LAW'S RELIGIOUS AWAKENING: CINCINNATI'S BIBLE WAR, THE CONCEPT OF RELIGIOUS NEUTRALITY, AND ITS ROLE TODAY

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INTRODUCTION

The roles and boundaries of religion and state are at the center of a global debate. As such, American legal history has been no stranger to such questions as, "What role does religion play in a state?" and, subsequently, "What are the boundaries of religion and state?"[1] In American law, at the heart of this debate, is the idea of a "wall of separation between Church & State," which suggests that individual rights are best served when the state stays out of religion, and religion stays out of the state.[2] Equally stemming from this debate is the question of whether the wall of separation draws a hard line that cannot be crossed.[3] In *McCreary v. ACLU*, Justice Sandra Day O'Connor's concurrence warned that "[t]hose who would renegotiate the boundaries between church and state must . . . answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?"[4] However, while the idea of the separation of church and state has remained fairly constant, the debate over the boundaries of church and state has always remained in flux.[5]

Even prior to the adoption of the religion clauses of the U.S. Constitution,[6] the debate over the boundaries of church and state took place in state and local courthouses.[7] The debate encompassed questions of school funding, reading the Bible in school, who was qualified to sit in state government, and whether Christianity was a part of American law.[8] At one end, proponents of moral republicanism held that good government depended on religion.[9]

At the same time, others pushed for a more secular understanding of religion and state and the Establishment and Free Exercise Clauses.[10] In short, how and why individuals or groups want to renegotiate these boundaries is shaped by how they see the relationship between religion and state.[11]

The debate over religion, government, and education illustrates this struggle between religion and state. Central to this story is whether government should be required to teach Christian morals through the reading

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1 *See infra* Parts I–II.

2. *See infra* notes 270–77 and accompanying text. The term "wall of separation" comes from Thomas Jefferson's metaphor, sent to the Danbury Baptist Association, which described the First Amendment religion clause as a "wall of separation between of Church & State." *See* Letter from Thomas Jefferson, President of the U.S., to the Danbury Baptist Ass'n (Jan. 1, 1802), https://www.loc.gov/loc/lcib/9806/danpre.html [https://perma.cc/GU3X-9CE6].

3. *See infra* notes 73–91, 278–85 and accompanying text.

4. McCreary v. ACLU, 545 U.S. 844, 882 (O'Connor, J., concurring).

5. *See infra* Parts I–IV.

6. *See also* U.S. CONST. amend. I.

7. *See infra* notes 42–55 and accompanying text.

8. *See infra* notes 151–63 and accompanying text.

9. *See infra* notes 71–82 and accompanying text.

10. *See infra* notes 42–55 and accompanying text.

11. *See infra* notes 262–88 and accompanying text.

of the Bible in a public school. On one side are those who prefer to build Thomas Jefferson's famous "wall of separation"[12] and declare that the answer is "no." Meanwhile, proponents of moral republicanism argue that since morality is vital to republican society, government must allow religion into school.[13] As such, the government must provide religious education.[14] While the United States Supreme Court has addressed the issue of permitting religious exercises in public schools, the Court has yet to answer whether morality (Christian or otherwise) is important enough to require government action.

In *School District of Abington Township v. Schempp*, the United States Supreme Court held that teacher-led religious exercises, such as reading the Bible, were not compatible with the concept of neutrality and separation of church and state.[15] The Court stated that the First Amendment commanded that, "the Government maintain strict neutrality, neither aiding nor opposing religion."[16]

Schempp's concept of religious neutrality developed from an accumulation of legal thought on religion and state that shifted from government support of religion to equal accommodation. Nearly a century earlier, the Ohio Supreme Court, in *Board of Education v. Minor*, upheld the Cincinnati public school's ban on reading the Bible.[17] In *Minor*, Justice John Welch reasoned that the best solution between religion and state is a "doctrine of 'hands off.'"[18] Justice Welch described the doctrine as the "state not only keep[ing] its own hands off," but also "see[ing] to it that religious sects keep their hands off each other."[19] Justice Welch added that the government keeping its hands off "is the golden truth which it has taken the world eighteen centuries to learn, and which has at last solved the terrible enigma of church and state."[20] It was Justice Welch's doctrine of hands off

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12. *See supra* note 3 and accompanying text; *see also* Rebecca Riffkin, *In U.S., Support for Daily Prayer in Schools Dips Slightly*, GALLUP (Sept. 25, 2014), https://news.gallup.com/poll/177401/support-daily-prayer-schools-dips-slightly.aspx [https://perma.cc/726E-5YVE]; Matthew Sheffield, *Poll: 12 percent of Americans Support New Laws Promoting Bible in Public Schools*, THE HILL (May 24, 2019), https://thehill.com/hilltv/what-americas-thinking/445477-poll-only-12-percent-of-americans-support-new-laws-promoting [https://perma.cc/3KGR-56M8].
13. *See infra* notes 75-82 and accompanying text.
14. *See infra* notes 71–82 and accompanying text.
15. 374 U.S. 203, 225–26 (1963).
16. *Id.* at 225.
17. 23 Ohio St. 211, 250 (1872).
18. *Id.*
19. *Id.*
20. *Id.* at 251. In *McCreary*, Justice O'Connor reminds us of something similar:

> By enforcing the Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat. At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for

that *Schempp* used when holding that religious exercises were impermissible in public schools.[21] To some, the doctrine of hands off has been seen to form a strict wall between government and religion.[22] Yet, *Minor* marks a religious awakening in American legal thought away from a strict wall of separation into a concept of neutrality, incorporating the concerns of both strict separatists and moral republicans.[23]

Now, 145 years after *Minor*, the Supreme Court and American society still battle with the concepts of a wall of separation and neutrality.[24] With Supreme Court decisions such as *Locke v. Davey*[25] and *Trinity Lutheran v. Comer*,[26] where does the doctrine of hands off fit into a national constitutional scheme? Instead of an impregnable wall between church and state, we find an important relationship between religion and state. In this relationship, government is neutral and takes into account the interests of both the Establishment and Free Exercise Clauses.

I. BACKGROUND

A. The Northwest Ordinance and American Republican Desires

As the Constitution was being debated, the Confederation government issued the governing document for the Northwest Territory: the Northwest Ordinance.[27] The Northwest Territory was a large swath of land north of the Ohio River, consisting of present-day Ohio, Illinois, Indiana, Wisconsin, and Michigan.[28] The Northwest Ordinance famously guaranteed religious civil liberties, promoted good will to Native Americans, prohibited

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> constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish.

McCreary v. ACLU, 545 U.S. 844, 882 (O'Connor, J., concurring).

21. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 214–15 (1963) (citing Bd. of Educ. v. Minor, 23 Ohio St. 211, 250 (1872)).

22. *See, e.g.*, *The Colonial and Early National Periods*, *in* 1 CHURCH AND STATE IN AMERICA: A BIOGRAPHICAL GUIDE (John F. Wilson ed., 1986); J. Thomas Kirkman, *The Fourth R: Conflicts over Religion in America's Public Schools*, 89 MASS. L. REV. 193, 195 (2006) (book review).

23. *See infra* Part III.

24. *See, e.g.*, Rebecca Kheel, *Scalia: 'Don't Cram' Religious Neutrality 'Down Throats of American People'*, THE HILL (Jan. 1, 2016, 5:03 PM), http://thehill.com/regulation/court-battles/264588-scalia-dont-cram-religious-neutrality-down-throats-of-american [https://perma.cc/2NC2-TAGY]; Jeffrey Rosen, *The Refining of Religious Neutrality*, N.Y. TIMES, (June 28, 2002), http://www.nytimes.com/2002/06/28/opinion/the-refining-of-religious-neutrality.html [https://perma.cc/X664-YDS3].

25. 540 U.S. 712 (2004).

26. 137 S. Ct. 2012 (2017).

27. Thomas Nathan Peters, *Religion, Establishment, and The Northwest Ordinance: A Closer Look at an Accommodationist Argument*, 89 KY. L.J. 743, 744 (2000). For further history of the Northwest Ordinance, see Dennis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 934–40 (1995).

28. Duffey, *supra* note 27, at 930 n.6.

slavery, and created a framework for self-government, including dividing the territory and providing a means to become admitted into the United States.[29] In the Religion, Morality, and Knowledge Clause (the "RMK Clause"), the Northwest Ordinance declared, "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[30]

When looking for founding principles, legal scholars have generally overlooked the Northwest Ordinance for other documents, such as the Constitution, Declaration of Independence, and the Federalist Papers.[31] When legal scholars cite the Northwest Ordinance, they generally focus only on particular provisions.[32] Yet, the Northwest Ordinance as a whole has legal historical significance in understanding the political principles of the American republic.[33] As Professor Dennis Duffey observes, the Northwest Ordinance has "a special claim to constitutional authority insofar as it is a founding text of those aspects of our political tradition that draw upon the principles it contains."[34]

Those principles derived from the Northwest Ordinance are expansionism, development, imperialism, risk (physical and economic), commercialism, and utopianism.[35] The principle of utopianism invoked the desire to create an ideal social order from scratch.[36] As Harold M. Hyman noted, "[t]he Northwest Ordinance described the future Union of the states as it should be. The Ordinance, like the Constitution, was a vision as well as a blueprint for immediate implementation."[37] For example, the Northwest Ordinance guaranteed religious freedom, barred the existence of slavery, and encouraged education.[38] Further, the Northwest Ordinance outlined moral goals for the territory.[39] More importantly, this utopian ideal was recognized in the halls of the Supreme Court. For example, in *Strader v. Graham*, the plaintiff's attorney commented that the Ohio River was "like the fabled Styx, the river of death, which, if once crossed, can never be re-crossed."[40] Importantly, it was partly out of this utopian principle of the Northwest Ordinance that the debate over the role of church and state began to turn into

29. 1 Stat. 50–53 (1789).

