

ORIGINALISM V. ORIGINALISM: HOW JAMES MADISON'S UNDERSTANDING OF THE ESTABLISHMENT CLAUSE CAN HELP COMBAT CHRISTIAN NATIONALISM

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INTRODUCTION

Since the insurrection at the Capitol on January 6th, the public has begun to take notice of a looming threat to American Democracy: Christian Nationalism. Christian Nationalists believe that America was founded as a Christian nation by Christians, who based the nation's founding documents on Christian principles.¹ They also believe that the United States has been blessed by God, but that these blessings are threatened by cultural degradation.² This understanding of the United States is not only false but dangerous and conflicts with protections offered by the Constitution.³ However, this is not some kind of fringe idea held only by radicals, it is becoming widely popular among Republicans in government and at large.

A recent poll conducted by Politico found that 61% of Republicans believe that the United States should declare itself a Christian Nation.⁴ Colorado Republican Representative Lauren Boebert said that “[t]he church is supposed to direct the government, the government is not supposed to direct the church.”⁵ Georgia Congresswoman Marjorie Taylor Greene has stated that Republicans “should be Christian nationalists.”⁶

Others, such as Supreme Court Justice Amy Coney Barrett and former Vice President Mike Pence, are more subtle in their rhetoric. When Justice Barrett gave

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¹ PHILIP S. GORSKI ET AL., *THE FLAG AND THE CROSS: WHITE CHRISTIAN NATIONALISM AND THE THREAT TO AMERICAN DEMOCRACY* 3 (2022).

² *Id.*

³ *See generally* ANDREW L. SEIDEL, *THE FOUNDING MYTH: WHY CHRISTIAN NATIONALISM IS UN-AMERICAN* (2019).

⁴ Stella Rouse & Shibley Telhami, *Most Republicans Support Declaring the United States a Christian Nation*, POLITICO (Sept. 21, 2022, 4:30 AM), <https://www.politico.com/news/magazine/2022/09/21/most-republicans-support-declaring-the-united-states-a-christian-nation-00057736> [<https://perma.cc/2AF7-ZJCQ>].

⁵ Amanda Tyler, *Opinion: Marjorie Taylor Greene's Words on Christian Nationalism Are a Wake-Up Call*, CNN (July 27, 2022, 8:58 AM), <https://www.cnn.com/2022/07/27/opinions/christian-nationalism-marjorie-taylor-greene-tyler/index.html> [<https://perma.cc/W9FP-P8VX>].

⁶ *Id.*

a commencement address at Notre Dame Law School, she told the graduates that they must “always keep in mind that [their] legal career is but a means to an end, and . . . that end is building the kingdom of God.”⁷ In October 2022 in an interview with Fox Business Channel, Pence stated that “the radical left believes that the freedom of religion is the freedom from religion. But it’s nothing the American founders ever thought of or generations of Americans fought to defend.”⁸

The Supreme Court has recently created a history and tradition test for Establishment Clause cases, thereby taking an explicitly originalist approach.⁹ Originalism is a school of Constitutional interpretation that demands strict adherence to the text of the Constitution and the original intent of the Framers.¹⁰ In the case of the religion clauses, the Framers were concerned with avoiding the violent and destabilizing effects of entangling religion with the government that had belied Europe in the centuries prior to the revolution.¹¹ Originalism would thereby require that Court decisions must keep these concerns and *only these concerns* in mind when interpreting the Constitution’s religion clauses.

Proponents of originalism claim that this interpretive scheme is a way to restrict judicial decision making because it insists that Constitutional provisions are fixed.¹² However, this could not be further from the truth, since originalist Justices often ignore inconvenient facts and will revise history to create conclusions that further their preferred policy goals.¹³ This Note, by applying the historical view of James Madison to the Establishment Clause and the implications that said view would have for an originalist, will demonstrate the aforementioned contradiction that comes with originalism.

It will further discuss the fact that these implications would likely be ignored by the conservative originalist Court because the history does not align with its policy goals. It is clear that many Justices are either Christian Nationalists or at the very least friendly to the ideas that it espouses.¹⁴ The terrifying fact is that under this Supreme Court, it is possible that Christian Nationalism will become the legal lens

⁷ Amy Coney Barrett, Diploma Ceremony Address at Notre Dame Law School Commencement (May 2006).

⁸ Brandon Gage, *Mike Pence Says Americans Don’t Have a Right to Freedom from Religion*, SALON (Oct. 27, 2022, 5:00 AM), https://www.salon.com/2022/10/27/mike-pence-says-americans-don-t-have-a-right-to-freedom-from-religion_partner/ [<https://perma.cc/2N J2-QBSR>].

⁹ See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022).

¹⁰ ERWIN CHEMERINSKY, *WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM* ix (2022).

¹¹ ERWIN CHEMERINSKY & HOWARD GILLMAN, *THE RELIGION CLAUSES: THE CASE FOR SEPARATING CHURCH AND STATE* 21 (2020).

¹² CHEMERINSKY, *supra* note 10, at 14, 19.

¹³ *Id.* at x, xi.

¹⁴ See Caroline Mala Corbin, *The Supreme Court’s Facilitation of White Christian Nationalism*, 71 ALA. L. REV. 833, 836 (2020).

through which the Establishment Clause is viewed. Traditionally, the Court has recognized certain fundamental principles concerning the Establishment Clause.¹⁵ However, if Christian Nationalism becomes the historical understanding of the Court, then an ahistorical understanding that threatens the very existence of the Establishment Clause will become binding precedent.

James Madison wrote and introduced the First Amendment¹⁶ to the first Congress thereby making his understanding of the Establishment Clause extremely important within an originalist framework.¹⁷ James Madison's personal correspondence and other writings clearly demonstrate that his understanding of the Establishment Clause was one of complete separation between religion and government.¹⁸ Consequently, a potential solution to the ahistorical understanding of Christian Nationalism would be to have Congress codify the secular understanding that Madison had regarding the Establishment Clause.

This Note will focus on what can be done to prevent Christian Nationalism from ending the Establishment Clause. Part I will focus on the cases that defined former Establishment Clause doctrine and how recent cases have done away with the parameters laid out in those earlier cases. Part II will focus on the understanding that James Madison had about the Establishment Clause. Part III will argue that Madison's understanding of complete separation can and should be codified either under Congress' enforcement power under the Fourteenth Amendment or the Spending Power of Article I. Part IV will consider how a statute could affect future Establishment Clause cases. Part V will discuss the feasibility of a federal statute being passed and the alternative option of secular activists passing similar statutes at the state level.

I. A BRIEF HISTORY OF ESTABLISHMENT CLAUSE JURISPRUDENCE

The portion of the First Amendment that deals with religion says that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"¹⁹ This portion is divided into two clauses: the Establishment

¹⁵ Michael A. Rosenhouse, *Construction and Application of Establishment Clause of First Amendment—U.S. Supreme Court Cases*, 15 A.L.R. Fed. 2d 573 (2006).

¹⁶ "Congress shall make no law respecting an establishment of religion" U.S. CONST. amend. I.

¹⁷ This is demonstrated through the fact that many Establishment Clause cases make reference to Madison. *See generally* *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); *Carson v. Makin*, 142 S. Ct. 1987 (2022); *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664 (1970).

¹⁸ *See* discussion *infra* Part II.

¹⁹ U.S. CONST. amend. I.

Clause²⁰ and the Free Exercise Clause.²¹ The interpretation and purpose of these clauses in the Constitution are contested.²² However, generally speaking, the religion clauses protected people's freedom of religion and freedom from religion.²³

As with all of constitutional law, the religion clauses are interpreted in the case law of the Supreme Court. Establishment Clause doctrine was built up by many cases during the twentieth century.²⁴ Cases from the first part of the century culminated in the *Lemon Test* in 1971 which acted for decades as a three-pronged test to determine whether a policy violated the Establishment Clause.²⁵ The prevailing doctrine embodied by the *Lemon Test* is known as non-preferentialism.²⁶ Under this view, the government is supposed to act with "benevolent neutrality" towards religions.²⁷ One of the earliest cases that illustrate non-preferentialist jurisprudence is the 1947 case of *Everson v. Board of Education*.²⁸ In that case, the Court determined that "the 'establishment of religion' clause . . . means at least this: Neither a state nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another."²⁹

In *Everson*, the Court considered a statute that allowed parents to be reimbursed for the money that they expended for the transportation of their children to and from religious schools via buses.³⁰ The statute was held to be constitutional, but only because its purpose was to provide for the safe transportation of school children and that the religious schools met the secular educational requirements of the state.³¹ In other words, *Everson* established that a statute must have a secular purpose in order for it to be considered constitutional.³²

²⁰ *Id.* ("Congress shall make no law respecting an establishment of religion . . .").

²¹ *Id.* ("Congress shall make no law respecting . . . or prohibiting the free exercise [of religion].").

²² See generally CHEMERINSKY & GILLMAN, *supra* note 11.

²³ *Id.*

²⁴ See generally *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022).

²⁵ See *Lemon*, 403 U.S. at 612–13.

²⁶ Richard L. Pacelle Jr., *Lemon Test*, FREE SPEECH CTR. (Oct. 17, 2023), <https://firstamendment.mtsu.edu/article/lemon-test/> [<https://perma.cc/5C9N-AAVN>].

