (No. 12-696) (quoting Cong. Globe, 36th Cong. 1st Sess. 648-49 (1860); Jonathan D. Sarna, Rabbi Raphall Goes to Washington, Forward (Feb. 17, 2010), <https://forward.com/opinion/125905/rabbi-raphall-goes-to-washington/>); Sarna, *supra* note 3.

4 *American Humanist Ass'n v. Md.-Nat'l Capital Park & Planning Comm'n*, 874 F.3d 195 (4th Cir. 2017).

5 *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Fourth Circuit also relied on "the endorsement inquiry" set out in *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 19, 119 (2001) in its discussion.

6 *American Humanist Ass'n*, 874 F.3d at 200.

Several religious minority groups have filed amicus briefs arguing both for⁷ and against⁸ the constitutionality of the Peace Cross, as it is known to locals. Some of these groups argue that regardless of whether the Fourth Circuit’s decision is affirmed or reversed, the Supreme Court should maintain the current state of the law surrounding the Establishment Clause—especially the *Lemon* test and its variants—because it either adequately or best protects religious minorities and fosters a pluralistic society.⁹ They express concern that a different approach—particularly the “coercion” test advocated by American Legion¹⁰—would enable majority suppression of minority religious exercise.¹¹

This article refutes the claim that current Establishment Clause jurisprudence best protects minority religious groups. It first argues that analysis based on *Lemon* and later decisions modifying it does not satisfactorily protect minority religions, much less *best* protect them. These tests are fundamentally flawed because they permit, and even require, subjective judicial decision-making. Next, the article argues that an approach rooted in the original meaning of the First Amendment best protects minority religions.¹² Such an approach provides an objective measure for gauging Establishment Clause violations, in contrast to the

subjective reasoning required by the *Lemon* test and its successors. Finally, the article argues that reliance on *Lemon*-based precedent to protect religious minorities is misplaced. The political branches, including local, state, and federal legislative and executive bodies, are better suited than the courts to protect religious minorities and include them in American civic life.

Elauf, Smith, and Rabbi Raphall were able to engage and flourish in the public square consistent with their minority religious beliefs, and they did not need the *Lemon* test to do so; indeed, judicial intervention in Smith’s case worked *against* his freedom to practice his religion. The Peace Cross, a veterans’ memorial that invokes imagery from the majority religion of Christianity, does not violate the Establishment Clause and does not harm religious minorities. An originalist interpretation of the Establishment Clause makes this clear, and our country can best determine how to adapt to its increasingly religiously diverse population through conversation and compromise in the political branches.

I. RELIGIOUS MINORITY DISPLAYS AND PRACTICES ARE VULNERABLE UNDER CURRENT LAW

Many years before courts began interpreting the Establishment Clause, Alexander Hamilton expressed his thoughts on the interpretation of the Constitution in a letter to George Washington. He wrote, “whatever may have been the intention of the framers of a constitution or of a law, that intention is to be sought for in the instrument itself, according to the usual and established rules of construction.”¹³ Interpreting a constitution or a law is easy when the text of the instrument is clear and its application is uncontroversial. The task is more difficult, however, when the text of a given provision is ambiguous or its application to a case is not obvious.

Many cases resolved under the Establishment Clause fit this description of “difficult,” to say the least. Consider the text of the Clause: “Congress shall make no law respecting an establishment of religion” The word “Congress” is likely well-known to most readers. So is the word “law.” But what is “an establishment”? Some even argue that the word “religion” is a term of art rather than a reference to religion generally.¹⁴

In an ironic twist of jurisprudence, the clearest parts of the clause, “Congress” and “law,” were read out of it in *Everson v. Board of Education* and several Establishment Clause cases involving government action generally.¹⁵ In *Everson*, the Supreme Court

7 The religious minority groups supporting the American Legion and the Maryland bi-county commission include the National Jewish Commission on Law and Public Affairs, Agudas Harabbonim of the United States and Canada, Agudath Israel of America, Rabbinical Alliance of America, Rabbinical Council of America, Orthodox Jewish Chamber of Commerce, Lieutenant Colonel Kamal S. Kalsi, D.O., Jewish Coalition for Religious Liberty, and the Islam & Religious Freedom Action Team of the Religious Freedom Institute.

8 The religious minority groups supporting the American Humanist Association include American Jewish Committee, Central Conference of American Rabbis, Anti-Defamation League, Hadassah, the Women’s Zionist Organization of America, Inc., Hindu American Foundation, Jewish Social Policy Action Network, Men of Reform Judaism, National Council of Jewish Women, Reconstructing Judaism, Reconstructionist Rabbinical Association, Union for Reform Judaism, Women of Reform Judaism, the Jewish War Veterans of the United States of America, Inc., and Muslim Advocates.

9 See, e.g., Brief amicus curiae of Kamal S. Kalsi at 6, *American Legion v. Am. Humanist Ass’n*, No. 17-1717 & 18-18 (argued Feb. 27, 2019) (hereinafter Kalsi brief) (contending that the Court should hold that the memorial is constitutional and that “existing Establishment Clause tests (the *Lemon* test, the endorsement test, and the purpose-based analysis of the *Van Orden* concurrence), . . . are adequate to resolve this case and also best protect religious freedom in our pluralistic society”); Brief amicus curiae of Muslim Advocates at 11, *American Legion*, No. 17-1717 & 18-18 (hereinafter Muslim Advocates brief) (arguing that the Court should hold that the memorial is unconstitutional and that “application of the *Lemon* test rightly finds unconstitutional . . . government endorsements of religion”).