30. 1 Stat. 52 (1789).

31. *See generally* Duffey, *supra* note 27, at 930–33.

32. *Id.* at 931.

33. *See generally id.* (arguing that the Northwest Ordinance has "constitutional" significance in understanding the political principles of the republic and thus should have a spot alongside the Constitution, Federalist Papers, and Declaration of Independence).

34. *Id.* at 951.

35. *Id.* at 953–66.

36. *Id.* at 963.

37. Harold M. Hyman, AMERICAN SINGULARITY: THE 1787 NORTHWEST ORDINANCE, THE 1862 HOMESTEAD AND MORRILL ACTS, AND THE 1944 G.I. BILL 28 (1986).

38. 1 Stat. 50–53 (1789).

39. Duffey, *supra* note 27, at 963.

40. 51 U.S. (10 How.) 82, 90 (1850) (argument of counsel for plaintiffs).

the modern debate over religion and state in a republican form of government.[41]

B. Religion and State in the Ohio Constitution and Ohio Supreme Court

In trying to understand the Establishment and Free Exercise Clauses, it has become common practice to consider how state constitutional law developed in the area of church and state.[42] Such a review, over the interpretation of the Establishment Clause, for example, has centered on the struggle over religious liberty in Virginia.[43] The Virginia struggle pitted Patrick Henry against James Madison over Henry's proposal to fund religious teachers.[44] Madison, leading the opposition, fought for a strict separation of church and state out of a "concern that civil authority not come between the individual and the working of God's grace."[45] Although we should not dismiss the ideas that came from that struggle, looking to Madison alone risks overlooking the constitutional experiences of other states regarding the boundaries of church and state.[46]

Additionally, state review of constitutional practice of church and state focuses on disestablishment, potentially overlooking free exercise.[47] This focus distorts how we view the debate over church and state.[48] Additionally, as discussed later, a focus on state practice distorts how we interpret the religion clauses.[49] Under this distorted view, we may conclude that state constitutions either embodied a secularist perspective or pushed state constitutional law towards a secularist perspective.[50] Instead, we find early state constitutions that expressly recognized the existence of God, or

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41. *See infra* Sections I.B–C. For a more detailed examination of the Northwest Ordinance in the debate over the Establishment and Free Exercise Clauses, see Peters, *supra* note 27, at 748–80.

42. A more recent example can be found in Justice Sotomayor's dissent in *Trinity Lutheran v. Comer*, 137 S. Ct. 2012 (2017), which will be analyzed below. *See infra* Section IV.B.

43. G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73, 85 (1989).

44. *Id.* at 80–84.

45. *Id.* at 82.

46. *Id.* at 86.

47. *Id.* at 87.

48. *Id.*

49. *Id.*

50. *Id.* For example, Justice Sotomayor's dissent in *Trinity Lutheran* argues that state practice showed a move towards taking religion out of the public arena by prohibiting funds to ministers and houses of worship. *See* Trinity Lutheran v. Comer, 137 S. Ct. 2012, 203–36 (2017) (Sotomayor, J., dissenting) ("The course of this history shows that those who lived under the laws and practices that formed religious establishments made a considered decision that civil government should not fund ministers and their houses of worship. To us, their debates may seem abstract and this history remote. That is only because we live in a society that has long benefited from decisions made in response to these now centuries-old arguments, a society that those not so fortunate fought hard to build.").

acknowledged the state's dependence on God's favor.[51] This recognition of church and state fell into the moral republican understanding that religion and good government went hand-in-hand.[52]

In short, the history of church and state amongst the states is vague, and to divine universal meaning from them in order to understand the Establishment and Free Exercise is difficult.[53] Yet, we can see that the state governments still recognized the importance of religion. Rather than establish a purely secular society, the states moved to prevent government intrusion, not religious influence.[54] For example, state courts continued to recognize Christianity as a part of the common law.[55]

The Northwest Ordinance shaped Ohio's constitutional experience on how to handle church and state. Ohio adopted a version of the Northwest Ordinance's RMK clause into article I, section 7 of the Ohio constitution.[56] Article I, section 7 of the Ohio constitution reads:

> I. Rights of conscience; education; the necessity of religion and knowledge
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> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted . . . . *Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction*.[57]

Section 7's first half plainly protects the individual right to worship and exercise religious beliefs.[58] However, the second half of section 7 of the Ohio RMK clause mandated, in the minds of some, that the government support the teaching of religion as part of the general assembly's "duty" to

51. Tarr, *supra* note 43, at 87.
52. *See infra* Section I.C.
53. *See infra* notes 261–63 and accompanying text.
54. Tarr, *supra* note 43, at 88.
55. *See, e.g.*, Updegraph v. Commonwealth, 11 Serg. & Rawle 394 (Pa. 1824).
56. OHIO CONST. art. I, § 7.
57. *Id.* (emphasis added to show Ohio RMK clause).
58. *See id.*

encourage education.[59] Interestingly, the Ohio RMK clause made it a government duty to make laws that protected every religious denomination.[60] Seemingly, the Ohio constitution envisioned a time when government may have to enter the religious domain, albeit neutrally.

It was not until 1853 that the Ohio Supreme Court would take up the issue of church and state in *Bloom v. Richards* and plant the roots of *Minor*'s neutrality principle.[61] In *Bloom*, the defendant attempted to void a contract because it was formed on a Sunday, in violation of the prohibition against working on the Sabbath.[62] However, Judge Thurman disagreed with the defendant, and upheld the contract's validity.[63] In defending the contract's validity, Judge Thurman distinguished the English common law and the Ohio constitution.[64] Judge Thurman posited that although Christianity was a part of the English common law, it was not a part of the Ohio constitution.[65] He put it bluntly: "We have no union of church and state, nor has our government ever been vested with authority to enforce any religious observance simply because it was religious."[66] As such, Ohio's statute prohibiting labor on the Sabbath could not stand under the Ohio constitution.[67] Therefore, the contract was enforceable against the defendant.[68]

The *Bloom* decision appeared to create Thomas Jefferson's fabled wall of separation between church and state in Ohio.[69] However, the existence of any such wall was murky at best. Article I, section 7 of the Ohio constitution seemingly pointed to government neutrality in religion.[70] For example, the government was mandated to create laws that protect every denomination.[71] Further, the Ohio RMK clause recognized religion and knowledge as being essential to good government. Does this mandate then require the Ohio General Assembly to provide for religious education in public schools? If such a mandate existed, there could not be a wall of separation between church and state, and neutrality would be a difficult

59. Bd. of Educ. v. Minor, 23 Ohio St. 211, 212–15 (1872); *see also* Peters, *supra* note 27, at 748–72 (citing arguments in favor of accommodationists that the Northwest Ordinance required government to support religious instruction).

60. OHIO CONST. art. I, § 7.

61. 2 Ohio St. 387 (1853).

62. *Id.* at 388.

63. *Id.* at 392.

64. *Id.* at 390.

65. *Id.* at 391.

66. *Id.* at 392.

67. *Id.*

68. *Id.*

69. The Ohio Supreme Court's decision in *Bloom* was part of a changing understanding over the maxim that "Christianity [was] a part of the common law." *Id.* at 388. For a more detailed discussion of this history, see Stuart Banner, *When Christianity Was Part of the Common Law*, 16 LAW & HIST. REV. 27, 29–44 (1998) (describing the American legal history of the maxim that Christianity was a part of common law).

70. OHIO CONST. art. I, § 7.

71. *Id.*

prospect. It was in these murky waters that the *Minor* case would be decided, and a new mark in U.S. legal history would be made in the debate over the role of the state in religion and morality. To some, the fate of the republic rested on the resolution of that debate.[72]

C. Moral Republican Education and Religion in the Nineteenth Century

Common schools, the precursor to public schools, were developed partly through westward expansion and the growth of cities.[73] Westward expansion and immigration raised worries of "obedience, loyalty, and mutual understanding between citizens and federal leadership."[74] To alleviate those concerns, the federal government recommended that half of land sale proceeds go to funding common schools to "improve . . . the minds and morals of the present generation, and of generations to come" in order to create "stronger bonds of union."[75]

Religion was at the heart of improving the morals of society and creating the "stronger bonds of union."[76] Common school advocates drew their ideas from the religious revivals of their day, in hopes of creating a republican moral foundation.[77] For example, education reformer Horace Mann believed that the American Revolution removed the restraints on conduct, and as a result, a "moral reformation" was necessary in order to avoid anarchy.[78] Mann's desire centered on a "common piety rooted in Scripture," a civil society centered on a Christian republic, and a unified intellectual culture.[79] Theologian and education scholar Calvin Stowe added that "republicanism can be maintained only by universal intelligence and virtue among the people . . . . [W]ithout intelligence and virtue in the great mass of the people, our liberties would pass from us."[80] In essence, the American republic's fate was tied to Christian morality and an educated populace.