²⁷ *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 676 (1970).

²⁸ See generally *Everson*, 330 U.S. 1.

²⁹ *Id.* at 15.

³⁰ *Id.* at 3.

³¹ *Id.* at 18.

³² It is worth mentioning that the idea of secular purpose is expanded in the 1985 case of *Wallace v. Jaffree* to include actions by the government that could amount to endorsement. Specifically, the Court stated that "in applying the purpose test, [the Court must] ask 'whether [the] government's actual purpose is to endorse or disapprove of religion.'" Furthermore, endorsement as a term is extremely broad and includes a state's intention to characterize [a religious activity] as a favored practice. *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

The case of *Engel v. Vitale* in 1962 expanded on the constitutional limitations that the Establishment Clause placed on the government. The facts of the case show that the state of New York had adopted a program of daily classroom prayers in public schools.³³ The prayer was brief, neutral, and voluntary.³⁴ However, for rather obvious reasons this practice was held to be unconstitutional. The Court stated that “[n]either the fact that a prayer [is] . . . neutral nor the fact that [it] . . . is voluntary can serve to free it from the limitations of the Establishment Clause . . .”³⁵

Those limits mean that “it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.”³⁶ The result of this case can be viewed as establishing that the government cannot provide or partake in a religious practice. The primary reason of the Court for coming to this conclusion is that to allow the government to act religiously has historically led to the entanglement of policy and religious orthodoxy which causes the two to encroach upon one another.³⁷ In other words, policies that entangle religious authority and government authority are unconstitutional because after they are entangled, there is nothing stopping that authority from encroaching further.³⁸

The Court expanded its interpretation of the Establishment Clause in the case of *School District of Abington Township v. Schempp* which took place in 1963. This case combined two sets of petitioners; the first were from Pennsylvania and the second were from Maryland.³⁹ Petitioners were challenging a Pennsylvania law that required public schools to read from the Bible at the opening of each school day, and a Maryland city rule that provided for opening exercises in the public schools that consisted primarily of reading a chapter from the Bible and the Lord’s Prayer.⁴⁰

The Court found that these practices were unconstitutional because “if [the primary effect of a practice] is the advancement or inhibition of religion then the enactment exceeds the scope of . . . the Constitution.”⁴¹ In other words, for a practice

³³ *Engel v. Vitale*, 370 U.S. 421, 422 (1962).

³⁴ *Id.* at 421.

³⁵ *Id.* at 430.

³⁶ *Id.* at 425.

³⁷ *Id.* at 429–36.

³⁸ It should be noted that in the 1973 case of *Committee for Public Education and Religious Liberty v. Nyquist* religious authority is shown to mean more than a state religion or preference for one religion. According to the Court, “a law may be one ‘respecting an establishment of religion’ even though its consequence is not to promote a ‘state religion’ and even though it does not aid one religion more than another but merely benefits all religions alike.” In other words, the Establishment Clause prevents giving aid to religion in general. *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973).

³⁹ *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 205, 211 (1963).

⁴⁰ *Id.*

⁴¹ *Id.* at 222.

to withstand the Establishment Clause, its primary effect must neither advance nor inhibit religion.⁴²

The three tests determined in the previously mentioned cases were combined in the 1971 case *Lemon v. Kurtzman*. The case considered the constitutionality of state statutes from Rhode Island and Pennsylvania which provided taxpayer-funded aid to church-related schools with regard to instruction in secular matters.⁴³ To determine the constitutionality of a statute the Court stated that they must make three considerations: “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.”⁴⁴ The Court then examined the statutes with this three-pronged test in mind and determined that they were unconstitutional.⁴⁵

For the next two decades, the Supreme Court upheld and applied the test presented in *Lemon*. In the 1992 case of *Lee v. Weisman*, Justice Blackmun in his concurring opinion made note that “since 1971, the Court has decided 31 Establishment Clause cases; in only one instance, the decision of *Marsh v. Chambers* has the Court not rested its decision on the basic principles described in *Lemon*.”⁴⁶

Despite the fact that the *Lemon* Test clarified Establishment Clause doctrine and was continuously used in Establishment Clause cases for two decades, conservatives sought to kill it from its inception.⁴⁷ The most hated part of the test was the entanglement prong, and as such, it was the first to be excised. For years, under the guise of helping better define the *Lemon* Test, Justice O’Connor analyzed Establishment Clause cases in her concurrences through the lens of what came to be called the Endorsement Test.⁴⁸ This test, which is first vaguely outlined in *Lynch v. Donnelly*, would require the Court to determine whether a “reasonable observer is likely to draw from the facts before [them] an inference that the State itself is endorsing a religious practice or belief.”⁴⁹

⁴² It is also worth noting another conclusion that the Court came to about Establishment Clause challenges. That conclusion was that “[t]he Establishment Clause . . . does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals . . .” *Id.* at 221. This means that anytime “the power, prestige and financial support of government is placed behind [a] . . . religious belief” the practice is unconstitutional because “the indirect coercive pressure upon religious minorities to conform . . . is plain.” *Id.*

⁴³ 403 U.S. 602, 606 (1971).

⁴⁴ *Id.* at 612–13.

⁴⁵ *Id.* at 625.

⁴⁶ 505 U.S. 577, 603 n.4 (1992).

⁴⁷ Kimberly Robinson, *Supreme Court Again Nods to History, Tradition in Religion Case*, BLOOMBERG L. (June 28, 2022, 4:46 AM), <https://news.bloomberglaw.com/us-law-week/supreme-court-again-nods-to-history-tradition-in-religion-case> [<https://perma.cc/RLE9-J2Y4>].

⁴⁸ See William M. Janssen, *Toiling in the Lemon Groves: Prelude to the Endorsement Test*, 7 CHARLESTON L. REV. 691, 706–10, 712–13 (2013).

⁴⁹ See *Witters v. Wash. Dept. of Servs. for Blind*, 474 U.S. 481, 493 (1986).

The Endorsement Test, meant to stand alone, removed the entanglement prong and conflated the purpose and effect prongs of the *Lemon* test.⁵⁰ The removal of the entanglement prong and the establishment of the Endorsement Test as *Lemon*'s replacement was finally completed in the 1997 case of *Agostini v. Felton* when Justice O'Connor writing for the majority said "it is simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute's effect."⁵¹

With the end of the entanglement prong and the continued use of the Endorsement Test, the Court maintained a weakened version of the non-preferentialist philosophy that had defined the Establishment Clause for decades. Given the weakened state that non-preferentialist jurisprudence was placed in after the adoption of the Endorsement Test, it is unsurprising that in recent cases when the Court, stacked with Justices who are hostile to non-preferentialism, had the chance to end non-preferentialist jurisprudence, they did so.

The new judicial philosophy that has come to replace non-preferentialism as the lens through which the Supreme Court views the Establishment Clause is known as accommodationism.⁵² Under this view, the Establishment Clause should be interpreted to accommodate religious participation in government and government support for religious institutions.⁵³ Under recent case law, the government only violates the Establishment Clause when its policy purposefully discriminates between religions or is religiously coercive.⁵⁴ This new lens for analyzing the Establishment Clause has led to the dismantling of the purpose and effect prongs. The cases establishing this new jurisprudence have been the final nails in the coffin for the *Lemon* test.

The first of these cases is *Town of Greece v. Galloway* in 2014. Greece, a town in upstate New York, had a practice of opening town meetings with an opening prayer.⁵⁵ During the ten years after the practice began, only four prayers were delivered by non-Christians, all of which occurred in 2008 immediately after the town received complaints about its selection practice.⁵⁶ Citizens filed suit claiming that the town's selection process violated the Establishment Clause because it favored Christians over other religions.⁵⁷ The town defended its practice by stating that the population of the town was predominantly Christian and that the congregations

⁵⁰ Mark Strasser, *The Protection and Alienation of Religious Minorities: On the Evolution of the Endorsement Test*, 2008 MICH. ST. L. REV. 667, 673–74 (2008).

⁵¹ 521 U.S. 203, 233 (1997).

⁵² See CHEMERINSKY & GILLMAN, *supra* note 11, at 12–13.

⁵³ *Id.*

⁵⁴ It is also debatable whether that is still the case as the Supreme Court has shown that it is willing to treat cases brought by Muslims differently than those brought by Christians. See ANDREW SEIDEL, *AMERICAN CRUSADE: HOW THE SUPREME COURT IS WEAPONIZING RELIGIOUS FREEDOM* 21–23 (2022).

⁵⁵ 572 U.S. 565, 565 (2014).

⁵⁶ *Id.* at 611–12 (Breyer, J., dissenting).

⁵⁷ *Id.* at 565.

within the town borders were also overwhelmingly Christian.⁵⁸ However, the facts made it clear that many of the town's residents attended congregations outside of the town's borders.⁵⁹

The Court ruled that “[a]bsent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a particular prayer will not likely establish a constitutional violation.”⁶⁰ In other words, the mere fact that the overwhelming majority of prayers were Christian does not violate the Constitution. Furthermore, the Court stated that “the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing.”⁶¹ This means that a town council is free to ignore its citizens who are a part of a religious minority simply because their congregation is not inside the town. Thus, even when a policy has a discriminatory effect, that overwhelmingly favors a certain religion, the Establishment Clause is now found to be inapplicable.