10 See *infra* notes 68-70 and accompanying text.

11 Kalsi brief at 7-8; Muslim Advocates brief at 7; Brief amici curiae of Religious and Civil-Rights Organizations at 34, *American Legion*, Nos. 17-1717 & 18-18; Brief amici curiae of Baptist Joint Committee for Religious Liberty, et al. at 36-37, *American Legion*, Nos. 17-1717 & 18-18 (hereinafter Baptist Joint Committee brief).

12 “Originalist research is simply investigation of historical circumstances to determine the intent behind one particular legal document: the United States Constitution.” Rob Natelson, A Bibliography for Researching Original Understanding 1 (2011), <https://i2i.org/wp-content/uploads/2011/01/Originalist-Bibliography.pdf>.

13 Letter from Alexander Hamilton, Secretary of the Treasury, to President George Washington (Feb. 23, 1791), in 3 THE WORKS OF ALEXANDER HAMILTON 445, 463 (Henry Cabot Lodge ed., 1904).

14 Brief Amicus Curiae of Citizens United, Citizens United Foundation, Public Advocate of the United States, Conservative Legal Defense and Education Fund, Policy Analysis Center, Pass the Salt Ministries, and Restoring Liberty Action Committee at 5-7, *American Legion*, No. 17-1717.

15 *Everson v. Board of Education*, 330 U.S. 1 (1947). The application of the Establishment Clause to government practices besides passing legislation, at least at the state level, began in *Everson*. In that case, a citizen filed a lawsuit challenging a local school district’s reimbursement authority under a state statute granting school districts authority “to make rules and contracts for the transportation of children to and from schools.” *Id.* at 3. The Supreme Court later reviewed the constitutionality

incorporated the Establishment Clause through the Fourteenth Amendment and applied it to the states.¹⁶ The decisions involving government action showed that the Supreme Court was concerned about more than just laws establishing religion. As a result, *no* government body may engage in *any act* “respecting an establishment of religion.”

As for that phrase, “respecting an establishment of religion,” there “are only so many lights to assist the courts in arriving with more accuracy at the true interpretation of the intention.”¹⁷ Thomas Jefferson offered counsel on how to approach such questions: “On every question of construction,” return “to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed.”¹⁸ Jefferson and Hamilton’s advice underlie the originalist approach to interpreting constitutional provisions.

But several of the groups opposing the Maryland bi-county commission’s ownership and maintenance of the Peace Cross—and even some that favor it—insist that the Court should stand by precedents that neglect the meaning of the words of the Establishment Clause at “the time when [it] was adopted.”¹⁹ The *Lemon* test and its progeny not only depart from the original meaning of the constitutional text they claim to interpret and apply, they also fail to protect religious minority displays and practices as well as a more constitutionally-rooted test would.²⁰

A. The Lemon Test Is Too Subjective

In 1971, the Supreme Court in *Lemon v. Kurtzman* articulated a three-prong test to determine if a statute passed muster under the Establishment Clause. The Court said that judges should ask whether there was a secular *purpose* for the statute, whether its primary *effect* advanced or inhibited religion, and whether it “foster[ed] an excessive government *entanglement*

with religion.”²¹ In *Larson v. Valente*,²² the Court “indicate[d] that laws discriminating *among* religions are subject to strict scrutiny,” but that “laws ‘affording a uniform benefit to *all* religions’ should be analyzed under *Lemon*.”²³

The *Lemon* prongs received additional gloss in later decisions. In *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, a majority of the Supreme Court adopted the “endorsement” test, which asks judges to discern “what viewers may fairly understand to be the purpose of the display” being challenged as an establishment of religion.²⁴ The endorsement test also instructs that “[e]very government practice must be judged in its unique circumstances.”²⁵ The Court would later attribute to the hypothetical viewer, sometimes called “the reasonable person,”²⁶ knowledge of the purpose of the challenged government action.²⁷ In a later case, the Court said that the excessive-entanglement prong of *Lemon* should be treated “as an aspect of the inquiry into [an action’s] effect” due to their similar analyses.²⁸ Finally, in *Van Orden v. Perry*, Justice Stephen Breyer, in a concurring opinion, emphasized a judge’s need to use his best “legal judgment” in deciding cases involving religious displays.²⁹ In analyzing the Ten Commandments monument at issue, he considered how the display was “used” and “the context of the display,” including the message conveyed, “the physical setting,” and the period of time over which the display went unchallenged.³⁰ Justice Breyer’s opinion essentially represented a return to the endorsement test.

Throughout all of these decisions, the Court progressively moved from calling *Lemon*’s three prongs “must have[s]” to calling them “no more than helpful signposts” or “familiar considerations.”³¹ But these tests are still in force and are used together or separately depending on the given government action and the circuit court of appeals rendering the decision. The problem is that these tests are malleable, such that judges at the trial level must make decisions without clear guidance on the extent to which they should rely on or extrapolate from the

of a state commission’s grant of “property tax exemptions to religious organizations,” *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 666 (1970), and a school district’s policy of daily, in-class prayer, *Engel v. Vitale*, 370 U.S. 421, 422 (1962). In *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984), the Court for the first time applied Establishment Clause law to a local government’s ownership and maintenance of a display depicting religious symbols.

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

17 2 J.G. Sutherland, *STATUTES AND STATUTORY CONSTRUCTION* § 363, at 696 (John Lewis, ed. 2d ed. 1904).