In practice, common school reformers settled on a non-sectarian program of reading the Bible without commentary.[81] The Bible read without commentary allowed the listener to judge the passage according to his or her

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72. *See infra* Section I.C.
73. Matthew Steilen, *Parental Rights and the State Regulation of Religious Schools*, 2009 BYU EDUC. & L.J. 269, 303–10 (2009).
74. *Id.* at 305.
75. *Id.*
76. *Id.*
77. *Id.* at 310.
78. *Id.*
79. *Id.*
80. Molly O'Brien & Amanda Woodrum, *The Constitutional Common School*, 51 CLEV. ST. L. REV. 581, 600 (2004).
81. Steilen, *supra* note 73, at 312.

own reason and belief.[82] Yet, reading the Bible without commentary still presented a problem. If you were a Protestant that read the King James Bible, the program did not discriminate against your beliefs.[83] But, if you were from a Christian denomination that did not use the King James Bible, or if you did not partake in the Bible, reading the Bible without commentary was discriminatory.[84] For those in nineteenth-century Cincinnati, Ohio, this meant a Roman Catholic student could not hear the Douay Bible in school.[85]

D. Judicial Backing of Religion in Common Schools

The issue of religion in common schools did not present a novel issue for the court in *Minor*.[86] By the time of *Minor*, state courts put legal force into the belief that the United States was a Christian (i.e., Protestant) nation.[87] Judges accomplished this by giving "constitutional significance" to the phrase "Christian nation."[88] The courts reasoned that religious practices were protected because they were a part of a "broad tradition of American civic religion."[89] Further, in states where the Northwest Ordinance applied, such as Ohio, judges read the RMK clause as mandating religious education unless the constitution said otherwise.[90] Finally, state courts found non-sectarian religious practices at schools did not violate an individual's religious liberty.[91]

II. CINCINNATI'S BIBLE WAR

A. The Accidental War

In the mid-nineteenth century, Cincinnati was one of the most religiously diverse cities in the United States.[92] Cincinnati's Roman Catholic population was bolstered by waves of Irish and German immigrants.[93] The most recent wave of German immigrants consisted of Roman Catholic

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82. *Id.*
83. *Id.*
84. *Id.*
85. Corinna Barrett Lain, *God, Civic Virtue, and the American Way: Reconstructing* Engel, 67 STAN. L. REV. 479, 488 (2015).
86. Michael Dehaven Newsom, *Common School Religion: Judicial Narratives in a Protestant Empire*, 11 S. CAL. INTERDISC. L.J. 219, 244 (2002) (describing the common features faced by state courts in religion cases).
87. *Id.* at 252; *see also* Banner, *supra* note 69, at 32–44 (describing the American legal history of the maxim that Christianity was a part of common law).
88. Newsom, *supra* note 86, at 252.
89. *Id.*
90. *Id.*
91. *Id.* at 255.
92. STEVEN K. GREEN, THE BIBLE, THE SCHOOL, AND THE CONSTITUTION: THE CLASH THAT SHAPED MODERN CHURCH-STATE DOCTRINE 94 (2012).
93. *Id.*

liberals and freethinkers from the failed revolutions that struck Europe in 1848.[94] Additionally, the nation's two leading Jewish leaders called the city home.[95]

When Cincinnati opened its first common school in 1829, Protestants and nativists hoped that the school would promote protestant-republicanism to "assimilate immigrant children into American culture."[96] The influx of diversity troubled the Protestant population of the Ohio valley.[97] They feared that the growth of Roman Catholic immigrants would make the valley predominately Roman Catholic.[98] Further, they worried that the Ohio valley could become a home base to individuals that posed a threat to American republican ideals.[99] For example, Preacher Lyman Beecher described the threat posed by the Roman Catholic population.[100] Beecher proclaimed that the threat lay in the "political claims and character of the Catholic religion, and its church and state alliance with the political and ecclesiastical governments of Europe hostile to liberty . . . . Their policy points them to the West, the destined centre of civilization and political power they once had."[101] Thus, protestant-republicanism and morality in schools would prove to be central issues in the Cincinnati Bible War.[102]

As with other common schools in the United States, the Cincinnati common school system had a Protestant character.[103] The Protestant character was reflected in the character of prayers, textbooks, and Bible readings without commentary.[104] Roman Catholic Bishop John Purcell criticized the Protestantism of the common schools, calling them a "sectarian free-school" where the children's "foundations of spiritual life are poisoned and those unsuspecting children have tracts placed in their hands, insinuating the vilest and most malicious slander of our real principles."[105] Nonetheless, the Cincinnati school board and Roman Catholic leaders attempted to create accommodations to allow for dissenting students to be excused or allow their scripture of choice to be read.[106] But, Bishop Purcell refused to accept accommodations and instead created private schools for Cincinnati's Roman Catholic children.[107]

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94. *Id.*
95. *Id.*
96. *Id.* at 95.
97. *Id.* at 94–95.
98. *Id.* at 95; *see supra* notes 73–79 and accompanying text.
99. GREEN, *supra* note 92, at 95.
100. *Id.* at 94–95.
101. *Id.*
102. *See infra* Section II.B.
103. GREEN, *supra* note 92, at 95.
104. *Id.*
105. *Id.*
106. *Id.* at 96.
107. *Id.*

In 1869, the Cincinnati Bible War began with a proposed merger between the common schools and the Roman Catholic private schools.[108] Under the proposal, Roman Catholic teachers would be allowed to stay at their old schools but would only be able to teach secular subjects.[109] Samuel Miller, a school board member and lawyer, proposed a separate resolution prohibiting "religious instruction and the reading of religious books including the Holy Bible."[110] Miller claimed that the purpose of the proposal was to "allow the children of parents of all sects and opinions, in matters of faith and worship, to enjoy alike the benefit of the school fund."[111] Additionally, Samuel Miller hoped that his proposal would facilitate the merger.[112]

Although Miller's resolution was not a part of the merger negotiations, the public believed the two were intertwined.[113] The *Methodist Christian Advocate* claimed that the proposed merger would ruin the republic by endangering the moral and intellectual development of the youth.[114] The merger was also unpopular amongst the Roman Catholic population, and the proposed merger was tabled.[115] However, Miller's resolution banning religious instruction and reading the Bible from the Cincinnati public schools remained and was scheduled for a vote on November 1, 1869.[116] This allowed pro- and anti-Bible forces to muster. During the board debate, pro-Bible forces advocated the importance of moral education that the Bible provided.[117] For example, Rufus King, grandson of a signer of the Constitution, argued that the Bible was the "cornerstone of our American institutions."[118] Nonetheless, Miller's resolution passed 22–15.[119]

B. The Trial and Two Theories of Church and State

Twenty-eight days later, on November 29th, the pro-Bible faction moved to enjoin the Bible ban.[120] At trial, the school board's resolution carried a presumption of validity.[121] Thus, the pro-Bible attorneys centered their argument on the Bible ban as an act of ultra vires.[122] They argued that the Northwest Ordinance desire for "religion, morality, and knowledge,"

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108. *Id.* at 97.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 98.
117. *Id.*
118. *Id.* at 100.
119. *Id.* at 101.
120. *Id.* at 104.
121. *Id.* at 105.
122. *Id.*

incorporated into article I, section 7 of the Ohio constitution, imposed a duty on government to promote religion.[123] Further, the pro-Bible faction added that only religious instruction, not secular education, could bring the moral education a society requires.[124] Although the *Bloom* court denied Christianity as part of the common law, the pro-Bible attorneys contended that the Ohio constitution recognized religion as "the bond of society, the basis upon which our institutions rest, as essential to good government."[125] In sum, this recognition (that religion was essential to good government), together with the alleged duty in the Ohio RMK clause to promote religion, obligated public schools to teach religion.[126]

The school board's attorney argued that neither the Northwest Ordinance nor the Ohio constitution obligated religious instruction.[127] The Northwest Ordinance, the attorney argued, implied only that religion, morality, and knowledge would be an outgrowth of an educated public.[128] However, if religious instruction was mandated, religion meant all religions and not a specific sect.[129] Finally, the school board argued that religious preference was in tension with the "foundation of our republican institutions" because the constitution did not prefer one religion to another.[130]

Both sides ended oral arguments in front of a panel of three Cincinnati superior court judges on December 3, 1869.[131] Perhaps sensing the importance of the case, the panel did not return its decision until February 15, 1870.[132] In three separate opinions, the panel voted 2–1 to enjoin the school board's resolution prohibiting religious instruction and reading the Bible in school.[133]

In the leading opinion, Judge Hagans held that the school board acted ultra vires. Judge Hagans conceded that a government obligation to encourage religion conflicted with the Ohio constitution.[134] Yet, Judge Hagans interpreted a solution through article I, section 7 of the Ohio constitution.[135] Under article I, section 7, the Ohio general assembly has a duty to "pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship."[136] Accordingly, this placed a duty on the government to facilitate "religious fealty

123. *Id.* at 106.
124. *Id.* at 105.
125. *Id.* at 107.
126. *Id.*
127. *Id.* at 109.
128. *Id.*
129. *Id.*
130. *Id.* at 110.
131. *Id.* at 104, 111.
132. *Id.* at 111–12.
133. *Id.*
134. *Id.* at 112.
135. *Id.*
136. *Id.*; *see also* OHIO CONST. art. I, § 7.

generally."[137] Religious instruction, Judge Hagans held, fell into the government's duty to generally facilitate "religious fealty."[138]

Rather than stop, Judge Hagans dived deeper into the meaning of religion and the state. According to Judge Hagans, religion was an adjunct of the state.[139] "The framers of the Constitution," Judge Hagans explained, "that the moral sense must necessarily be regulated and controlled by the religious belief [estimated by the Christian standard]."[140] The framers' obligation to regulate the "moral sense" was found in the phrase, "religion, morality and knowledge are essential to good government."[141] Those that opposed this belief opposed the "general public sense" that upheld the law and the community.[142] As such, to prohibit religious instruction was to "cut off the instrumentality by which those essentials to good government are cultivated."[143] Because Miller's resolution attacked the "moral sense" of the law, the resolution could not stand.