By ending the effect prong, the Court gutted the *Lemon* test and butchered the Establishment Clause by effectively rendering it void. This is further demonstrated by the 2017 case of *Trinity Lutheran Church v. Comer*. Missouri had a state program that offered reimbursement grants to qualifying nonprofit organizations to install playground surfaces made from recycled tires.⁶² The Department responsible for the grants had “a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity.”⁶³ Trinity Lutheran Church applied for a grant and the Department denied the Center's application explaining that “under Article I, Section 7 of the Missouri Constitution, the Department could not provide financial assistance directly to a church.”⁶⁴

The Court stated that “denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest ‘of the highest order.’”⁶⁵ Furthermore, they said that “[t]he express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant.”⁶⁶ The consequence of this decision is that a state program is now required to give taxpayer money to religious organizations because failure to do so is discrimination against religion. As Justice Sotomayor's dissenting opinion noted, the majority's “reasoning weaken[ed] this

⁵⁸ *Id.*

⁵⁹ *Id.* at 610–11 (Breyer, J., dissenting).

⁶⁰ *Id.* at 567.

⁶¹ *Id.* 585–86.

⁶² *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2017 (2017).

⁶³ *Id.*

⁶⁴ *Id.* at 2018.

⁶⁵ *Id.* at 2019.

⁶⁶ *Id.* at 2015.

country's longstanding commitment to a separation of church and state" as embodied in the Establishment Clause.⁶⁷

The reasoning of *Trinity Lutheran Church v. Comer* was upheld in the 2020 case *Espinoza v. Montana Department of Revenue* when the Court said that "the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs" and that "once a State decides to [fund secular private schools], it cannot disqualify some private schools solely because they are religious."⁶⁸ This issue was decided again in 2022 when the Court decided in *Carson v. Makin* that a non-sectarian requirement for tuition assistance was discrimination against religion and therefore unconstitutional.⁶⁹

While these cases using an accommodationist lens have terminated many of the defining characteristics of church-state separation that protected Americans from religious overreach, none go as far as the 2022 case of *Kennedy v. Bremerton*. In *Kennedy*, an assistant high school football coach at a public school named Joseph Kennedy had been kneeling on the 50-yard line to pray with a majority of the team immediately after shaking hands with their opponents and engaging in postgame talks with "overtly religious references," while the players kneeled around him.⁷⁰

The school district requested that Kennedy cease his actions due to Establishment Clause concerns.⁷¹ The district explained that their establishment concerns were motivated by the fact that any reasonable observer would view Kennedy's actions as an endorsement by the district of his religious views and the possibility that students would feel coerced to participate in religious conduct to which they might have otherwise objected to.⁷² The district repeatedly emphasized that it was happy to accommodate Kennedy's desire to pray on the job in a way that did not interfere with his duties or risk perceptions of endorsement.⁷³

However, Kennedy ignored the request of the district, refused the accommodation, and continued to act as he had in the past, stating that he was compelled by his sincere religious belief.⁷⁴ For violating its request, the district informed Kennedy that he was being put on paid administrative leave.⁷⁵ Kennedy then sued the district for "violating" his Free Exercise rights.⁷⁶ The Court ruled in favor of Kennedy

⁶⁷ *Id.* at 2027.

⁶⁸ 140 S. Ct. 2246, 2254, 2261 (2020).

⁶⁹ *See* 142 S. Ct. 1987, 1989–90 (2022).

⁷⁰ 142 S. Ct. 2407, 2435–36 (2022) (Sotomayor, J., dissenting).

⁷¹ *Id.* at 2438.

⁷² *Id.* at 2439–40.

⁷³ *Id.* at 2439.

⁷⁴ *Id.*

⁷⁵ *Id.* It is important to note that parents reached out to the district saying that their children had participated in Kennedy's prayers solely to avoid separating themselves from the rest of the team. *Id.* at 2440.

⁷⁶ *Id.*

stating that “[i]n place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by ‘reference to historical practices and understandings.’”⁷⁷ The Court claimed that the district’s Establishment Clause concerns led to a heckler’s veto that was not part of the First Amendment and therefore their decision to place Kennedy on leave was unconstitutional.⁷⁸

It is important to note that the facts of this case were entirely ignored and distorted by the majority to come to a conclusion that they saw as politically desirable.⁷⁹ Consequently, the Court for the first time in over seven decades has stated that it is willing to permit coercive religious expression in public schools under the veneer of religious freedom. This case should not be seen as being specific to its facts. In providing a new test for Establishment Clause doctrine that is as vague as “historical practices and understandings,” the Court has paved the way for Christian Nationalists to completely dismantle the “wall of separation” that American democracy has so long held dear.

The Court has shown that it is willing to distort the truth to create a conclusion that its conservative majority desires. The nebulous concept of “historical practices and understandings” will now allow the Court to select interpretations of the Establishment Clause that already align with their views. However, as Part II will show, if “historical understandings” were seriously thought about by the Court, then it would be clear that its accommodationist framework is completely without warrant. Instead, the Establishment Clause would have to be seen through a secularist lens.

II. MADISON’S UNDERSTANDING

Now that this Note has given a basic understanding of current Establishment Clause jurisprudence and its predecessors, it can begin to examine the “historical understanding” of the Establishment Clause. Nearly all of the cases mentioned above that discuss the Establishment Clause make mention of James Madison in some way.⁸⁰ This is not surprising at all, as the First Amendment was authored and proposed by Madison during the First Congress.⁸¹ Consequently, courts have traditionally looked at Madison’s understanding of church-state separation when looking at the Establishment Clause.

⁷⁷ *Id.* at 2428.

⁷⁸ *Id.* at 2427.

⁷⁹ *See id.* at 2434 (Breyer, J., dissenting).

⁸⁰ *See generally id.*; *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Carson v. Makin*, 142 S. Ct. 1987 (2022); *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664 (1970).

⁸¹ James H. Read, *James Madison*, FREE SPEECH CTR. (Aug. 5, 2023), <https://www.mtsu.edu/first-amendment/article/1220/james-madison> [<https://perma.cc/4G3A-LYFK>].

However, these analyses typically look at his “Memorial and Remonstrance against Religious Assessments” which he wrote in 1785.⁸² While there is certainly value in looking at this text to understand Madison’s concerns regarding church-state separation, the text does not tell us much about what Madison thought about the Establishment Clause since it was not written until 1789.⁸³ Therefore, to truly understand Madison’s views on the Establishment Clause—rather than the relationship between religion and government in general—this Note will instead look to what he wrote after the First Amendment was added to the Constitution.

However, before doing this it would be helpful to know the religious influences that held sway over the founding generation.⁸⁴ This is because one of the core claims of Christian nationalism is that “America was founded as a Christian nation by (white) men who were ‘traditional Christians,’ who based the nation’s founding documents on ‘Christian principles.’”⁸⁵ However, just like the other claims of Christian Nationalism, this is not true.⁸⁶

It is the case that most Americans were Christians during the eighteenth century.⁸⁷ However, the fact that most people were Christians says nothing about the founders, who had a diversity of religious belief between them.⁸⁸ During the eighteenth century, a new religious world-view became very popular among educated Americans: Deism.⁸⁹ Deism claimed that God created the universe and then withdrew to let events take their course without further interference.⁹⁰ Due to the fact that Deists did not believe in revelation,⁹¹ Deists often took issue with the claims of organized religion (like Christianity) and thought that many of its conclusions were unreasonable.⁹² Thus, at a time in which political thought began to re-evaluate the role of kings, religious thought also began to re-evaluate the role of God.

Within deistic thought, reason came to be seen as “a liberator from the shackles of repressive religion and tyrannical government.”⁹³ Deism and its emphasis on the

⁸² See generally *Everson*, 330 U.S. 1; *Schempp*, 374 U.S. 203; *Engel*, 370 U.S. 421; *Lemon*, 403 U.S. 602 (Douglas, J., concurring); *Kennedy*, 142 S. Ct. 2407.

⁸³ James Madison, *The Bill of Rights: A Transcription (1789)*, NAT’L ARCHIVES, <https://www.archives.gov/founding-docs/bill-of-rights-transcript> [<https://perma.cc/F5W8-XZRZ>].

⁸⁴ The term founding generation means the members of the Continental Congress, Constitutional Convention, and Presidents of the early republic.

⁸⁵ GORSKI ET AL., *supra* note 1, at 4.

⁸⁶ See generally SEIDEL, *supra* note 3; DAVID L. HOLMES, *THE FAITHS OF THE FOUNDING FATHERS* 1 (2006).

⁸⁷ HOLMES, *supra* note 86, at 1.

⁸⁸ *Id.* at 50.

⁸⁹ *Id.* at 49.

⁹⁰ *Id.* at 44.

⁹¹ Revelation includes spiritual experiences (visions, messages, premonitions, etc.) as well as revealed texts (Bible, Quran, Vedas, etc.). See generally *id.* at 47.

⁹² *Id.* at 47–48.