18 Letter from Thomas Jefferson to Judge William Johnson (June 12, 1823), in 10 *THE WRITINGS OF THOMAS JEFFERSON* 449 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904).

19 2 Sutherland, *supra* note 17, § 363, at 696.

20 See generally Kenneth A. Klukowski, *Reclaiming Religious Liberty by Restoring the Original Meaning of the Establishment Clause*, Legal Memorandum No. 237, HERITAGE FOUND. (2018), https://www.heritage.org/sites/default/files/2018-09/LM-237_0.pdf (outlining major cases and analytical frameworks involved in Establishment Clause jurisprudence).

21 *Lemon*, 403 U.S. at 612-13 (italics added).

22 *Larson v. Valente*, 456 U.S. 228 (1982).

23 *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987) (emphases in original).

24 *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 595 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 694 (O’Connor, J., concurring)). Justice Sandra Day O’Connor first introduced the test in her concurrence in *Lynch*. 465 U.S. at 692-94 (O’Connor, J., concurring).

25 *County of Allegheny*, 492 U.S. at 595 (quoting *Lynch*, 465 U.S. at 694 (O’Connor, J., concurring)).

26 *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (O’Connor, J., concurring).

27 *McCreary Cty. v. ACLU*, 545 U.S. 844, 862 (2005).

28 *Agostini v. Felton*, 521 U.S. 203, 232-33 (1997).

29 545 U.S. 677, 700 (2005).

30 *Id.* at 700-03.

31 *Lemon*, 403 U.S. at 612; *Hunt v. McNair*, 413 U.S. 734, 741 (1973); *McCreary Cty.*, 545 U.S. at 859.

evidence before them.³² And the outcome of an appealed decision is still unpredictable, as circuit court judges review lower court decisions de novo because those decisions involve mixed questions of law and fact.³³

Interpreting and applying the Establishment Clause should not be this complicated. Indeed, according to one treatise author, this jurisprudence imperils the separation of powers. Rules of construction “are a part of the law of the land equally with the statutes themselves, and not much less important. The function of such interpretation unrestrained by settled rules would introduce great uncertainty, and would involve a power virtually legislative.”³⁴ Unfortunately, when it comes to interpreting the Establishment Clause, these centuries-old rules of construction fall apart. Many Supreme Court decisions have abandoned Jefferson’s counsel of returning “to the time when the Constitution was adopted.” And by dispensing with his wisdom, Establishment Clause jurisprudence has indeed “introduce[d] great uncertainty” and has become “interpretation unrestrained” and “a power virtually legislative.”³⁵

B. Current Law Surrounding Religious Minority Displays and Practices Lacks Consistent, Principled Reasoning

An examination of relevant caselaw demonstrates that neither the *Lemon* test, the endorsement test, nor legal judgment have provided an effective shield for religious minorities. The following survey of decisions shows that, while religious minorities sometimes successfully use *Lemon* and its successors to combat constitutional violations, there is no guarantee that they will succeed nor a consistent standard to predict what will happen when a government tries to accommodate their displays or practices.

1. Holiday Displays

In *County of Allegheny*, the Justices’ analyses of the constitutionality of displaying a menorah on public property splintered in multiple directions. Justice Harry Blackmun would have upheld the menorah based on his idiosyncratic belief that the menorah was secular enough to be constitutionally displayed on public property.³⁶ Justice Sandra Day O’Connor concluded that the menorah, while a religious symbol, passed constitutional muster because the county situated it next to a holiday-themed tree.³⁷ Three Justices considered the menorah a religious symbol and would have held its presence on public

property unconstitutional.³⁸ Four other Justices considered the entire display constitutional regardless of the religiosity of the menorah or its surrounding props.³⁹

After the Court issued *County of Allegheny*, a New York district court held that a display of a menorah next to a tree decorated with lights was a religious display that violated the Establishment Clause.⁴⁰ The lighted tree, though secular, could not counter the religious significance of the menorah.⁴¹ The court distinguished the display from the one in *County of Allegheny* on the ground that the tree’s Christmas lights were obscured during the day. The court opined that the reasonable observer would think the city was displaying an eighteen-foot menorah next to a plain old tree and therefore endorsing Judaism.

*Skoros v. City of New York*⁴² and *Mehdi v. United States Postal Service*⁴³ reveal how government officials have had to employ policies that afford little room for logic because of the fractured outcome of *County of Allegheny*. In *Skoros*, the Second Circuit determined that a public school holiday display policy from the New York State Department of Education did not violate the Establishment Clause. The policy considered a nativity to be a “religious symbol” but a menorah and crescent moon and star to be “secular symbols” for the purposes of classroom holiday displays.⁴⁴ The Second Circuit described the policy as a “good-faith—if not entirely correct—reading of the Supreme Court’s decision in *Allegheny*.”⁴⁵ It ultimately concluded that the policy was simply a constitutional means of carrying out the secular purpose of “promot[ing] pluralism through multicultural holiday displays.”⁴⁶

In *Mehdi*, challengers unsuccessfully argued that the United States Postal Service’s seasonal display policy, which permitted “‘evergreen trees bearing nonreligious ornaments’ and ‘menorahs (when displayed in conjunction with other seasonal matter),’” violated the Establishment Clause.⁴⁷ The challengers argued that the policy failed to include the display of what the challengers characterized as the non-religious crescent moon to represent Muslim practices around the same time of year.⁴⁸ In upholding USPS’s seasonal display policy, the district court observed that the “policy was no doubt crafted by the Postal Service with *Allegheny* in mind.”⁴⁹

38 *Id.* at 637-38 (Brennan, J., concurring in part and dissenting in part).