In his dissent, Judge Alphonso Taft, father of future President and Chief Justice William Howard Taft, contended that the school board had the discretion to manage the school how they saw fit.[144] Judge Taft further argued that the school board's resolution should only be overturned if it violated a clear state law.[145] Judge Taft explained that the RMK clause of article I, section 7 did not mandate a government obligation but only recognized that religion, morality, and knowledge would be promoted generally through education.[146]

Next, Judge Taft reminded the superior court that in *Bloom*, the Ohio Supreme Court found that Christianity was not above the law.[147] In a counter to Judge Hagans's "moral sense theory," Judge Taft drafted his own theory of church and state.[148] Judge Taft elaborated that the Bill of Rights protected the religious opinion of all sects.[149] The constitution indicated "a neutrality toward all sects, which would not be otherwise maintained, and which had become essential to religious peace."[150] To allow the reading of Protestant beliefs in public schools was to permit a union of church and state.[151] In short, the Bill of Rights required government neutrality towards religion.[152] As

137. GREEN, *supra* note 92, at 112.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 112–13.
142. *Id.* at 112.
143. *Id.* at 113.
144. *Id.*
145. *Id.* at 113–14.
146. *Id.* at 114.
147. *Id.* at 114–15.
148. *Id.* at 114.
149. *Id.* at 115.
150. *Id.*
151. *Id.*
152. *Id.*

such, the board's resolution did not conflict with the constitution, but rather the resolution was in line with the requisite principle of neutrality.

Both Judges Taft and Hagans submitted two opposed theories of church and state. Judge Hagans's theory was rooted in the Protestant republicanism of the early nineteenth century.[153] But Judge Taft marked a more modern theory—one of government neutrality. Unbeknownst to Samuel Miller, his resolution, created to help a proposed (but ultimately failed) merger, brought before the Ohio Supreme Court two major questions.[154] Is the government obligated to promote religion through schools to protect the "moral sense" of the law, or does the Ohio Bill of Rights require government neutrality on the issue of church and state?[155] Miller's resolution now implicated much more than bibles.

Broadly, the opinions of Judges Taft and Hagans reflected the changing legal debate of whether or not Christianity was a part of American common law. Prior to American independence, William Blackstone, in his *Commentaries on the Laws of England*, stated, "Christianity is part of the laws of England."[156] Blackstone's statement attached itself to the American common law. In *People v. Ruggles*, Judge James Kent opined, "Christianity, in its enlarged sense, as a religion revealed and taught in the Bible, is not unknown to our law."[157] From *Ruggles*, state courts and legal treatises affirmed: "[T]he proposition, that Christianity is a part of the common law, is supported by the very highest judicial authority both in England and in this country."[158]

153. *See supra* Section I.B.

154. GREEN, *supra* note 92, at 115.

155. *Id.*

156. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765), *reprinted in* London: Dawsons 59 (4 vol. 1766)*; see also* De Costa v. De Paz (1754) 36 Eng. Rep. 1, 715; 2 Swans. 1, 532; Rex v. Woolston (1729) 94 Eng. Rep. 1, 655; Fitz-G. 1, 64; The King v. Curl (1727) 94 Eng. Rep. 1, 20; 1 Barn KB 1, 29.

157. People v. Ruggles, 8 Johns. 290, 293–94 (N.Y. 1811). This point has been a staple of Kent's lectures for some time. *See* James Kent, *Of the Theory, History and Duty of Civil Government*, *in* DISSERTATIONS: BEING THE PRELIMINARY PART OF A COURSE OF LAW LECTURES (1795), *reprinted in* Littleton, Colo.: F.B. Rothman 5, 24 (1991).

158. *See, e.g.*, Goree v. State, 71 Ala. 7, 9 (1881); Shover v. State, 10 Ark. 259 (1850); State v. Chandler, 2 Del. (2 Harr.) 553, 555–56 (1837); Melvin v. Easley, 52 N.C. 378 (1860); Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 400 (Pa. 1824); City Council of Charleston v. Benjamin, 33 S.C.L. (2 Strob.) 508 (S.C. 1846); Bell v. State, 31 Tenn. 41, 44 (1851); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 467, 472 (Bos.: Little, Brown 1868); Nathan Dane, *Crimes Against Religion and Morality*, *in* 6 A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 664, 675 (Bos.: Cummings, Hilliard & Co. 1823); FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES 525, 559 (Platt Potter ed., Albany: W. Gould & Sons 1871); THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 1, 17 (N.Y.C.: J. S. Voorhies 1857); Joseph Story, *Christianity a Part of the Common Law, in* 9 THE AMERICAN JURIST AND LAW MAGAZINE 346, 346–48 (Bos.: Lilly, Wait, and Co. 1833); CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES 166, 167 (St. Louis: F. H. Thomas Law Book Co., 1886)*; see also* P. Emory Aldrich,

Although American legal thought in the early nineteenth century upheld Christianity's place in law, the notion did have its opponents. Justice Joseph Story claimed that "[t]he error of the Common Law" was that it "tolerated nothing but Christianity, as taught by its own established church, either Protestant or Catholic; and with unrelenting severity consigned the conscientious heretic to the stake."[159] A Philadelphia lawyer put it more plainly:

> The doctrine that the "Christian religion is a part of the common law," . . . was promulgated in the worst times, and by the worst men of a government that avowedly united church and state; in times when men were sent to the block or to the stake on any frivolous charge of heresy. . . . These consequences of the doctrine were very satisfactory to the English government, in its origin. They enabled the tyrants of the fifteenth and sixteenth centuries to find a convenient excuse for sending to the block any one who became obnoxious to them.[160]

Justice Story held that the United States corrected that mistake, where now "the morals of the law are of the purest and most irreproachable character."[161] As the *Minor* case was being argued, Justice Charles Doe of the New Hampshire Supreme Court reflected, in a dissenting opinion, "the maxim, that Christianity is part of the laws of England, is a relic of the time when the clergy ruled England; when ambassadors, judges, and chief ministers of state were ecclesiastics. It is the acknowledgement of a state religion."[162] Justice Doe concluded that "[w]hen church and state are one, the Christianity of any sect established as the religion of the state is, to some extent, the law of the land."[163]

By the mid- to late-nineteenth century, legal thinkers began to refine and narrow the scope of what makes up law.[164] In the process, the notion that Christianity was a part of the law as a legal proposition declined.[165] Law was limited to rules backed by some sanction from the state.[166] Law stood as a

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The Christian Religion and the Common Law, in 6 AMERICAN ANTIQUARIAN SOCIETY PROCEEDINGS 18, 33–34 (1889).

159. For Justice Story's full speech, see JOSEPH STORY, THE MISCELLANEOUS WRITINGS, LITERARY, CRITICAL, JURIDICIAL, AND POLITICAL, OF JOSEPH STORY 440–76 (Bos.: James Munroe & Co. 1835); *see also* JOSEPH STORY, VALUE AND IMPORTANCE OF LEGAL STUDIES 503, 517 (William W. Story ed., Bos.: Little, Brown 1852).

160. Specht v. Commonwealth, 8 Pa. 312, 315–16 (1848).

161. For the speech reported in full, see STORY, *supra* note 159, at 440–76.

162. Hale v. Everett, 53 N.H. 9, 209 (1868) (Doe, J., dissenting).

163. *Id.*

164. *See generally* Banner, *supra* note 69, at 49–60 (discussing how the legal proposition that Christianity was a part of the common law began to decline).

165. *Id.* at 57.

166. *See* Bd. of Educ. v. Minor, 23 Ohio St. 211, 247 (1872).

separate body of principles formulated and enforced by government officials.[167] Religion was not a part of the law because it was not formulated and enforced by government officials.[168] As such, when the source of law is narrowed to government enforcement, rather than a wide range of external sources, religion does not have a place in law.[169]

III. THE *MINOR* DECISION

A. The Arguments

The Cincinnati school board appealed the superior court's decision to the Ohio Supreme Court.[170] The school board's attorneys argued that the board had the authority and discretion to dictate how the school was run.[171] Further, the school board built onto the theory set out by Judge Taft.[172] The school board elaborated that reading the Bible was a form of worship that compelled against the consent of others and, therefore, violated article I, section 7 of the Ohio constitution.[173] Additionally, the school board hypothesized that if aid were given to religion, religion would become an impermissible "creature of the state."[174] As a result, the board's attorney expressed to the court that the interest of both church and state were protected by the principle of separation of church and state.[175]

The pro-Bible faction continued their claim that the school board did not have the power to prohibit the Bible from schools.[176] The faction's attorney held, as did Judge Hagans, that article I, section 7 of the Ohio

167. Banner, *supra* note 69, at 58.

168. *Id.* Although the U.S. Supreme Court has not provided a firm definition of religion, the Court's attempts to define "religion" have focused on philosophical beliefs rather than a religion's ability to enforce its tenets. *See, e.g.*, Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981); Wisconsin v. Yoder, 406 U.S. 205, 248 (1972); United States v. Seeger, 380 U.S. 163, 176 (1965) ("The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God."); Torcaso v. Watkins, 367 U.S. 488, 495 (1961) ("Neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."); Davis v. Beason, 133 U.S. 333, 342 (1890) ("The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter.").