⁹³ *Id.* at 49.

role of reason influenced “most of the political leaders who designed the new American government.”⁹⁴ One of the political leaders who was greatly influenced by deism was James Madison.⁹⁵ The influence of deism no doubt caused Madison to become concerned with the dangers that organized religion and its unreasonable claims could pose to reasonable governance.

The influence of deistic thought is clear in the often-cited Memorial and Remonstrance against Religious Assessments when Madison says “[w]ho does not see 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?”⁹⁶ Making it clear that Madison shared the Deist worry about allowing religion to become entangled with the government.

With this in mind, the first document that will be helpful in exploring Madison’s understanding of the Establishment Clause comes from a veto early in his presidency. In a letter vetoing a bill providing financial support to a Baptist Church and several ministers James Madison said that he vetoed the bill:

Because the Bill, in reserving a certain parcel of land of the United States for the use of said Baptist Church, comprizes [sic] a principle and precedent for the appropriation of funds of the United States, for the use and support of Religious Societies; contrary to the Article of the Constitution which declares that Congress shall make no law respecting a Religious Establishment.⁹⁷

Such a statement makes clear that any appropriation of federal funds for the use and support of religious organizations was seen by Madison as being a violation of the Establishment Clause.

This comes in direct opposition to the Supreme Court’s recent opinions which appear to claim that state programs are required to give taxpayer money to religious organizations because failure to do so is discrimination against religion.⁹⁸ The Court’s view flies in the face of Madison’s “historical understanding.” Thus, if the

⁹⁴ *Id.* at 50.

⁹⁵ “[T]he pattern of Madison’s religious associations and the comments of contemporaries clearly categorize the fourth president of the United States as a moderate Deist.” *Id.* at 97.

⁹⁶ James Madison, *Memorial and Remonstrance Against Religious Assessments (1785)*, in FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-08-02-0163> [<https://perma.cc/KN7R-WRZC>].

⁹⁷ Letter from James Madison to the House of Representatives (Feb. 28, 1811), in FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/03-03-02-0252> [<https://perma.cc/C8E4-MDTJ>].

⁹⁸ See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246 (2020); *Carson v. Makin*, 142 S. Ct. 1987 (2022).

Court were consistent, it would have to overrule its previous opinions under the test put forward in *Kennedy v. Bremerton*.

That being said, Madison would go further than overturning the most recent Supreme Court cases. Instead, following his “historical understanding” would require that the United States to redefine the current relationship that the government has with religion. Other decisions by a non-preferentialist Supreme Court and lower courts that were required to use a non-preferentialist standard have allowed legislative sessions to begin with prayer,⁹⁹ religious language in the national motto¹⁰⁰ and pledge,¹⁰¹ as well as allowed churches to be tax exempt.¹⁰² These kinds of religious acts would of course be allowed to continue under the accommodationist lens.¹⁰³

Madison’s view put forward in his Detached Memoranda written in 1820 shows that his understanding of the Establishment Clause would not allow for any of these practices. According to Madison:

*Strongly guarded as is the separation between Religion & Govt. in the Constitution of the United States, the danger of encroachment by Ecclesiastical Bodies, may be illustrated by precedents [sic] already furnished in their short history. . . . See also attempt in Kentucky, for example, where it was proposed to exempt Houses of Worship from taxes. . . . But besides the danger of a direct mixture of Religion & civil Gover[n]ment, there is an evil which ought to be guarded ag[ain]st[] in the indefinite accumulation of property from the capacity of holding it in perpetuity by ecclesiastical Corporations. . . . The growing wealth acquired by them never fails to be a source of abuses.*¹⁰⁴

Consequently, under Madison’s “historical understanding,” churches would no longer be tax-exempt.¹⁰⁵ In fact, given this understanding, tax-exempt religious organizations should be viewed as dangerous.

⁹⁹ See *Marsh v. Chambers*, 463 U.S. 783 (1983); *Town of Greece v. Galloway*, 572 U.S. 565 (2014).

¹⁰⁰ See *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010); *Newdow v. Peterson*, 753 F.3d 105 (2d Cir. 2014); *Mayle v. United States*, 891 F.3d 680 (7th Cir. 2018).

¹⁰¹ See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

¹⁰² See *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664 (1970).

¹⁰³ See *supra* Part I.

¹⁰⁴ It should be noted that Madison also references vetoes he made during his presidency including the one mentioned earlier. See *supra* note 97 and accompanying text; James Madison, *Detached Memoranda (Jan. 31, 1820)*, in FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/04-01-02-0549> [<https://perma.cc/WQ4L-3U5A>].

¹⁰⁵ See *Churches, Integrated Auxiliaries, and Conventions or Associations of Churches*, IRS (May 4, 2022), <https://www.irs.gov/charities-non-profits/churches-integrated-auxiliaries-and-conventions-or-associations-of-churches> [<https://perma.cc/3BPB-59XG>].

This understanding would directly contradict the idea that tax exemption does not act as a subsidy for religion as the non-preferentialist Supreme Court claimed in *Walz v. Tax Commission of New York*.¹⁰⁶ In the Detached Memoranda, Madison also said that the appointment of Chaplains to the two Houses of Congress was inconsistent with the Constitution. Specifically, he said that:

The Constitution of the U.S. forbids every thing like an establishment of a national religion. The law appointing Chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes. Does not this involve the principle of a national establishment, applicable to a provision for a religious worship for the Constituent as well as of the representative Body, approved by the majority, and conducted by Ministers of religion paid by the entire nation.¹⁰⁷

It, therefore, seems as though Madison objected both to the prayer of ministers done in a legislative body meant to represent the people and their having received funding from taxpayer money for said prayer. Therefore, the “long standing practice of legislative prayer” that justified the decision of *Town of Greece v. Galloway*¹⁰⁸ would necessarily be deemed unconstitutional and especially so if those who prayed received taxpayer money.¹⁰⁹

Madison would still go further than taxing religious organizations and prohibiting legislative prayer. In fact, there is reason to think that he would disapprove of the clearly religious references in our national motto and pledge due to how each implies a religious affiliation. In his detached memoranda, Madison says that:

Religious proclamations by the Executive recommending thanksgivings & fasts are shoots from the same root with the legislative acts reviewed. Altho' [sic] recommendations only, they imply a religious agency . . . [t]hey see[m] [to] imply and certainly nourish the erroneous idea of a national religion. . . . The idea also of a union of all w[ho?] form one nation under one Govt. in acts of devotion to the God of all is an imposing idea.¹¹⁰

¹⁰⁶ See 397 U.S. 664, 672 (1970).

¹⁰⁷ Madison, *supra* note 104.

¹⁰⁸ See *supra* note 99 and accompanying text.

¹⁰⁹ The facts of the case do not indicate whether those who led prayer were compensated in any way. Madison is clear that it is unconstitutional regardless.

¹¹⁰ Madison, *supra* note 104.

While the motto and pledge are different from an executive religious proclamation, they seem to still “imply and certainly nourish the erroneous idea of a national religion” as well as the idea of “a union of all w[ho?] form one nation under . . . God.”¹¹¹

Despite the fact that the Supreme Court has not ruled on the merits of a case challenging the religious reference in the motto and pledge, in *Elk Grove Unified School District v. Newdow* the concurring opinions of conservative Justices Rehnquist, O’Connor, and Thomas seem to suggest that they would look at the references as being a historical recognition of the country’s religious character.¹¹² Given that the current Supreme Court is mostly composed of conservatives, they are likely to agree with this line of thinking. However, as Chief Justice Rehnquist states in his concurrence the purpose of these references was “to contrast this country’s belief in God with the Soviet Union’s embrace of atheism.”¹¹³ If the stated purpose of the religious references in the pledge and motto is not seen as implying or nourishing the erroneous idea of a national religion, then I am not sure what such an implication would look like.

Madison’s position is stated most clearly in a letter to Edward Livingston in 1822 when he says that “a perfect separation between ecclesiastical & Civil matters is of importance.”¹¹⁴ Such an understanding is that of a firm secularist who would not allow religion to have any special privileges or immunities that would aid it nor allow the government to engage in any practice that would show an endorsement of a religious position.

III. CONGRESSIONAL POWER

From the preceding sections, it is abundantly clear that Madison’s “historical understanding” would necessarily need to be included in any future Establishment Clause case and that its inclusion would necessarily entail a secularist reading of the Constitution that is in direct conflict with the accommodationist view promoted by Christian Nationalists.¹¹⁵ The question, therefore, is whether the Supreme Court is likely to abandon its ahistorical accommodationism in favor of historical secularism. The answer to this question is a resounding no, because as mentioned in the introduction, the current Supreme Court has Christian Nationalist sympathies.¹¹⁶ So short

¹¹¹ *Id.*

¹¹² The case was decided based on standing, but the concurrences made arguments based on the merits. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 25–26 (2004) (Rehnquist, C.J., concurring) (discussing the significance of the Pledge).

¹¹³ *Id.* at 25.

¹¹⁴ Letter from James Madison to Edward Livingston (July 10, 1822), in FOUNDERS ONLINE, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/04-02-02-0471> [<https://perma.cc/68N6-XKUT>].

¹¹⁵ *See supra* Parts I–II.