39 *Id.* at 655 (Kennedy, J., concurring in part and dissenting).

40 *Ritell v. Vill. of Briarcliff Manor*, 466 F. Supp. 2d 514 (S.D.N.Y. 2006).

41 *Id.* at 526-27.

42 *Skoros*, 437 F.3d 1.

43 *Mehdi v. USPS*, 988 F. Supp. 721, 729 (1997).

44 *Skoros*, 437 F.3d at 19.

45 *Id.* at 22.

46 *Id.*

47 *Mehdi*, 988 F. Supp. at 729.

48 *Id.* at 723-24 & n.3.

49 *Id.* at 729.

32 See, e.g., *Skoros v. City of New York*, 437 F.3d 1, 26 (2006) (citing *Lynch*, 465 U.S. at 693-94 (O’Connor, J., concurring)) (“[N]o specific evidence is necessary to allow judges to determine how a mature objective mind would process the images and information conveyed by a holiday display.”).

33 See, e.g., *id.* at 13 (“Where, as here, a case is tried on a stipulated record, our review is de novo because the district court’s rulings are necessarily conclusions of law or mixed fact and law.”).

34 2 Sutherland, *supra* note 17, § 363, at 696.

35 *Id.*

36 *County of Allegheny*, 492 U.S. at 613-14.

37 *Id.* at 636, 633 (O’Connor, J., concurring).

2. Government Accommodations of Religious Practices

Judicial decisions applying *Lemon* or its variants may result in favorable outcomes for religious minorities, like cases involving government approval of eruv. But courts’ *Lemon*-based analyses in such cases lack uniformity, which undermines any notion of the test’s stability and fails to guide governments as they make policy.

Eruvs are a ceremonial religious practice of some Orthodox Jewish sects in which adherents put up wires between utility poles to demarcate certain areas where members of the sects live and worship.⁵⁰ Typically, members of these sects are prohibited “from pushing or carrying objects outside their homes on the Sabbath or Yom Kippur.”⁵¹ But adherents “may engage in such activities outside their homes on the Sabbath within an eruv.”⁵² An eruv “extends the space within which pushing and carrying is permitted on the Sabbath beyond the boundaries of the home, thereby enabling . . . [adherents] to push baby strollers and wheelchairs, and carry canes and walkers, when traveling between home and synagogue.”⁵³ In one case involving an eruv setup, the Third Circuit reasoned that “a reasonable, informed observer would not perceive an endorsement of Orthodox Judaism because the Borough’s [decision to approve the eruv] would ‘reflect[] nothing more than the governmental obligation of neutrality’ toward religion.”⁵⁴ The Second Circuit reasoned similarly in a challenge involving an eruv setup in New York.⁵⁵

The Second Circuit went on to argue, however, that the accommodation of eruvs had “*more* of a secular purpose, cause[d] *less* of an advancement of religion, and foster[ed] *less* church-and-state entanglement”⁵⁶ than allowing “a ‘private Christian organization for children’ to hold meetings at a public school ‘for the purpose of conducting religious instruction and Bible study’” or “a Christmas nativity scene display, on public property,” which earlier Supreme Court decisions had upheld.⁵⁷ This was supposed to be so because the eruvs were not alleged to “contain any overtly religious features that would distinguish them to a casual observer as any different from strips of material that might be attached to utility poles for secular purposes.”⁵⁸ This reasoning suggests that some religious practices will pass muster under the Establishment

Clause and others will not simply based on whether the average viewer—as imagined by the judge deciding the case—knows their religious significance. Like the Second Circuit, a New Jersey district court noted the eruv’s “almost invisible boundary” and that “[a]n eruv does not in any way force other residents to confront daily images and symbols of another religion.”⁵⁹ The district court also noted that “the eruv itself has no religious significance or symbolism and is not part of any religious ritual.”⁶⁰ This reasoning harkens back to *County of Allegheny*’s question of the religiosity of a given symbol or display as the determinative factor in whether a government action violates the Establishment Clause.

These cases show that the *Lemon* test and those derived from it do not provide the protection for minority religions that some advocates think they do. Courts deciding cases under *Lemon* have no choice but to perpetuate the absence of a clear rule of law. Their decisions inevitably devolve into statements about their own “legal judgment” or highly fact-specific determinations, neither of which provide a stable basis for governments trying to decide whether they may constitutionally approve or accommodate a given religious practice or display.

II. RELIGIOUS MINORITY DISPLAYS AND PRACTICES WILL BE BETTER PROTECTED BY A CLEAR LEGAL STANDARD ROOTED IN THE ORIGINAL MEANING OF THE ESTABLISHMENT CLAUSE

The answer to confusion over what constitutes an unconstitutional establishment of religion is an objective test that relies on more than Supreme Court precedent accumulated from 1947 to 2005. Establishment Clause law has suffered from a lack of principled guidelines according to which judges can render decisions. As a result, decisionmakers often “interpolat[e] meaning into a legal text instead of interpreting meaning from the text.”⁶¹ Between 1947 and 2005, only one case, *Marsh v. Chambers*,⁶² articulated an objective standard. To determine whether prayers in Congress violated the Establishment Clause, the Court analyzed historical practices at the time of the founding and the ratification of the First Amendment.⁶³ The Court has increasingly incorporated this kind of reasoning in its decisions, including in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*⁶⁴ and *Town of Greece v. Galloway*.⁶⁵ This historical approach—or an originalist interpretation of the Constitution’s text—is the right approach to Establishment Clause challenges.