169. *See* Banner, *supra* note 69, at 58–59.

170. *Minor*, 23 Ohio St. 211.

171. *Id.* at 216–17.

172. *See supra* notes 141–49 and accompanying text.

173. *Minor*, 23 Ohio St. at 217.

174. *Id.* at 221.

175. *Id.*

176. *Id.* at 222–25.

constitution created a duty on the government to teach religion.[177] Religious instruction was a necessity of the state.[178] The framers of the Constitution intended for an "intermingling of a religious morality with the intellectual education of the young."[179] Such intermingling was permissible because school is, for some children, the only place they would receive religious instruction.[180]

Finally, the pro-Bible attorneys attacked the rationale of the Ohio Supreme Court's ruling in *Bloom*. They contended that the notion of separation of church and state was nothing but a ghost.[181] Because the line between church and state was non-existent, *Bloom*'s remarks on Christianity in the law were extraneous.[182] Instead, the "true relation" between religion and state was government coming to the aid of religion, not leaving it to fend for itself.[183] A resolution banning the Bible in school was the antithesis of the "true relation" between religion and state. However, the "true relation" argument was weakened by the fact that it was based only on non-Ohio precedent for support.[184]

B. Justice Welch's Opinion

Justice Welch was in charge of crafting the Ohio Supreme Court's decision in *Minor*. Justice Welch was a one-time Whig prosecutor in Athens County, Ohio, a state senator, and a member of the U.S. House of Representatives.[185] During the Civil War, he served as a Common Pleas judge until being appointed in 1865 to a seat on the Ohio Supreme Court.[186] In 1867 and 1872, Justice Welch was elected to full terms on the Ohio Supreme Court.[187]

In the beginning, Justice Welch carefully emphasized what the case was *not* about. The case was not about morality, religion, or the wisdom of having or not having the Bible in schools.[188] Rather, the "real question," Justice Welch explained, was whether the court had "jurisdiction to interfere in the management and control of such schools, to the extent of enforcing religious instructions, or the reading of religious books therein[.]"[189] Then,

177. *Id.* at 225–27.
178. *Id.* at 228.
179. *Id.* at 226–27.
180. *Id.* at 227.
181. *Id.* at 233.
182. *Id.* at 234.
183. *Id.* at 234–35.
184. *Id.*
185. *John Welch*, THE SUPREME COURT OF OHIO & THE OHIO JUDICIARY SYSTEM, https://www.supremecourt.ohio.gov/SCO/formerjustices/bios/welch.asp (last visited June 17, 2019) [https://perma.cc/4VES-5ZYE].
186. *Id.*
187. *Id.*
188. *Minor*, 23 Ohio St. at 238.
189. *Id.*

he added a second jurisdictional question: "Do the laws of Ohio clothe its courts with power to interfere, either by injunction or mandate, to compel religious instructions and reading of religious books in public schools of the state?"[190] The Ohio Supreme Court unanimously found that both questions had to be answered in the negative.[191]

According to Justice Welch, article I, section 7 did not mandate that the government endorse religious instruction in public schools.[192] The phrase "religion, morality, and knowledge" only spoke to "other areas of learning in the schools."[193] Morality and good conduct did not require the teaching of religion to a pupil, nor a religious teacher.[194] Justice Welch pointedly stated that had religious instruction been mandated, then the "legislation of the nearly half a century have failed so to interpret it" to require religious instruction.[195] As a result, there had been no laws passed enforcing such a mandate.[196]

At this point, Justice Welch could have stopped and inferred that if the government was not mandated to support religion, a school could create a resolution not supporting religion. In short, the school board had the discretion to issue a resolution forbidding the reading of the Bible. Because the issue was a part of the school board's discretion, it would be, as Judge Taft claimed, that the court could only interfere in a school board's discretionary decisions if it violated a clear state law.[197] Instead, Justice Welch dove deeper into the meaning of religion and the state.

Article I, section 7's use of "religion, morality, and knowledge" provided the court and legislature no direction. The language of article I, section 7 could be read as "true 'religion' and 'morality' are aided and promoted by the increase and diffusion of 'knowledge,' on the theory that 'knowledge is the hand-maid of virtue,' and that all three—religion, morality, and knowledge—are essential to good government."[198] But, the language gives "no direction" to "what system of general knowledge, or of religion or morals, shall be taught; nor as to what particular branches of such system or systems shall be introduced into the 'schools;' nor is any direction given as to what other 'means of instruction' shall be employed."[199] Without any direction, what was meant by religion and morality was left to legislative discretion, subject to the limitations of the Ohio Bill of Rights.[200]

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190. *Id.* at 240.
191. *Id.*
192. *Id.* at 241.
193. *Id.* at 242.
194. *Id.*
195. *Id.*
196. *Id.* at 242–43.
197. *See* GREEN, *supra* note 92, at 113.
198. *Minor*, 23 Ohio St. at 244.
199. *Id.*
200. *Id.*

Justice Welch then turned his attention to the issue of Christianity and the law. Justice Welch observed that religion did not mean "Christian religion."[201] "When they speak of 'religion,'" Justice Welch began, "[we] must mean the religion of man, and not the religion of any *class* of men."[202] Similarly, when it is spoken that "all men" have certain rights, it cannot mean merely "all Christian men."[203] As Justice Welch rationalized, this was because "some of the very men who helped to frame these [state] constitutions were themselves not Christian men."[204] Therefore, the language of *Bloom* was not extraneous, and Justice Welch reaffirmed the holding in *Bloom*.[205]

According to Justice Welch, religion and government were best when kept in their own domains. He warned that when religion joins with government or the domain of law, religion never "rises above the merest superstition, [and] government never rises above the merest despotism."[206] Religion, Justice Welch declared, was not an object of government.[207] Rather, religion served as a provider of tenets to create a better society. Justice Welch explained, "Religion is 'essential' to much more than human government. It is essential to man's spiritual interests, which rise infinitely above, and are to outlive, all human governments."[208] The framers were content with holding that religion was to be enjoyed "each in his own way, and providing means for the diffusion of general knowledge among the people."[209] However, we would be mistaken if we claimed that Justice Welch was making a secular case denying Christianity's influential role in the development of law.

Rather than just reaffirming *Bloom*'s statement on Christianity not being a part of the law, Justice Welch proceeded to refine religion's place in law.[210] In doing so, Justice Welch attempted to fit both the moral republican belief of morality's importance in government and Judge Hagans's "moral sense" theory into a concept of neutrality. Although the Northwest Ordinance's RMK clause did not create a government obligation, Justice Welch agreed that religion was essential to government.[211] Religion had the "instrumentalities for *producing and perfecting* a good form of government."[212] This was because religion was the parent of good government and not the "offspring" of government.[213] Good government

201. *Id.* at 245.
202. *Id.* at 246.
203. *Id.*
204. *Id.*
205. *Id.* at 248–49.
206. *Id.* at 248.
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.* at 246, 248–49.
211. *Id.* at 248.
212. *Id.* (emphasis in original).
213. *Id.* at 249.

needed religion, but importantly, good government could not control religion.[214] If government controlled religion, a good government could not be created.[215]

Justice Welch proposed that if the best form of government required the best religion, it was not the government's choice to decide the "best" religion.[216] What Justice Welch imagined was a "marketplace of religion" similar to Justice Oliver Wendell Holmes's marketplace of ideas.[217] In this marketplace of religion, the government keeps its hands off religion, and the "best will triumph in the end."[218] However, the hands-off nature of the marketplace did not mean that government could not aid religion. Instead, Justice Welch stated, "the state will impartially aid all parties in their struggles after religious truth, by providing means for the increase of general knowledge, which is the handmaid of good government, as well as of true religion and morality."[219]

By allowing the state to impartially aid all parties, Justice Welch appears to hold that if government aids one sect (e.g., Southern Baptist), government must aid all other sects (e.g., Roman Catholic). Consequently, Justice Welch's theory on religion and state is not one calling for a complete wall of separation but rather a theory of equal accommodation and neutrality. As such, *Minor* is a step down from the wall of separation advocated in *Schempp*.[220] Religion and state are in separate domains, but because religion is the "handmaid of good government," there are moments where the wall can be stepped over.[221] But if stepped over, government, or law in Justice Welch's phraseology, cannot benefit one religion over the other.[222] In sum, according to Justice Welch, religion lay outside the "legitimate province of government," and government could not choose one religion over another religion.[223] Reading the Bible in schools put one religion (i.e., Protestants) over another (i.e., Roman Catholics).[224] The superior court's injunction preventing the school board's prohibition on reading a Bible passage was overturned.[225]

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214. *Id.* at 248–49; *see* GREEN, *supra* note 92, at 105–07.

215. *Minor*, 23 Ohio St. at 248.

216. *Id.* at 251.

217. Abrams v. United States, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting) (describing the "marketplace of ideas").