¹¹⁶ *See supra* Introduction.

of appointing new members of the Supreme Court, what can be done to prevent the Supreme Court from using revisionist history to continue with its accommodationist gutting of the Establishment Clause?

This Note's proposed solution would be to have Congress pass a statute, or Religion State Separation Act, that would protect the Establishment Clause before it is written out of the Constitution by a radical Supreme Court. This Religion State Separation Act should reflect the secularist philosophy of James Madison which served as the foundation for the Establishment Clause. However, before discussing a potential Religion State Separation Act, it is important to ask whether such a statute could pass constitutional muster. A Religion State Separation Act would be constitutional. To demonstrate how such a statute could be constitutional, this Note will look at a similar development that occurred with the Free Exercise clause.

To begin the analysis, it is important to look at the 1990 case of *Employment Division v. Smith*.¹¹⁷ In *Smith*, a group of employees were fired after ingesting peyote for sacral purposes.¹¹⁸ The Oregon Employment Division denied them unemployment compensation because their discharge was deemed to have involved work-related misconduct.¹¹⁹ The Supreme Court stated that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes or prescribes conduct that his religion prescribes or proscribes.¹²⁰

The *Smith* decision was wildly unpopular and in 1993 Congress passed the Religious Freedom Restoration Act (RFRA). RFRA provides that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."¹²¹ RFRA thereby directly contradicts the *Smith* decision. Congress used its enforcement power under Section 5 of the Fourteenth Amendment to pass RFRA.¹²² This provides the first possible way in which Congress could pass a Religion State Separation Act to protect the Establishment Clause.

However, RFRA was then challenged in 1997 during the case *City of Boerne v. Flores*.¹²³ The majority stated that for purposes of determining whether federal legislation has been validly enacted pursuant to Congress's enforcement power under Section 5 of the Federal Constitution's Fourteenth Amendment, legislation which alters the meaning of a right cannot be said to be enforcing rights found in the Constitution.¹²⁴

¹¹⁷ See 494 U.S. 872 (1990).

¹¹⁸ *Id.* at 874.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 879.

¹²¹ Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹²² U.S. CONST. amend. XIV, § 5.

¹²³ See 521 U.S. 507 (1997).

¹²⁴ See *id.* at 519.

Furthermore, the majority opinion stated that RFRA does alter the meaning of the right to free exercise and was therefore unconstitutional.¹²⁵ However, the dissent by Justice O'Connor implies that RFRA does not alter the meaning of free exercise, but rather seeks to enforce it and is therefore constitutional.¹²⁶ This divide makes it difficult to say how effective Congress's enforcement power would be in creating a statute protecting the Establishment Clause.¹²⁷ Given the accommodationist lens through which the current Supreme Court views the Establishment Clause, it is likely the Court will rule that a statute that uses a secularist understanding is unconstitutional. As a result, it seems as though Congress would likely need to use another power so that the Court's decision in *City of Boerne* would not apply.

Luckily, there is another example of this for the Free Exercise Clause. Following the Court's decision in *City of Boerne*, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), enacted under Congress's Commerce and Spending Clause powers.¹²⁸ RLUIPA imposes the same general test as RFRA but on a more limited category of governmental actions.¹²⁹

The defining case for Congress's Spending Clause is the 1987 case *South Dakota v. Dole*.¹³⁰ The Supreme Court stated that there were five requirements for a statute to fall under the spending power of Congress. First, the exercise of the spending power must be in pursuit of the general welfare.¹³¹ Second, if Congress desires to condition the states' receipt of federal funds, it must do so unambiguously, enabling the states to exercise their choice knowingly, cognizant of the consequences of their participation.¹³² Third, conditions on federal grants must be related to the federal interest in particular national projects or programs.¹³³ Fourth, the statute must not conflict with other constitutional provisions.¹³⁴ Finally, spending conditions must not pass the point where pressure turns into coercion.¹³⁵

In 2005, Justice Thomas, one of the more radically conservative members of the Court, wrote a concurring opinion in the case of *Cutter v. Wilkinson* that stated that

¹²⁵ *Id.* at 534.

¹²⁶ *Id.*

¹²⁷ It is important to note that *City of Boerne* did not invalidate RFRA at the federal level. Instead, it invalidated its application to the states. The result of this was the passage of state RFRAs around the country and Congress's passage of RLUIPA. See CHEMERINSKY & GILLMAN, *supra* note 11, at 118–19.

¹²⁸ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 695 (2014).

¹²⁹ Religious Land Use and Institutionalized Persons Act of 2000, 114 Stat. 803, 42 U.S.C.S. § 2000cc.

¹³⁰ 483 U.S. 203 (1987).

¹³¹ *Id.* at 207. In considering whether a particular expenditure is intended to serve general public purposes, courts will defer substantially to the judgment of Congress. *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 208.

¹³⁵ *Id.* at 211.

RLUIPA was a constitutional use of Congress's spending power.¹³⁶ Specifically, he stated: "It also bears noting that Congress, pursuant to its Spending Clause authority, conditioned the States' receipt of federal funds on their compliance with RLUIPA. . . . [W]hile Congress' condition stands, the States subject themselves to that condition by voluntarily accepting federal funds."¹³⁷ If a Justice as conservative as Justice Thomas believes this to be the case regarding the spending power, then the spending power could be a more viable option by which Congress could pass a statute protecting the Establishment Clause.

Now that it is clear that Congress has the power to pass statutes that protect the Free Exercise clause under either the enforcement power or the spending power, it should also be clear that Congress could pass a Religion State Separation Act that protects the Establishment Clause. If implemented in a Religion State Separation Act, Madison's views would prohibit the government from passing legislation that aids a religious establishment.

A potential Religion State Separation Act would likely mirror the *Lemon* test¹³⁸ in many ways but would also have much more stringent requirements since it would use a secularist lens rather than a non-preferentialist lens. To accurately represent Madison's views on the First Amendment, the Religion State Separation Act defending the Establishment Clause would state that a statute or policy must (1) have a solely secular legislative purpose, (2) not have the effect of advancing religion, and (3) not foster any government entanglement with religion.¹³⁹

The similarities to the *Lemon* test are clear but it is important to emphasize the difference between what each of these prongs would entail under a secularist framework. The purpose test within this proposed legislation would need to prohibit any kind of religious reasoning when considering legislation. Consequently, reasons such as contrasting belief in God with atheism that depend almost entirely upon religious motivations would necessarily disqualify legislation. The effect prong would need to prohibit religious organizations from receiving both direct aid (such as receiving taxpayer money through grants) and indirect aid such as tax-exempt status. Finally, the entanglement prong must prohibit practices that would lead a reasonable observer to think that the government endorsed a religious position as well as prohibit religiously coercive practices.

That being said, there is another issue that must be addressed when discussing what power Congress has to enforce the historical understanding of the Establishment Clause by James Madison. It is an issue that has allowed the Supreme Court

¹³⁶ 544 U.S. 709, 726 (2005) (Thomas, J., concurring).

¹³⁷ *Id.* at 732–33.

¹³⁸ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

¹³⁹ *Id.* Note that the language given in these prongs uses similar wording to the *Lemon* test while at the same time using terms that would go further in separating religion and government than what *Lemon* required.

to essentially rewrite the Establishment Clause to its liking. That question is what happens when the Establishment Clause and the Free Exercise conflict? To understand how the Supreme Court is using this question to bludgeon the Establishment Clause, this Note will need to discuss a small amount of Free Exercise jurisprudence.

Current Free Exercise jurisprudence is defined by the *Smith* decision which held that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes or prescribes conduct that his religion prescribes or proscribes.¹⁴⁰ This standard for limiting Free Exercise has been used regularly for the past three decades.¹⁴¹ What has been a recent development is the Supreme Court's abuse of the Free Exercise Clause as a cudgel to beat the Establishment Clause to death. Using an accommodationist lens, the Supreme Court in Establishment Clause cases like *Trinity Lutheran Church v. Comer*, *Espinoza v. Montana Department of Revenue*, *Carson v. Makin*, and *Kennedy v. Bremerton* has essentially decided that any regulation which marginally affects the religious belief of a person in a negative way is discrimination against religion and therefore unconstitutional because the hostility it shows toward religion it is not neutral.¹⁴² However, that stance only works against a secular understanding if there is an assumption that the government is allowed to align itself with religion.¹⁴³ As this Note has made clear, such an assumption is false.

Therefore, to fully determine whether a statute protecting the Establishment Clause would be viable, one also needs to find a way to prevent the Court from overruling the Religion State Separation Act on the grounds that it violates Free Exercise. It is for this reason, that the Religion State Separation Act needs to be modeled off of the views of James Madison. The fact that the statute would be couched within his views provides additional protection against the Court.

If the Supreme Court is truly going to apply an originalist framework, it might not like what originalism has to say about the Religion State Separation Act. The result of a Free Exercise claim would necessarily include either a revision of the conclusions drawn within the new Establishment Clause jurisprudence or a revision of the Constitution by the Supreme Court larger than any other. The Religion State Separation Act would thereby serve another purpose. If the Religion State Separation Act cannot protect the Establishment Clause, then it would serve as more evidence that the Supreme Court has become an institution run by nothing more than political hacks.¹⁴⁴

¹⁴⁰ 494 U.S. 872 (1990).