Critics of this approach argue that it would leave the Establishment Clause without teeth. This is likely true to the

50 See *Jewish People for the Betterment of Westhampton Beach v. Vill. of Westhampton Beach*, 778 F.3d 390, 393 (2d Cir. 2015); *Tenaflly Eruv Ass’n v. Borough of Tenaflly*, 309 F.3d 144, 176 (3d Cir. 2002); *American Civil Liberties Union v. Long Branch*, 670 F. Supp. 1293, 1293 (D.N.J. 1987); *Smith v. Cmty. Bd.* No. 14, 491 N.Y.S.2d 584, 588 (Sup. Ct. 1985).

51 *Tenaflly Eruv Ass’n*, 309 F.3d at 152 (citation omitted).

52 *Id.*

53 *Id.*

54 *Id.* at 176 (alteration in original).

55 *Jewish People for the Betterment of Westhampton Beach*, 778 F.3d at 395. See also *Smith*, 491 N.Y.S.2d at 587 (similar reasoning in a state trial court decision).

56 *Jewish People for the Betterment of Westhampton Beach*, 778 F.3d at 396 (emphases in original).

57 *Id.* (citing *Good News Club*, 533 U.S. at 103-04; *Lynch*, 465 U.S. at 671).

58 *Id.* at 395.

59 *Long Branch*, 670 F. Supp. at 1295-96.

60 *Id.* at 1296.

61 D. Arthur Kelsey, *Bracton’s Warning and Hamilton’s Reassurance*, 66 VA. LAWYER REGISTER 20, 21 (2017).

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

63 *Id.* at 790 (“[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent.”).

64 *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012).

65 *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

extent that the original meaning of the Establishment Clause would permit religious displays on public property (and to the extent that the critic wants religious displays to be held unconstitutional). As one court of appeals judge observed, “There is, put simply, lots of history underlying the practice of placing and maintaining crosses on public land . . .”⁶⁶ But applying an originalist approach opens up the public square for the expression of *all* religions. While a court applying a historical interpretation of the Establishment Clause would likely approve a monument like the Peace Cross, it would also likely uphold similarly situated displays inspired by minority religions.

An originalist understanding of the Establishment Clause would make judicial decision-making more objective and stable than it is under current law. As one scholar explains, “This approach requires the judge to look at the text of the Constitution, and if it is unclear, the judge tries to discover not what the text ought to mean but what it did mean to those who wrote the words and, more importantly, to those who voted for those words to become law.”⁶⁷

The American Legion, which supports the Peace Cross memorial, argues that a “coercion” test is the best way to implement the original meaning of the Constitution’s prohibition of religious establishments. It would prohibit “government actions that pose a realistic threat to religious liberty—those that coerce belief in, observance of, or financial support for religion.”⁶⁸ The *Lemon* test and the succeeding tests are not viable because they do not “accord[] with history and faithfully reflect[] the understanding of the Founding Fathers,” and because “the text and history of the First Amendment show the Establishment Clause was designed to prohibit coercion.”⁶⁹ Religious displays like the Peace Cross, the American Legion argues, should only be found unconstitutional if they are found coercive.⁷⁰

One amicus argues against an adoption of this analysis, claiming that “[a] narrower standard that . . . focuses only on coercion would open the door to sectarian endorsements that will aggravate religious tensions and needlessly divide Americans.”⁷¹ He further describes American Legion’s analysis as a “break[] with [the Court’s] Establishment Clause precedents.”⁷² It is true that an approach rooted in an originalist interpretation is narrower than the analytical frameworks found in *Lemon* and its progeny. But an originalist interpretation of the Establishment Clause would set clearer boundaries for which religious displays or practices are acceptable, which would be fairer and more predictable than current law. It is difficult to say exactly how many more religious displays would be considered acceptable under a consistently

applied standard based on an originalist interpretation, but recent jurisprudence indicates that principled boundaries would be no less helpful to religious minorities than to members of majority faiths.

In *Town of Greece v. Galloway*, in which the Court adopted an original understanding of the Establishment Clause with respect to legislative prayer,⁷³ the Court said it was “virtually inconceivable that the First Congress, having appointed chaplains whose responsibilities prominently included the delivery of prayers at the beginning of each daily session, thought that this practice was inconsistent with the Establishment Clause.”⁷⁴ As American society has grown more religiously diverse, figures including the Dalai Lama, Rabbi Joshua Gruenberg, Satguru Bodhinatha Veylanswami, and Imam Nayyar Imam have opened legislative sessions with statements expressly declaring their deeply held religious beliefs. As the Court said, Congress “acknowledges our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds.”⁷⁵

But under *Lemon* and succeeding tests, courts often proscribe government support of an action or display simply because it is sectarian. A court found a menorah unconstitutionally on public property because its presence next to an unlighted tree in the daytime would appear to the reasonable person to be a government’s endorsement of religion.⁷⁶ Even when they uphold religious displays or accommodations, courts employ inconsistent reasoning,⁷⁷ which gives no guidance to officials. In that sense, the *Lemon* decision and its successors render policymakers’ options *more* narrow because they are forced to make rigid, if not totally nonsensical, distinctions between what displays and practices are “in” or “out.” This is what happened in *Skoros* and *Medhi*, where public school and post office officials were forced to write policies based on the outcome of *County of Allegheny*: menorahs and decorated Christmas trees “in,” nativities and crescent moons and stars “out.”