218. *Minor*, 23 Ohio St. at 251.

219. *Id.*

220. *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 214–15 (1963) (citing Bd. of Educ. v. Minor, 23 Ohio St. 211, 250 (1872)).

221. *See Minor*, 23 Ohio St. at 246, 248–49.

222. *See id.* at 251.

223. *See* Abrams v. United States, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting) (describing the "marketplace of ideas"); *Minor*, 23 Ohio St. at 246, 248–51.

224. *Minor*, 23 Ohio St. at 254.

225. *Id.*

IV. LEGACY

A. Blaine, Wall of Separation, and Neutrality

The *Minor* decision marked a middle ground between secularists, who advocated that the First Amendment mandated an impregnable "wall of separation" between church and state, and moral republicans, who argued that the government must promote religion. Broadly, Justice Welch fused together early American republican moral desires through recognizing religion's importance to government and the concerns of separationists into a theory of neutrality.[226] A change in thought in the boundaries of religion and state began to take hold. Beyond Cincinnati, other cities such as Chicago, New York City, Buffalo, and Rochester voted to prohibit Bible-reading and religious exercises in public schools.[227]

Further, as Roman Catholics began to gain a political foothold in cities, Protestants joined with nativist groups in a campaign to preserve religion in public school and deny government support of sectarian institutions.[228] Out of this situation, the Blaine Amendment of 1876 became a significant political event in American history.[229] As Steven Green contends,

> The specific issue at hand—application of the First Amendment religion clauses to the states with an express prohibition on funding religious schools—became subsumed in a much larger matrix involving a growing discomfort with the forces of change in post-Civil War America and an uncertainty over the future direction of the nation.[230]

As such, the Blaine Amendment symbolized a defense of American values and institutions pressured by "immigration, race, Reconstruction, urbanization, and industrialization."[231]

The Blaine Amendment proposed an addition to the First Amendment of the U.S. Constitution that would bar state public funds, in particular, public funds collected for public schools, from being "under the control of any religious sect; nor shall any money so raised or lands so

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226. *See supra* Section I.C.

227. Joseph P. Viteritti, *Davey's Plea: Blaine, Blair,* Witters*, and the Protection of Religious Freedom*, 27 HARV. J.L. & PUB. POL'Y 299, 310 (2003).

228. *Id.*

229. Steven K. Green, *Insignificance of the Blaine Amendment*, 2008 BYU L. REV. 295, 318 (2008).

230. *Id.*

231. *Id.* at 322.

devoted be divided between religious sects or denominations."[232] In the Blaine Amendment, the Republican Party hoped to find an issue to help them challenge the upstart Democratic Party.[233] The Blaine Amendment went against the common understanding, at the time, that the First Amendment did not prohibit aid to religious schools.[234] Further, in 1876, because the religion clauses did not yet apply to the states via the Fourteenth Amendment, it was assumed that the states were free to define religious freedom.[235]

However, the Blaine Amendment did not provoke serious constitutional debate.[236] The Congressional debate centered on the issues of partisanship, federalism, states' rights, securing public school financing, and the danger imposed by Catholics on such financing.[237] While each side made rhetorical arguments surrounding the principle of separation of church and state, no congressman saw the proposal as affecting existing legal principles.[238] For example, Senator Frederick Frelinghuysen stated the Blaine Amendment affirmed the principles of freedom of conscience and individuals not being "taxed for sectarian purposes."[239] Senator Frelinghuysen added, "The whole history of our country, from its origin to the present day, establishes and fortifies these positions."[240] In the end, the Blaine Amendment failed to garner enough votes to reach the necessary two-thirds majority in the Senate.[241]

Nonetheless, by 1890, twenty-nine states added similar provisions in their state constitutions.[242] State versions of the Blaine Amendment varied

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232. Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 53 n.96 (1992).

233. Green, *supra* note 229, at 320–24.

234. Viteritti, *supra* note 227, at 312; *see also* Alfred Meyer, *The Blaine Amendment and the Bill of Rights,* 64 HARV. L. REV. 939, 942 (1951) (discussing the federalism issue as it pertains to the Blaine Amendment); Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 661–66 (1998) (explaining that the Establishment Clause had not yet been applied to prohibit federal funding of religious institutions).

235. *See* Permoli v. Municipality No. 1 of New Orleans, 44 U.S. (3 How.) 589 (1845) (holding that the religion clauses of the First Amendment do not apply to the states); Barron v. Baltimore, 32 U.S. 243 (1833).

236. Green, *supra* note 229, at 324–27; *see also* Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 565–73 (2003) (highlighting the debate of the Blaine Amendment in Congress).

237. Green, *supra* note 229, at 324.

238. *Id.*

239. *See* 4 CONG. REC. 5561 (1876) (statement of Sen. Frelinghuysen).

240. *Id.*

241. Viteritti, *supra* note 227, at 312.

242. *Id.* For examples of state Blaine Amendments, see ALA. CONST. art. XIV, § 263; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. IX, § 10; ARK. CONST. art. XIV, § 2; COLO. CONST. art V, § 34; DEL. CONST. art. X, § 3; FLA. CONST. art. I, § 3, art. IX, § 6; GA. CONST. art. I, § 2, para. 7; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 5; IND. CONST. art. I, § 6; KY. CONST. §§ 186, 189; MASS. CONST. amend. XVIII, § 2; MICH. CONST. art. I, § 4, art. VIII, § 2; MINN. CONST. art. I, § 16, art. XIII, § 2; MISS. CONST. art. VIII, § 208; MO. CONST. art. I,

from one state to the next.[243] Mark DeForrest describes the variety of the state Blaine Amendments as a spectrum.[244] On one end, state courts construe Blaine Amendments narrowly and thus restrict their scope.[245] On the other end, state courts have allowed indirect and direct aid to religious schools.[246] In the middle, are states and state courts that permit indirect government funding to religious schools, but prohibit overt funding.[247]

State Blaine Amendments have faced criticism, using the Blaine Amendment's background in religious bigotry to discredit advocates of prohibiting funding of religious schools.[248] For example, Justice Clarence Thomas, in *Mitchell v. Helms*, stated that the Blaine Amendment, the legal doctrine barring funding of religious schools, "has a shameful pedigree that we [should] not hesitate to disavow . . . . This doctrine, born of bigotry, should be buried now."[249] In addition to the objectionable background of the Blaine Amendment, the Blaine Amendment also raises federal constitutional concerns.[250]

Joseph Viteritti observes:

> [H]istory informs our understanding that the Blaine Amendment and its state-derived progeny were written to circumscribe and undermine American constitutional principles designed to protect members of religious minorities, be they Roman Catholic immigrants arriving from Ireland at the height of the nativist movement, or young men pursuing a vocation in the ministry in the heyday of a secularist popular culture.[251]

Because religious freedom is vital to the "American scheme of democracy," religious freedom should not be defined one way in one state, and another in another state.[252] Viteratti's argument brings up questions of federalism, and whether there are limits to state constitutional practice. As mentioned earlier, state constitutional practice plays an important role in

§ 7, art. IX, §§ 5, 8; NEB. CONST. art. VII, § 11; NEV. CONST. art. XI, § 2; N.J. CONST. art. VIII, § 4, para. 2; N.M. CONST. art. XII, § 3; N.Y. CONST. art. XI, § 3; N.C. CONST. art V, § 12, art. IX, § 6; N.D. CONST. art. VIII, § 1; OKLA. CONST. art. II, § 5, art. XI, § 5; S.D. CONST. art VIII, § 16; TEX. CONST. art. VII, § 5; VA. CONST. art VIII, § 10; WASH. CONST. art. I, § 11, art. IX, § 4; WIS. CONST. art. X, § 6; WYO. CONST. art. VII, § 12.

243. DeForrest, *supra* note 236, at 576–90.

244. *Id.* at 577.

245. *Id.*

246. *Id.*

247. *Id.*

248. Green, *supra* note 229, at 296.

249. Mitchell v. Helms, 530 U.S. 793, 828–29 (2000).

250. DeForrest, *supra* note 236, at 602.

251. Viteritti, *supra* note 227, at 324–25.

252. *Id.* at 325.

understanding the U.S. Constitution, particularly the religion clauses.[253] Further, the Supreme Court has described the states as "laboratories" in the development of individual rights and liberties.[254] As the Supreme Court began to incorporate the Bill of Rights into the Fourteenth Amendment, this concern for state constitutional practice remained.

Justice Brennan coined this concern, or rather identified the legal development as, a "theory of neo-federalism."[255] Neo-federalism grew out of the development of selective incorporation of the Bill of Rights into the Fourteenth Amendment and thus applying the Bill of Rights to the states.[256] Under neo-federalist thought, the U.S. Constitution provided a "floor," or a minimum level of protection, that the states could not violate.[257] States were permitted to provide a ceiling, or a maximum extent of rights, but could not provide fewer or more restricted rights.[258] As such, if a state constitutional provision limits fundamental rights guaranteed by the U.S. Constitution, that

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253. *See supra* Section I.B.