¹⁴¹ See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022).

¹⁴² See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020); *Carson v. Makin*, 142 S. Ct. 1987 (2022); *Kennedy*, 142 S. Ct. 2407.

¹⁴³ See CHEMERINSKY & GILLMAN, *supra* note 11, at 164.

¹⁴⁴ Adam Serwer, *The Lie About the Supreme Court Everyone Pretends to Believe*, THE

As every law student learns in their constitutional law course during their first year, the Supreme Court draws its power from its legitimacy.¹⁴⁵ As Hamilton said, it is the “weakest” of the three branches of government with “no influence over either the sword or the purse.”¹⁴⁶ To overturn a statute protecting the Establishment Clause would destroy what little legitimacy the Court has after it overturned *Roe*.¹⁴⁷ Therefore, even if the Court wanted to rule in favor of Christian Nationalism over the views of James Madison, the author of the First Amendment, they would not dare out of fear that they would demolish whatever public support they have left.¹⁴⁸

From this conclusion, the Religion State Separation Act also would serve a tertiary purpose. It protects the legitimacy of the Court by preventing it from ruling in ways that not only take away the rights of the American people, but also threaten the very foundations of our secular democratic system. The benefits of a Congressional statute are quite large and the effectiveness of pursuing this route of action is also quite high. Therefore, if Congress cared at all about preserving church-state separation, they would pass the aforementioned statute, and if the Court cared at all about its legitimacy, it would not overturn it.

IV. EFFECT ON FUTURE CASES

The primary effect of a statute that follows the description given above would be the protection of the Establishment Clause against a Supreme Court with Christian Nationalist sympathies.¹⁴⁹ While it is nice to state the purpose of a statute and its contents, it is also important to state the effects that said statute will have on future cases. To explore this, I will use the facts of the cases *Carson v. Makin* and *Kennedy v. Bremerton* and analyze them under the prongs that were proposed in the previous section: a statute or policy must (1) have a solely secular legislative purpose,

ATLANTIC (Sept. 28, 2021), <https://www.theatlantic.com/ideas/archive/2021/09/lie-about-supreme-court-everyone-pretends-believe/620198/> [<https://perma.cc/7E8S-CUJ9>].

¹⁴⁵ That legitimacy is in turn defined by either public opinion or expertise. In recent years it has mostly been defined by public opinion as the idea of the Supreme Court as experts has eroded. See generally Or Bassok, *The Supreme Court's New Source of Legitimacy*, 16 U. PA. J. CONST. L. 153 (2013).

¹⁴⁶ THE FEDERALIST NO. 78 (Alexander Hamilton).

¹⁴⁷ See Lawrence Hurley, *Justices Join Debate on Supreme Court's Legitimacy After Abortion Ruling*, NBC (Sept. 18, 2022, 4:30 AM), <https://www.nbcnews.com/politics/supreme-court/justices-join-debate-supreme-courts-legitimacy-abortion-ruling-rcna47795> [<https://perma.cc/93ZB-Y6A9>].

¹⁴⁸ See Stephen Jessee et al., *The Supreme Court is Now Operating Outside of American Public Opinion*, POLITICO (July 19, 2022, 4:30 AM), <https://www.politico.com/news/magazine/2022/07/19/supreme-court-republican-views-analysis-public-opinion-00046445> [<https://perma.cc/N2KG-EDRW>].

¹⁴⁹ See Caroline Mala Corbin, *The Supreme Court's Facilitation of White Christian Nationalism*, 71 ALA. L. REV. 833, 836–37 (2020).

(2) not have the effect of advancing religion, and (3) not foster any government entanglement with religion. I will also analyze the facts in the case of *Elk Grove Unified School District v. Newdow* and judge it based on its merits.

While I already stated the facts of *Kennedy v. Bremerton* in Part I,¹⁵⁰ I will restate them here for the sake of convenience. In the case, an assistant high school football coach at a public school named Joseph Kennedy had been kneeling on the 50-yard line to pray with a majority of the team immediately after shaking hands with their opponents and engaging in postgame talks with “overtly religious references,” while the players kneeled around him.¹⁵¹

The school district requested that Kennedy cease his actions due to Establishment Clause concerns.¹⁵² The school district explained that its establishment concerns were motivated by the fact that any reasonable observer would view Kennedy’s actions as an endorsement by the school district of his religious views and the possibility that students would feel coerced to participate in religious conduct to which they might have otherwise objected to.¹⁵³ The school district repeatedly emphasized that it was happy to accommodate Kennedy’s desire to pray on the job in a way that did not interfere with his duties or risk perceptions of endorsement.¹⁵⁴

However, Kennedy ignored the district’s request; he refused the accommodation, and continued to act as he had in the past stating that he was compelled by his sincere religious belief.¹⁵⁵ The district notified Kennedy that it was placing him on paid administrative leave for violating its request.¹⁵⁶ Parents reached out to the district after this, saying that their children had participated in Kennedy’s prayers solely to avoid separating themselves from the rest of the team and that their children feared retaliation if they chose not to join in with the prayers.¹⁵⁷

Kennedy sued the district for “violating” his Free Exercise rights and the school stated that their actions were done to avoid an Establishment Clause violation.¹⁵⁸ Under the proposed Religion State Separation Act in Part III, the case would come out very differently than it did in reality. The facts of the case make it abundantly clear that a reasonable observer would view Kennedy’s actions as an endorsement by the district of his particular religious views and that his position made it so that his actions were religiously coercive to the players. This clearly implicates the entanglement prong.

¹⁵⁰ *See supra* Part I.

¹⁵¹ *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2435–36 (2022) (Sotomayor, J., dissenting).

¹⁵² *Id.* at 2436.

¹⁵³ *Id.* at 2439.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 2439–40.

¹⁵⁷ *Id.* at 2440.

¹⁵⁸ *Id.*

Kennedy was an employee of the district and was required to follow certain rules set by the district.¹⁵⁹ Kennedy's prayers were conducted in an extremely public fashion and during a time in which he was acting as a coach.¹⁶⁰ Furthermore, the prayers were of an overtly Christian nature.¹⁶¹ If the district were to allow Kennedy to continue his public Christian prayer during a time in which he was acting as a district employee, then any reasonable observer would believe that the district knew of his actions and tacitly approved of them.

It is also important to notice that Kennedy occupied a position of authority over students and that anything that he did while acting as a coach would necessarily impact the thoughts and actions of his players. High School football coaches possess immense power over their players by determining play time, recommendations, and connections for college athletic recruitment. Students could therefore reasonably develop an idea that they needed Kennedy's approval in order to advance their career in football, and that his disapproval could damage their chances at a better future.

In fact, many parents stated that their children participated in Kennedy's prayers "solely to avoid separating themselves from the rest of the team."¹⁶² In other words, they felt pressured by Kennedy to join in through fear that they would not be seen as a team player if they did not do so.¹⁶³ This idea led some students to think of Kennedy's actions as creating a pray-for-play system in which playtime and other benefits could be conditional upon their participation in Kennedy's public Christian prayers. If such a situation is not religiously coercive, then nothing would be.

Under the test of the proposed Religion State Separation Act, a statute or policy must (1) have a solely secular legislative purpose, (2) not have the effect of advancing religion, and (3) not foster any government entanglement with religion. The policy of the school district passes the three prongs. The sole purpose of their policy was the secular goal of preventing employees from misrepresenting the views of the school district and the policy could not be seen as purposefully endorsing any kind of religious view. The policy of the district did not advance religion in any way because it did not use the power, prestige, or financial support of the government to support a religious belief or practice. It also did not entangle government with religion since the policy did not have the government provide or partake in a religious practice.

Furthermore, the alternative of the school's policy or letting Kennedy continue with his practice would violate all of these prongs. Any reasonable observer would view the district allowing Kennedy to make a public prayer during his time at work

¹⁵⁹ *Id.* at 2435.

¹⁶⁰ *Id.* at 2436.

¹⁶¹ Paul Peterson, *A Coach Coerced Students To Pray, And The Supreme Court Just Said It Was OK*, NBC (June 27, 2022, 11:53 AM), <https://www.nbcnews.com/think/opinion/coach-kennedy-wins-supreme-court-case-praying-football-games-students-rcna35478> [<https://perma.cc/AC8N-BMH3>].

¹⁶² *Kennedy*, 142 S. Ct. at 2440.

¹⁶³ *Id.* at 2443.

and in front of players and students as a tacit endorsement by the district of his Christian prayer which would violate the purpose prong. Kennedy, in his position as a coach, used the power and prestige of his government position to religiously coerce students and had the effect of advancing his religion, which thereby violates the effect prong. Finally, by allowing Kennedy to perform his public Christian prayer as a government employee the school district (a government entity) would be providing and partaking in a religious practice. The case, when considered under the Religion State Separation Act, would clearly show that the district's Establishment Clause concerns were valid. Therefore, the Court would necessarily rule in favor of the district and against Kennedy.