Judges, public officials, and citizens deserve guidance. American Humanist Association observed during oral argument that these “cases are ill-suited for sweeping pronouncements and categorical rules,”⁷⁸ and arbitrary court decisions and government policies show why. Relying on the original meaning of the Establishment Clause is the best way to protect religious minorities because that meaning is fixed. A standard that relies on an originalist interpretation, while not perfect, provides more consistent guidance than a jurisprudence that relies on “what

66 *Kondrat’Yev v. City of Pensacola*, 903 F.3d 1169, 1180 (11th Cir. 2018) (Newsom, J., concurring).

67 *Kelsey*, *supra* note 61, at 21.

68 Opening Br. at 23, *American Legion*, Nos. 17-1717 & 18-18.

69 *Id.* at 18 (alterations in original) (citation omitted); *id.* at 24 (altering capitalization).

70 *See id.* at 19.

71 Kalsi brief at 3-4.

72 *Id.* at 10.

73 *Town of Greece*, 572 U.S. at 602 (adopting the reasoning used in *Marsh* and stating that the decision “reflected the original understanding of the First Amendment”) (Alito, J., concurring).

74 *Id.* at 602-03.

75 *Id.* at 579 (majority opinion).

76 *Ritell*, 466 F. Supp. 2d at 525.

77 *See Jewish People for the Betterment of Westhampton Beach*, 778 F.3d at 393; *Tenafly Eruv Ass’n*, 309 F.3d at 176; *Long Branch*, 670 F. Supp. at 1293; *Smith*, 491 N.Y.S.2d at 588.

78 Oral Argument Transcript at 83, *American Legion*, Nos. 17-1717 & 18-18.

viewers may fairly understand to be the purpose” of a display or on “legal judgment.”⁷⁹

III. RELIGIOUS MINORITY DISPLAYS AND PRACTICES WILL BE BETTER PROTECTED BY THE POLITICAL BRANCHES

Some amici argue that current Establishment Clause jurisprudence better protects minority religions than a more originalist approach would. An originalist approach “would tempt some governments to erect crosses and some citizens to pressure government to do so,” and it would allow a government to “endorse its preferred religious teachings and be candid about what it was doing.”⁸⁰ An approach like American Legion’s coercion test, others argue more specifically, would not “address the danger that the majority will, through government endorsements of its own faith, marginalize minority groups” or that “members of the majority [will] claim[] religious superiority, slinging allegations of religious inferiority at minorities.”⁸¹

These fears are unfounded. Governments are still subject to the “push and pull of the political process—above all from accountability for their speech through the democratic process.”⁸² Professor Hillel Y. Levin has argued that “courts are not typically the appropriate forum for delineating the required accommodations” for minority religions.⁸³ Indeed, “the track record for those who seek religious accommodations in court is not particularly favorable;”⁸⁴ they often lose. Furthermore, Professor Michael McConnell states “that the Court’s intervention over the last forty years has made things worse, not better.”⁸⁵ In the realm of Establishment Clause law, litigation outcomes for religious minorities are unpredictable; even where they have won, courts’ reasoning varied such that future outcomes remained uncertain.

The political branches, however, have demonstrated that they can protect religious minority rights and respond to America’s increasingly pluralistic society.

Of course, courts have an important role in protecting religious minorities, but as Professor Levin argues, the need for judicial intervention is the exception and not the rule.⁸⁶ The political branches have shown themselves to be more efficient sources of great protection for religious minority beliefs and practices. In Samantha Elauf’s case, the Supreme Court agreed with the EEOC that Abercrombie & Fitch violated Title VII of the Civil Rights Act of 1964 when Elauf’s religion became “a motivating factor” in its hiring process because her decision to wear a headscarf conflicted with Abercrombie & Fitch’s “Look Policy” prohibiting “any” head gear.⁸⁷ The case, which the Supreme Court decided based on the statute’s text, shows that legislation passed by Congress and enforced by an executive agency can protect minority religious practice.⁸⁸ According to the Court, “Congress defined ‘religion,’ for Title VII’s purposes, as ‘includ[ing] all aspects of religious observance and practice, as well as belief.’”⁸⁹ And

Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them *favored treatment*, affirmatively obligating employers not “to fail or refuse to hire or discharge any individual . . . because of such individual’s” “religious observance and practice.”⁹⁰

This case demonstrates the role the courts should play in protecting minority religions: interpreting a law passed by a legislative body and applying it.

Alfred Smith’s case shows how political “institutions often respond to judicial decisions that are unfavorable to religious groups by expanding religious minority groups’ rights.”⁹¹ Smith had lost his job as a counselor because he used a controlled

79 *County of Allegheny*, 492 U.S. at 595 (quoting *Lynch*, 465 U.S. at 694 (O’Connor, J., concurring)); *Van Orden*, 545 U.S. at 700.

80 Baptist Joint Committee brief at 36-37.

81 Kalsi brief at 7-8; Muslim Advocates brief at 7.

82 *Freedom from Religion Found., Inc. v. City of Warren*, 707 F.3d 686, 697 (6th Cir. 2013). There is historical precedent for relying on the political branches to protect religious rights. Thomas Jefferson and the Virginia General Assembly committed the timeless principles announced in Virginia’s Act for Religious Freedom to the legislature:

[W]e well know that this Assembly, elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding assemblies constituted with powers equal to our own . . . ; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind; and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right.