254. *See* Oregon v. Ice, 555 U.S. 160, 171 (2009) ("We have long recognized the role of the States as laboratories for devising solutions to difficult legal problems."); *see also* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

255. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). It should be noted that while Brennan identified and explained the development of neo-federalism, he by no means created the principle. Rather, he described and discussed a trend that was already occurring on the state level. *See* Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19, 30 (1989). For an examination of one state's approach to the complex jurisprudence surrounding the relationship of federal and state constitutional guarantees under the doctrine of neo-federalism, see Linda White Atkins, *Recent Development: Federalism, Uniformity, and the State Constitution—State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986)*, 62 WASH. L. REV. 569 (1987); Daryl R. Hague, Note, *New Federalism and "Occupation of the Field": Failing to Maintain State Constitutional Protections Within a Preemption Framework—Alverado v. Washington Public Power Supply System, 111 Wash. 2d 424, 759 P.2d 427 (1988), cert. denied, 109 S.Ct. 163*, 64 WASH. L. REV. 721 (1989).

256. DeForrest, *supra* note 236, at 605.

257. Brennan, *supra* note 255, at 495, 502; *see also* Utter, *supra* note 255, at 30.

258. Utter, *supra* note 255, at 30; *see also* Delaware v. Van Arsdall, 475 U.S. 673, 706–07 (1986) (Stevens, J., dissenting). The dual nature of our constitutional system, with the federal government setting a minimal constitutional standard, should not be construed as rendering state constitutions irrelevant. As Justice Stevens writes:

> [S]tate constitutions preceded the Federal Constitution and were obviously intended to have independent significance. The frequent amendments to state constitutions likewise presuppose their continued importance. Thus, whether the national minimum set by the Federal Constitution is high or low, state constitutions have their own unique origins, history, language, and structure—all of which warrant independent attention and elucidation. State courts remain primarily responsible for reviewing the conduct of their own executive branches, for safeguarding the rights of their citizenry, and for nurturing the jurisprudence of state constitutional rights which it is their exclusive province to expound.

Id. (citations omitted).

state provision is unconstitutional.[259] Arguably, although the Blaine Amendments may withstand the Establishment Clause, the Blaine Amendments may at the same time violate the Free Exercise Clause.[260]

The concept of neutrality in religion and state did not reach the Supreme Court until the mid-twentieth century. In *Everson v. Board of Education*, the Supreme Court took the step of incorporating the Establishment Clause into the Fourteenth Amendment of the U.S. Constitution.[261] Since then, the concept of neutrality has had to jostle with Jefferson's "wall of separation."[262] Further, the use of neutrality differs with competing interpretations under the religion clauses.[263] Scholars and the United States Supreme Court have observed that there is an interpretative tension between the Establishment and Free Exercise Clauses.[264] The tension between the two clauses is partly due to the Supreme Court observing that there is "play in the joints" and interpreting the two clauses differently.[265] In time, "play in the joints" has come to mean that things prohibited by one clause are not required by the other, leaving the states to experiment with greater free exercise or establishment provisions.[266] Regardless of the different interpretations utilized by the Establishment and Free Exercise Clauses, the Supreme Court has held that the focus was on "the adherence to the policy of neutrality."[267]

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259. DeForrest, *supra* note 236, at 606.

260. *See id.* at 602; *see also* sources cited *infra* notes 280–94 and accompanying text.

261. Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947).

262. *See supra* note 3; *infra* notes 264–79 and accompanying text.

263. *See infra* notes 264–79 and accompanying text.

264. *See* Tilton v. Richardson, 403 U.S. 672, 677 (1971) (noting "internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause"); Sylvia Sohn Penneys, Note, *And Now for a Moment of Silence:* Wallace v. Jaffree, 39 U. MIAMI L. REV. 935, 940 (1985) (recognizing potential tension between these two clauses if both are interpreted broadly); *see generally* Katie Hosford, Note, *The Search For a Distinct Religious-Liberty Jurisprudence Under the Washington State Constitution*, 75 WASH. L. REV. 643, 644 (2000) ("[F]ree exercise and separation of church and state have potential to lead to contradictory results."). Scholars have argued that this tension is avoidable. *See* Carl H. Esbeck, *Religion in the Public Square: Religion and the First Amendment: Some Causes of the Recent Confusion*, 42 WM. & MARY L. REV. 883, 893 (2001) (arguing that such conflicts between said religion clauses are extrinsic and avoidable); John Witte, Jr., *American Legal History: The Integration of Religious Liberty*, 90 MICH. L. REV. 1363, 1369 (1992) ("The drafters did not prefer one religion clause over the other or perceive any tension between [the two]."); *see generally* William Cox, Jr., *The Original Meaning of the Establishment Clause and Its Application to Education*, 13 REGENT U. L. REV. 111, 113 (2000/2001) ("[F]or the greater part of this century, the Court has been without a principled basis for interpreting the religion clauses of the First Amendment."). Carl Esbeck argues that if the Court applies neutrality, the tension between the two clauses disappears. *See* Esbeck, *supra* note 266, at 894.

265. Walz v. Tax Comm'r, 397 U.S. 644, 669 (1970).

266. *Id.*

267. *See id.* at 669–70 ("[T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."); *see generally* Shawn P. Bailey, *The Establishment Clause and The Religious Land Use and Institutionalized Persons Act of 2000*, 16 REGENT U. L. REV. 53, 53 (2003/2004)

Although the focus was on an "adherence to the policy of neutrality," the theory of neutrality was only one of two distinct visions of religious freedom.[268] On the one hand, there was a vision grounded in secularism and a strict separation of church and state (i.e. the secularist state).[269] On the other hand, the concept of neutrality rested on a pluralistic and egalitarian perspective (i.e. the pluralist state).[270] Under the secular model, the secularist state is religiously neutral, and individuals are allowed to practice religion freely in private with the expectation that they put aside their beliefs when they act as public citizens.[271] However, Michael McConnell contends that what passes as religious neutrality is, in reality, an ideological preference in different modes of thinking over others, that is, rationalism over conscience.[272] Further, since the secular state puts emphasis on maintaining a wall of separation between church and state, it inadvertently puts less emphasis on protecting the individual right of religious exercise.[273] Thus, the secular state places more emphasis on the anti-establishment rather than the free exercise principle.

The secular argument against religious discourse in the public arena rests on what is a perceived religious exclusivity of principles, such as religious faith.[274] Religious discourse is prohibited in the public arena because individual rights can only be fully enjoyed when government bases its fundamental rights on universally accessible principles.[275] Nonetheless, this argument points to several pieces of criticism.

First, religion in general and moral ideas from a generalized view of religion can be accessed universally.[276] Second, prohibiting religious

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(affirming Establishment Clause requires neutrality toward religion); Gabriel A. Moens, *The Menace of Neutrality in Religion,* 2004 BYU L. REV. 535, 536 (2004) ("The Supreme Court has interpreted the Establishment Clause as requiring or involving the application of the neutrality principle.").

268. Viteritti, *supra* note 227, at 325; *see also*, Joseph P. Viteritti, *Reading* Zelman*: The Triumph of Pluralism, and Its Effects on Liberty, Equality, and Choice*, 76 S. CAL. L. REV. 1105, 1123 (2003).

269. Viteritti, *supra* note 227, at 325.

270. *Id.*

271. Michael W. McConnell, *Believers as Equal Citizens*, *in* OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH 90, 100–01 (Nancy L. Rosenblum ed., 2000).

272. *Id.* at 104.

273. *Id.*

274. DeForrest, *supra* note 236, at 610.

275. *See* Paul Weithman, *Religious Reasons and the Duties of Membership*, 36 WAKE FOREST L. REV. 511, 512 (2001) (examining the liberal concept of civic discourse).

276. DeForrest, *supra* note 236, at 611; *see* Thomas C. Berg, *Religious Liberty in America at the End of the Century*, 16 J.L. & RELIGION 187, 188 (2001) (contending that Supreme Court jurisprudence for the last two decades has been moving towards seeing religion as meriting the same sort of constitutional protections as other ideas and activities.). Berg writes:

> [I]n the 1980s and 1990s, however, the Court began to move gradually from church-state separation, with its distinctive treatment of religion, toward an emphasis on the equality of religion with other ideas. The Court began

discourse in the public arena goes against the grain of the liberal ideal of "evaluating individual rights as existing prior . . . to 'community and moral commitments.'"[277] Third, the secularist's argument goes against the notion of distributive justice.[278] John Courtney Murray argues the moral principle of distributive justice requires that "government, in distributing burdens and benefits within the community, should have in view the needs, merits, and capacities of the various groups of citizens and of society in general."[279]

Finally, the secular prohibition on religious discourse is not in line with the Constitution. The Constitution's guarantee of religious freedom, both under the Establishment and Free Exercise Clauses, promotes religious diversity and thus allows pluralism to thrive because one community cannot be privileged over the other.[280] As a result, a secular prohibition of religious discourse in the public arena favors one community (non-religionist) over another community (religionist).[281] Further, James Madison and Thomas Jefferson understood the importance of equality of citizenship between non-believers and believers respectively.[282] For both Madison and Jefferson, equal citizenship in civil society meant sharing equally in the burdens and benefits of a free society.[283]

In comparison, McConnell's second model allows for public participation in a way that least compromises an individual's religious beliefs.[284] Pluralism, according to William Galston, is an essential component

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> permitting, and sometimes even requiring, the government to treat religion the same as other ideas and activities: what Professor Douglas Laycock has called 'formal neutrality' between religion and nonreligion. Decisions by the early 1990s had firmly established rights of equal treatment for religious speech by individuals in public schools, under the Free Speech Clause. The Court also began, little by little, to approve programs of financial aid under which religious institutions benefited on the same terms as others.