In the case of *Carson v. Makin*, Maine had a tuition assistance program for parents who live in school districts that neither operated a secondary school of their own nor contracted with a particular school.¹⁶⁴ Parents would designate the secondary school they would like their child to attend, and the school district transmitted payments to that school to help defray the costs of tuition.¹⁶⁵ Participating private schools had to meet certain requirements including that they be “nonsectarian.”¹⁶⁶

Some parents sought to use the program to send their children to Christian schools which (of course) do not qualify as “nonsectarian” and were therefore ineligible.¹⁶⁷ Petitioners sued the commissioner of the Maine Department of Education, Makin, alleging that the “nonsectarian” requirement violated the Constitution.¹⁶⁸ The Supreme Court held that Maine’s “nonsectarian” requirement for otherwise generally available tuition assistance payments violated the Free Exercise Clause.¹⁶⁹

The holding of the Supreme Court, in this case, means that a state program is required to give taxpayer money to religious organizations because failure to do so is discrimination against religion.¹⁷⁰ However under the Religion State Separation Act, such a conclusion could not be reached. Maine’s non-sectarian requirement had the solely secular purpose of preventing taxpayer money from supporting religious institutions. The rule did not advance religion because it did not use the power, prestige, or financial support of the government to support a religious belief or practice. The rule did not entangle religion and government since the policy did not have the government provide or partake in a religious practice.

Furthermore, like in Kennedy, the alternative to the rule clearly violates the proposed Religion State Separation Act. The effect of giving taxpayer money to religious organizations is very obviously a promotion of religion through government financial support. If the state must pay for parents to indoctrinate their children

¹⁶⁴ 142 S. Ct. 1987, 1993 (2022).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 1994–95.

¹⁶⁸ *Id.* at 1995.

¹⁶⁹ *Id.* at 2002.

¹⁷⁰ *Id.* at 1998.

into a certain religion, then the effect will likely be more converts to said religion. Consequently, the non-sectarian requirement would obviously be in line with the Religion State Separation Act while the alternative would violate the effect prong. Therefore, any court under the proposed statute would rule in favor of Makin and against Carson.

Finally, in *Elk Grove Unified School District v. Newdow* a public school district in California required each elementary school class to recite the Pledge of Allegiance daily.¹⁷¹ The father of one of the students who participated in this daily exercise filed suit against multiple parties.¹⁷² In the suit, the father sought a declaration that Congress's addition, in 1954, of the words "under God" to the Pledge violated the Establishment Clause.¹⁷³ As stated earlier the case was eventually decided based on issues regarding standing.¹⁷⁴ However, the concurring opinions of conservative Justices seemed to indicate that if it was decided on the merits that they would rule against Newdow.¹⁷⁵

Under the proposed Religion State Separation Act in section III the Court would likely be required to rule in favor of Newdow.¹⁷⁶ Rehnquist's concurrence states that the purpose of the change in the pledge to reference God was "to contrast this country's belief in God with the Soviet Union's embrace of atheism."¹⁷⁷ In other words, the sole reason for this change was to serve a religious purpose. Consequently, it would fail the purpose prong of the test and render the religious reference unconstitutional.

V. FEASIBILITY

Now that this Note has determined that a Religion State Separation Act could pass constitutional muster and what its effects would be on future cases, it is important to look at how such a statute could go into effect. As of this writing, Congress is divided with Republicans controlling the House of Representatives and Democrats holding the Senate.¹⁷⁸ Republicans have long aligned themselves with the religious

¹⁷¹ *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 4–5 (2004).

¹⁷² *Id.* at 8.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 17–18.

¹⁷⁵ *See id.* at 18 (Rehnquist, O'Connor & Thomas JJ., concurring) (requiring students to recite the pledge would not have violated the Establishment Clause if the case had been decided on the merits).

¹⁷⁶ As stated earlier, the fact that conservatives were willing to rule against Newdow and that the Supreme Court now has a conservative majority indicates that if a similar case was presented now, then the Court would rule that the pledge and/or motto are constitutional.

¹⁷⁷ *Newdow*, 542 U.S. at 25 (Rehnquist, C.J., concurring).

¹⁷⁸ *Party Divisions of the House of Representatives, 1789 to Present*, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Institution/Party-Divisions/Party-Divisions/> [<https://perma.cc/NDY8-S7H7>]; *Party Division*, U.S. SENATE, <https://www.senate.gov/history/party-div.htm> [<https://perma.cc/58AV-SHEA>].

right and are thereby unlikely to support any statute that defends separation of religion and government.¹⁷⁹ Furthermore, with Congressional involvement in events like the National Prayer Breakfast that include both Republicans and Democrats, the likelihood of congressional support for a statute protecting the separation of religion and government is very low.¹⁸⁰

So, if it is unlikely that a Religion State Separation Act will be passed by Congress to protect the Establishment Clause what can be done? The best option is likely a combination of efforts. First would be a push at the national level for current representatives to protect our Constitution against threats, and if they do not protect the Constitution, make a concerted effort to replace them. Second would be to advance a state-by-state solution like what occurred for RFRA.

The fact of the matter is that most Americans support church state separation.¹⁸¹ Consequently, if Congress were to represent the American public accurately, they would support a law like the Religion State Separation Act. Even if this wide support did not sway Congress to act, the public in the United States is becoming increasingly non-religious.¹⁸² This trend shows no indications of slowing down as younger generations are consistently becoming less religious.¹⁸³ The consequence of this means that as young people become old enough to vote, the voting base that has enabled Christian Nationalism to infiltrate the American government will erode. As a result, most of Congress will eventually represent a constituency that would overwhelmingly support an act to protect the Establishment Clause.

Opponents of a Religion State Separation Act might make two comments on this idea. First would be that if voters are going to become more secular with time, then why would Congress need to protect church state separation now? The response to this is that the threat of the Supreme Court is an ongoing issue that exists in the present and if left unchecked will continue to exist in the future. The fact that the

¹⁷⁹ Jeremy Leaming, *Religious Right*, FREE SPEECH CTR., <https://www.mtsu.edu/first-amendment/article/1375/religious-right> [<https://perma.cc/CA7A-3JWE>] (last updated Aug. 5, 2023).

¹⁸⁰ Domenico Montanaro, *Congress Takes Reins of Prayer Breakfast from Secretive Christian Evangelical Group*, NPR (Feb. 2, 2023 5:00 AM), <https://www.npr.org/2023/02/02/1153705297/congress-takes-reins-of-prayer-breakfast-from-secretive-christian-evangelical-gr> [<https://perma.cc/C674-LQDR>].

¹⁸¹ *In U.S., Far More Support Than Oppose Separation of Church and State*, PEW RSCH. CTR. (Oct. 28, 2021), <https://www.pewresearch.org/religion/2021/10/28/in-u-s-far-more-support-than-oppose-separation-of-church-and-state/> [<https://perma.cc/K7S6-VBFB>].

¹⁸² *Religious Landscape Study*, PEW RSCH. CTR. (2014), <https://www.pewresearch.org/religion/religious-landscape-study/> [<https://perma.cc/LJA7-V8UR>]; Jeffrey Jones, *U.S. Church Membership Falls Below Majority for First Time*, GALLUP (Mar. 29, 2021), <https://news.gallup.com/poll/341963/church-membership-falls-below-majority-first-time.aspx> [<https://perma.cc/CGM6-95ZQ>]; Jeffrey Jones, *Belief in God in U.S. Dips to 81%, a New Low*, GALLUP (June 17, 2022) [hereinafter Jones, *Belief in God*], <https://news.gallup.com/poll/393737/belief-god-dips-new-low.aspx> [<https://perma.cc/LGL6-QEPT>].

¹⁸³ Jones, *Belief in God*, *supra* note 182.

views of Congress will likely change over time does not in any way mitigate the threat posed by the Court today. Therefore, the demographics discussed only serve to illustrate that if members of Congress would like to keep their seats, they should look at these changes and adapt.¹⁸⁴

It is clear from the example of abortion that the Supreme Court does not represent the views of most Americans and is willing to rule in a way that advances its policy interests over what Americans want.¹⁸⁵ Many commentators have said that Congress should have created a law that solidified abortion's legal status.¹⁸⁶ In fact, Congress did attempt to pass a statute protecting abortion rights following the leaked *Dobbs* opinion, but the effort died in the Senate.¹⁸⁷ This should make Congress realize that action needs to be taken pre-emptively rather than reactively to protect rights threatened by the Court.¹⁸⁸

However, it is worth noting that there is an important difference between abortion and church-state separation. Abortion as a right was created solely via court decision and had no explicit reference in the Constitution.¹⁸⁹ While the Constitution makes it clear that explicit mention is not required for a right,¹⁹⁰ the current problem regarding abortion seems to be that there was no explicit protection beyond Court precedent. This made it easier for the Court to dismantle the right. Church-state separation on the other hand has explicit mention via the Establishment Clause.¹⁹¹ However, this does not prevent the Court from dismantling the right of Americans to have a secular government. Instead, being explicit in the Constitution makes it harder for the Court to dismantle the right, and an additional act of Congress for the

¹⁸⁴ Adapting to these demographic changes will need to include protecting church state separation more robustly and a church state separation act provides that robust protection.