Va. Code Ann. § 57-1. “The history of Virginia is instructive . . . because that Colony took the lead in defining religious rights.” *Marsh*, 463 U.S. at 787 n.5.

83 See generally Hillel Y. Levin, *Rethinking Religious Minorities’ Political Power*, 48 U.C. DAVIS L. REV. 1617, 1622 n.19 (2015).

84 *Id.* at 1642.

85 Eugene Volokh, *Cleaning Up the Lemon Mess*, VOLOKH CONSPIRACY (Feb. 28, 2019, 12:49 PM), <https://reason.com/volokh/2019/02/28/cleaning-up-the-lemon-mess>.

86 Levin, *supra* note 83, at 1640-41. In a case like *Tenafly Eruv Association v. Borough of Tenafly*, a court’s intervention would be welcome. 309 F.3d at 151, 155. In that case, members of an Orthodox Jewish sect wanted to put up eruvs and received permission from the borough to do so. After strong pushback from citizens who did not want the eruvs in place and the discovery of an ordinance that prohibited certain attachments to poles on public land, the borough voted to remove the eruvs previously put up with its approval. Eruv supporters challenged the borough’s vote on the ground that it violated their First Amendment right to free exercise, among other claims. They proved during litigation that the borough did not enforce the ordinance equally, permitting private postings, house number signs, or church direction signs. *Id.* at 151, 155 (citations omitted). The borough argued that it had a compelling interest to avoid an establishment clause violation. The Third Circuit rejected the borough’s argument, stating that “a reasonable, informed observer would not perceive an endorsement of Orthodox Judaism because the Borough’s change of heart would ‘reflect[] nothing more than the governmental obligation of neutrality’ toward religion.” *Id.* at 176 (alteration in original).

87 *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. at 2031.

88 *Id.* at 2032-34.

89 *Id.* at 2033 (alteration in original) (quoting 42 U.S.C. §2000e(j)).

90 *Id.* at 2033-34 (alteration in original) (emphasis added) (citation omitted).

91 Levin, *supra* note 83, at 1642.

substance, peyote, for a Native American religious practice. He sought unemployment benefits, but the employment division denied his application because he was terminated for “work-related ‘misconduct.’”⁹² The employment division did not exempt him from its policies because his violation took place in the course of his religious exercise, and neither did the Supreme Court. Justice Antonin Scalia, writing for the majority in *Employment Division v. Smith*, said, “Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now.”⁹³ Congress responded to the decision with a concerted, bipartisan effort to protect the religious freedom rights of people like Smith, whose religious practices would clash with the law unless exempted.⁹⁴ The Religious Freedom Restoration Act, signed into law by President Bill Clinton in 1993,⁹⁵ was created “in order to provide very broad protection for religious liberty,”⁹⁶ and it received unanimous support in the U.S. House of Representatives and near-unanimous support in the U.S. Senate.⁹⁷ Professor Levin also notes that Congress has enabled religious objectors to Social Security taxes—notably including the Amish, one of whom lost a Free Exercise Clause challenge to such taxes in 1982⁹⁸—to apply for exemptions for themselves and their employees,⁹⁹ and that in 2011 the executive branch also accommodated Amish religious beliefs.¹⁰⁰

Finally, even in the highly regimented military profession, the legislative and executive branches have accommodated the religious practices of servicemembers. When Congress passed the National Defense Authorization Acts for fiscal years 2013 and 2014, it provided for the “[e]nhancement” and “protection of rights of conscience.”¹⁰¹ Not long after, the Department of

Defense (DOD) issued Instruction 1300.17(4)(a), which provides servicemembers with heightened free exercise protections. The Instruction states that “[t]he DOD places a high value on the rights of members of the Military Services to observe the tenets of their respective religions.” Further, “[r]equests for religious accommodation will be resolved in a timely manner and will be approved,” so long as they do not “adversely affect mission accomplishment.”¹⁰² This Instruction was applied in the case of Iknor Singh, an observant Sikh who sought relief from the Army’s uniform standards.¹⁰³ The district court concluded that the Army failed to show that denying Singh a religious accommodation to observe his Sikh faith “further[ed] the government’s compelling interests” or was “the least restrictive means of furthering [the government’s] interests,” both of which are required under the Instruction.¹⁰⁴ As in Elauf’s case, the court protected a member of a minority religion by interpreting an already protective provision and applying it.

Through Army Directive 2017-03, the Army guaranteed even stronger protections for religious practices, specifically the practices of observant Sikhs. It directed “Army uniform and grooming policy to provide wear and appearance standards for the most commonly requested religious accommodations.”¹⁰⁵ Simratpal Singh did not have the benefit of the Directive when he pursued “a permanent religious accommodation that would allow him to wear uncut hair, a beard, and a turban, as required by his Sikh faith, while serving in the Army.”¹⁰⁶ A district court denied his attempt to obtain that permanent religious accommodation in light of the military’s generally stringent appearance and grooming standards. “Years of advocacy”—and likely court losses like his—inspired the issuance of the Directive in 2017.¹⁰⁷

The Department of Veterans Affairs (VA), recognizing the religious diversity of its servicemembers, has funeral guidelines to honor each fallen soldier’s religious convictions:¹⁰⁸

VA values and respects Veterans and their families’ right to committal services held at VA National Cemeteries

92 *Smith*, 494 U.S. at 882.