¹⁸⁵ Hannah Hartig, *About Six-in-Ten Americans Say Abortion Should Be Legal in All or Most Cases*, PEW RSCH. CTR. (June 13, 2022, 7:23 AM), <https://www.pewresearch.org/fact-tank/2022/06/13/about-six-in-ten-americans-say-abortion-should-be-legal-in-all-or-most-cases-2/> [<https://perma.cc/68XZ-PDFK>].

¹⁸⁶ Darragh Roche, *Barack Obama Blasted for Not Codifying Roe v. Wade: 'Dem Failure'*, NEWSWEEK (June 25, 2022, 7:23 AM), <https://www.newsweek.com/barack-obama-blasted-not-codifying-roe-v-wade-democrat-failure-1719156> [<https://perma.cc/R5VA-KB8T>]; Timothy Bella, *Democrats Plead For Action To Codify Roe v. Wade: 'It's High Time We Do It'*, WASH. POST (May 3, 2022, 11:08 AM), <https://www.washingtonpost.com/politics/2022/05/03/abortion-roe-wade-codify-bernie-biden/> [<https://perma.cc/ZRT5-3U2X>].

¹⁸⁷ Rebecca Shabad, *House Passes Bills to Protect Abortion Rights; Senate GOP to Block the Legislation*, CNBC (July 15, 2022, 1:57 PM), <https://www.cnn.com/2022/07/15/house-passes-bills-to-protect-abortion-rights-senate-gop-to-block-the-legislation.html> [<https://perma.cc/HMT7-TF6Y>].

¹⁸⁸ Additionally, given the results of the midterm elections following the *Dobbs* decision, members of Congress should realize the political importance that American put on preventing the Court from dismantling Constitutional rights.

¹⁸⁹ See *Roe v. Wade*, 410 U.S. 113, 152–53 (1973).

¹⁹⁰ U.S. CONST. amend. IX.

¹⁹¹ U.S. CONST. amend. I.

reasons given in Part III of this Note would make it almost impossible for the Court to dismantle the right.¹⁹²

The second objection is that these numbers are not indicative of an incoming great demographic shift. People tend to become more religious with age and people are living longer. Consequently, there will be a counterbalance to secularization.¹⁹³ Therefore, Congress does not need to change because there will be no demographic shifts to adapt to. However, recent evidence shows that this may no longer be the case as it appears as though non-religious identity has become “stickier.”¹⁹⁴ Consequently, the idea that young people’s rising disaffiliation from religious identity is some kind of ‘phase’ in life that will change with age is unlikely. The number of religiously unaffiliated people is growing and there does not appear to be any reason to think that this looming demographic trend will subside anytime soon.¹⁹⁵ This fact solidifies the need for members of Congress to recognize that if they want to keep their seats, they need to adapt to the growing view of young Americans.¹⁹⁶

That being said, while a future Congress might pass a Religion State Separation Act, the likelihood of the current Congress passing one is very low. As such, the best strategy at this time would likely be to have state legislatures pass their own church-state separation acts just as they passed state versions of RFRA. This strategy would probably work to the advantage of secular activists who would like to see a Religion State Separation Act because certain constitutional case law such as *City of Boerne* would no longer apply. This does not mean that state level issues would not hinder passing a church-state separation act, but it is likely that at least one state will be able to pass it.

Furthermore, this is not meant to suggest that Congress should not pass its own Religion State Separation Act. In fact, as this Note has made clear, a national statute is desperately needed.¹⁹⁷ What this state approach is meant to convey is that if the

¹⁹² See *supra* Part III.

¹⁹³ David Briggs, *New Study Finds Aging Populations Might Counteract Secularization*, CHRISTIAN CENTURY (Sept. 19, 2019), <https://www.christiancentury.org/article/news/new-study-finds-aging-populations-might-counteract-secularization> [https://perma.cc/V2QW-J8SY].

¹⁹⁴ PEW RSCH. CTR., *How U.S. Religious Composition Has Changed In Recent Decades*, in MODELING THE FUTURE OF RELIGION IN AMERICA (Sept. 13, 2022), <https://www.pewresearch.org/religion/2022/09/13/how-u-s-religious-composition-has-changed-in-recent-decades/> [https://perma.cc/LZ7Z-SHHX].

¹⁹⁵ Gregory A. Smith, *About Three-in-Ten U.S. Adults Are Now Religiously Unaffiliated*, PEW RSCH. CTR. (Dec. 14, 2021), <https://www.pewresearch.org/religion/2021/12/14/about-three-in-ten-u-s-adults-are-now-religiously-unaffiliated/> [https://perma.cc/4QLM-3B5D].

¹⁹⁶ This is in no way meant to imply that members of Congress should change their own religious affiliation, only that the legislation that they pass should be mindful of the views of their constituents.

¹⁹⁷ This is especially true since cases such as *Trinity Lutheran Church v. Comer*, *Espinoza v. Montana Department of Revenue*, and *Carson v. Makin* signal that the Supreme Court would likely strike down any state-based reform as a violation of the federal constitution.

national legislature either cannot or will not pass a statute to protect church state separation, state legislatures are the next best option.

CONCLUSION

The prevailing doctrine for Establishment Clause jurisprudence during the mid to late twentieth century was known as non-preferentialism. Under this view, the government is supposed to act with “benevolent neutrality” towards religions.¹⁹⁸ The doctrine was best espoused in the 1971 case *Lemon v. Kurtzman*. Under *Lemon*, a statute must (1) have a secular legislative purpose, (2) a primary effect that neither advances nor inhibits religion, and (3) not foster an excessive government entanglement with religion in order to avoid an Establishment Clause violation.¹⁹⁹

However, a new judicial philosophy has come to replace non-preferentialism as the lens through which the Supreme Court views the Establishment Clause: accommodationism. Under this view, the Establishment Clause should be interpreted to accommodate religious participation in government and government support for religious institutions.²⁰⁰ Under recent case law, the government only violates the Establishment Clause when its policy purposefully discriminates between religions or is religiously coercive. This new lens for analyzing the Establishment Clause has led to the dismantling of church-state separation and a vague test of referencing “historical practices and understandings.”

Given the explicitly originalist test and the willingness of the Court to ignore facts, it is important to note (1) what an actual “historical understanding” of the Establishment Clause looks like and (2) what can be done to prevent the Court from rewriting the Establishment Clause from the bench. James Madison as the author of the First Amendment, would be a proper reference for “historical understanding.” When this Note looked at Madison’s views on the Establishment Clause through his writings after the First Amendment’s adoption, it found that the Establishment Clause was the work of a firm secularist. Specifically, one who intended that the Constitution not allow religion to have any special privileges or immunities that would aid it nor allow the government to engage in any practice that would show an endorsement of a religious position.

A potential way to restrain the renegade Supreme Court would be to have Congress pass a Religion State Separation Act that would use Madison’s view as an interpretive scheme for the Establishment Clause. This Note determined that this is possible to do because Congress has previously passed statutes doing something similar for the Free Exercise Clause. However, the Court would likely use the precedent of *City of Boerne* to say that the Religion State Separation Act would be

¹⁹⁸ *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 676 (1970).

¹⁹⁹ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

²⁰⁰ See CHEMERINSKY & GILLMAN, *supra* note 11.

redefining the Constitution and therefore be outside Congress's enforcement power, thereby necessitating the use of Congress' spending power.

The Religion State Separation Act would also likely mirror the *Lemon* Test in many ways but would also have much more stringent requirements since it would use a secularist lens rather than a non-preferentialist lens. For example, to accurately represent Madison's views on the First Amendment, a Religion State Separation Act that defines Establishment Clause doctrine would likely say that a statute must (1) have a solely secular legislative purpose, (2) not have the effect of advancing religion, and (3) not foster any government entanglement with religion. This language would change the analysis to a more secularist view.

The similarities to the *Lemon* Test are clear but it is important to emphasize the difference between each of these prongs under a secularist framework. The purpose test within this proposed legislation would need to prohibit any kind of religious reasoning when considering legislation. Consequently, reasons such as contrasting belief in God with atheism that depends almost entirely upon religious motivations would necessarily disqualify legislation. Thus, any cases that challenge the pledge or national motto would likely succeed.

The effect prong would need to prohibit religious organizations from receiving both direct aid such as receiving taxpayer money through grants and indirect aid such as tax-exempt status. This would mean cases like *Carson v. Makin* would be decided in favor of state non-sectarian requirements. Finally, the entanglement prong must prohibit practices that would lead a reasonable observer to think that the government endorsed a religious position as well as prohibit religiously coercive practices. This would mean that cases like *Kennedy* would be decided in favor of school districts that defend church-state separation.

Finally, while some may be concerned about the Supreme Court using Free Exercise to prevent Congress from protecting the Establishment Clause, this is unlikely to succeed because the Religion State Separation Act would be couched within the "historical understanding" of James Madison. As a result, the Court will either have to abandon its originalist framework or ignore/lie about the history. The consequence of them taking the latter option would be to rule in favor of Christian Nationalism over the views of James Madison, *the author of the First Amendment*, and in doing so undermine the Court's legitimacy to the point in which it would have none. Thus, the passage of the Religion State Separation Act would use originalism against itself to either protect the Establishment Clause or damage the Court to the point in which its historical revisionism would end its ability to function.