93 *Id.*

94 Congress sought to restore what it saw as the pre-*Smith* status quo in Free Exercise Clause jurisprudence. 42 U.S.C. § 2000bb(b) (“The purposes of this Act are—(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) . . .”).

95 42 U.S.C. §§ 2000bb to 2000bb-4. See Ernest Istook, *As religious freedom law turns 25, vast majority of Democrats oppose what Bill Clinton signed into law*, WASHINGTON EXAMINER (Nov. 14, 2018, 12:00 AM), <https://www.washingtonexaminer.com/opinion/as-religious-freedom-law-turns-25-vast-majority-of-democrats-oppose-what-bill-clinton-signed-into-law>.

96 *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014).

97 Eugene Volokh, *IA. What Is the Religious Freedom Restoration Act?*, VOLOKH CONSPIRACY (Dec. 2, 2013, 7:43 AM), <http://volokh.com/2013/12/02/1a-religious-freedom-restoration-act/>.

98 *United States v. Lee*, 455 U.S. 252, 258-261 (1982).

99 Levin, *supra* note 83, at 1643; § 8007, 102 Stat. 3342, 3781-83 (1988) (codified at 26 U.S. Code § 3127).

100 Levin, *supra* note 83, at 1643; U.S. Soc. Sec. Admin., Program Operations Manual System (POMS) § RM 10225.035 (2011), available at <https://secure.ssa.gov/poms.nsf/lnx/0110225035>.

101 See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 532, 127 Stat. 672, 675 (providing for the “[e]nhancement of

protection of rights of conscience”); National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112- 239, § 533, 126 Stat. 1632, 1636 (providing for the “[p]rotection of rights of conscience”).

102 See *Dep’t of Def. Instruction*, No. 1300.17(4)(a), (Jan. 22, 2014), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130017p.pdf>.

103 *Singh v. McHugh*, 109 F. Supp. 3d 72, 93, 101 (D.D.C. 2015).

104 *Id.*

105 See Army Directive 2017-03 (Policy for Brigade-Level Approval of Certain Requests for Religious Accommodation) (Jan. 3, 2017), <http://s3.amazonaws.com/becketpdf/Army-Directive-2017-03-Policy-for-Brigade-Level-Approval-of-Certain-Requests-for-Religious-Accommodation.pdf>.

106 *Singh v. Carter*, 185 F. Supp. 3d 11 (D.D.C. 2016).

107 Press Release, Becket, *Sikh soldiers are back! New regulations create religious accommodations for storied soldiers* (Jan. 4, 2017), <https://www.becketlaw.org/media/sikh-soldiers-back/> (reporting on the new Army Directive 2017-03).

108 See Dep’t Veterans Affairs, Update of Policy Guidance on Religious Exercise and Expression in VA Facilities and Property Under the Charge

that honor their faith tradition. The wishes of a deceased Veteran’s family remain paramount in determining what, if any, religious expression will take place at a Veteran’s committal service. Families are free to have a committal service with or without religious references or the display of religious or other symbols.

and responsiveness of the political branches is the best formula for a robust protection of religion—all religions—in the public square.

Furthermore, the Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012 permits the placement of commemorative monuments in memory of an individual’s or group’s “service in the Armed Forces” in Arlington National Cemetery, and it does not prohibit the inclusion of religious symbols on those monuments.¹⁰⁹

American Humanist Association brought up this Act during oral argument in the Peace Cross case, prompting Justice Samuel Alito to quip that its religiously neutral approach to memorializing was “the way this sort of thing is being handled today in a pluralistic society in which ordinary people get along pretty well and—and are not at each other’s throats about religious divisions.”¹¹⁰ Justice Alito’s comments capture the sentiment that accommodation for minority religious beliefs in a pluralistic society is available outside the courts; indeed, it is best to seek such accommodation outside the courts.

Of course, some will seek to take advantage of the political branches to exclude others from full participation in our society. No government institution—including the judiciary—can perfectly protect against human rivalry and selfishness. But as a matter of structure, the political branches have greater capacity to protect the rights of religious minorities and to respond to bad policy. After all, “[o]nce a court issues a ruling, the doctrine of stare decisis immediately encamps around it to stifle any later change or repudiation. That is not at all the situation with legislation, which can come and go as political power migrates from one set of interest groups to another.”¹¹¹ The overall success of religious minorities in obtaining accommodations in legislation and executive action—and their mixed success and failure in the courts—shows that this is as true in practice as it is in theory.

IV. CONCLUSION

Religious minorities, like all Americans, want the law to protect their right to religious free exercise in the public square. An Establishment Clause doctrine that, in Thomas Jefferson’s words, reflects the clause’s meaning at the “time when the Constitution was adopted” and “recollect[s] the spirit manifested in the debates” benefits everyone by ensuring judicial objectivity and empowering the political branches to accommodate religious minorities.¹¹² A historical approach for the courts and a reliance on the flexibility

and Control of VA, dated November 7, 2014 (VAIQ 7718000), at 8 (2016).

109 Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, § 604, 126 Stat. 1165 (2012).

110 Oral Argument Transcript at 52-53, *American Legion*, Nos. 17-1717 & 18-18.

111 Kelsey, *supra* note 61, at 25.

112 Letter from Thomas Jefferson to Judge William Johnson, *supra* note 18, at 449.