Id. (citations omitted); *see also* Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CALIF. L. REV. 673, 678 (2002) (arguing that the principle of equal treatment of religion could conceivably justify vast increases in government funding of religion).

277. DeForrest, *supra* note 236, at 612; *see also* MICHAEL J. GERHARDT ET AL., CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES 245 (citing H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM 6 n.16 (1993)).

278. DeForrest, *supra* note 236, at 612–14.

279. JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 146 (1960).

280. DeForrest, *supra* note 236, at 614–16.

281. *Id.*

282. *Id.*

283. *See* Thomas Jefferson, *An Act for Establishing Religious Freedom* (1786), *reprinted in* THE ESSENTIAL THOMAS JEFFERSON 44–46 (John Gabriel Hunt ed., 1996); James Madison, *Memorial & Remonstrance Against Religious Assessments* (1785), *reprinted in* RELIGION AND THE CONSTITUTION 63–68 (Michael W. McConnell, John H. Garvey & Thomas C. Berg eds., 2002).

284. McConnell, *supra* note 271, at 104–05.

of the modern liberal state.[285] Resting on the classical liberal principles of John Locke, John Stuart Mill, and Adam Smith, pluralism allowed for individuals to choose, without state intrusion, competing definitions of a good life.[286] Pluralism is only limited by the "core requirements of individual security and civic unity."[287] As Galston explained, "[P]luralism is not the same as value relativism; there is a distinction between good and bad, and there are zones of legitimate intervention by the government through which it can define the requirements of civic unity and order."[288]

Justice Welch's concept of neutrality fits into a pluralistic model and foresees the possibility that government may have to intervene, and would be permitted to do so, if it does not favor one over another.[289] Similarly, government, in a pluralistic system not constrained by a hard separation of church and state like McConnell's secularist state, can take action if religious liberty is used improperly.[290] As mentioned earlier, Justice Welch's concept of neutrality recognizes religion's role in the formation of good government.[291] Pluralism also recognizes religion's role in the formation of good government in two ways. First, a pluralist society does not ask individuals to put aside their religious beliefs as long as it does not touch upon the "core requirements of individual security and civic unity."[292] Second, pluralism allows for competing definitions of what makes a good society.[293] In a pluralist society that allows such competing definitions of the good, rather than ideological preferences as in the secularist society, religion's influence on what makes good government is a permissible part of the debate.[294]

The Supreme Court has never wholly based its religion clauses jurisprudence on secular or neutral grounds.[295] For example, in *Everson*, the Court envisioned a wall of separation between church and state, but still approved a government-supported program providing transportation for children attending either religious or public schools.[296] Nonetheless, Thomas

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285. Viteritti, *supra* note 268, at 1157.

286. *Id.*

287. *Id.*

288. *Id.* at 1157–58.

289. *See* Abrams v. United States, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting) (describing the "marketplace of ideas"); Bd. of Educ. v. Minor, 23 Ohio St. 211, 246, 248–51, 254 (1872).

290. *See* McConnell, *supra* note 271, at 100–01, 104; Viteritti, *supra* note 227, at 325; Viteritti, *supra* note 268, at 1123. For example, the IRS's denial of tax exemption status for Bob Jones University to prohibit racial discrimination was permissible, denying that the IRS's non-discriminatory policy violated the university's right of religious exercise. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 602–05 (1983).

291. *See* sources cited *supra* notes 220–25.

292. *See* Viteritti, *supra* note 268, at 1157.

293. DeForrest, *supra* note 236, at 614–16.

294. *See* sources cited *supra* notes 220–25, 284–94.

295. Viteritti, *supra* note 227, at 325–26.

296. Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

Jefferson's wall of separation does not stand on firm legal ground.[297] This is partly because of a fault in the secularist paradigm of the religious clauses.[298]

As Joseph Viteritti argues, the Jeffersonian vision of the religious clauses "applies the Establishment Clause to compromise rights protected by the Free Exercise Clause as if the two were in conflict."[299] However, the two clauses are better understood as designed to protect an essential constitutional right from two different directions.[300] As formulated by Michael Paulsen:

> The establishment clause protects religious liberty; it safeguards much the same interests as the free exercise clause, but in a slightly different way. The free exercise clause defines the important individual liberty of religious freedom while the establishment clause addresses the limits of allowable state classifications affecting this liberty. The two clauses, naturally enough, address a single, central value from two different angles: The free exercise clause forbids government proscription; the establishment clause forbids government prescription. Stated narrowly, government can neither keep persons from exercising certain religious beliefs nor may it make them exercise any religion.[301]

Neutrality fits into Paulsen's perspective of the Establishment and Free Exercise Clauses. If government stands neutral on the issue of religion, it does not run the risk of intruding on either an individual's beliefs or practices. Further, neutrality takes the Establishment Clause into account.

Under a stricter church and state separation, federal and state governments run the risk of restricting rights under the Free Exercise Clause while trying to protect rights under the Establishment Clause.[302] Thus, the promotion of a strict separation of church and state can come at the expense of the principle of religious equality.[303] For example, in *Locke v. Davey*, the Supreme Court permitted the state of Washington to prohibit the use of state funds to pursue a theology degree.[304] The *Locke* Court rested its rationale primarily on Establishment Clause grounds with little discussion on the individual's free exercise interest or neutrality.[305]

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297. Viteritti, *supra* note 227, at 326.
298. *Id.* at 332.
299. *Id.*
300. *Id.* at 332–33.
301. Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication,* 61 NOTRE DAME L. REV. 311, 313 (1986).
302. Viteritti, *supra* note 227, at 326.
303. Paulsen, *supra* note 301, at 314.
304. Locke v. Davey, 540 U.S. 712 (2004).
305. *Id.* at 722–24.

The *Locke* Court's superficial approach to neutrality and free exercise drove Justice Scalia's dissent in *Locke*.[306] Justice Scalia pointed out that the majority overlooked the free exercise concerns of the individual, which require "formal neutrality" as a requirement for "free exercise constitutionality."[307] As a result, the majority's opinion in *Locke* is a "pure philosophical preference" to protect taxpayers' "freedom of conscience not to discriminate against candidates for the ministry."[308] Justice Scalia added that, "This sort of protection of 'freedom of conscience' has no logical limit and can justify the singling out of religion for exclusion from public programs in virtually any context."[309] If such reasoning is "pure philosophical preference," as Justice Scalia suggests, then the *Locke* majority falls into McConnell's secularist state by giving one ideological preference over another.[310]

More importantly, Justice Scalia observed that the Supreme Court had rejected the approach taken by the majority in prior cases.[311] In *McDaniel v. Paty*, the Supreme Court took up a challenge to a Tennessee statute that barred ministers from serving as delegates to the state's 1977 constitutional convention.[312] Tennessee's statute was based on the state's 1796 constitution prohibiting ministers from serving as legislators.[313] Tennessee defended the law as consistent with the Establishment Clause because they feared that ministers in public office would "promote the interests of one sect or thwart the interests of another, thus pitting one against the others, contrary to the anti-establishment principle with its command of neutrality."[314] The Establishment Clause interests notwithstanding, the Supreme Court found that the Tennessee law violated the Free Exercise Clause.[315] In short, the *McDaniel* Court did not take Tennessee's Establishment Clause argument for face value, considering instead protections under the Free Exercise Clause. Thus, neutrality did not just have an "anti-establishment principle," it also had a free exercise principle that needed to be reviewed by a court.[316]

In sum, Justice Welch's vision of religion and state has found a place in the Supreme Court.[317] But how the Supreme Court defines neutrality is an important indicator of how a case may be decided. If the Court looks at

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306. *Id.* at 726–34 (Scalia, J., dissenting).
307. *Id.* at 726.
308. *Id.* at 730.
309. *Id.*
310. *See supra* note 276 and accompanying text.
311. *Locke*, 540 U.S. at 732–33.
312. 435 U.S. 618, 621 (1978).
313. *Id.*
314. *Id.* at 628–29.
315. *Id.* at 629.
316. *Locke*, 540 U.S. at 733. For further discussion on how the courts could consider both the concerns of the Establishment and Free Exercise clauses, see generally Michael A. Paulsen, *supra* note 301. A full analysis of this discussion is outside the bounds of the article.
317. *See Locke*, 540 U.S. at 733; *McDaniel*, 435 U.S. at 621; Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

neutrality under the secularist point of view, government neutrality is tilted towards Thomas Jefferson's strict "wall of separation."[318] Neutrality tilted to a wall of separation, or a strict wall of separation, may permit government action under the Establishment Clause without reviewing, or giving weight to, free exercise concerns.[319] In his *Locke* dissent, Justice Scalia was concerned by the lack of such review and by the majority's approach of taking Washington's anti-establishment rationale at face value.[320]

Such a methodology is concerning. For example, if Tennessee's establishment clause argument were taken for face value, then the result of *McDaniel* changes.[321] As a result, the minister's free exercise rights would be limited.[322] Justice Welch's concept of neutrality, along with the pluralist vision of neutrality, alleviates this concern.[323] Neutrality under the pluralist state is not tilted in one direction or the other.[324] As a result, neutrality is broader since it must take into account both Establishment and Free Exercise Clause concerns.[325] It is this version of neutrality that the Supreme Court described in *Walz* and *McDaniel* and that Justice Scalia described in his *Locke* dissent.[326]

B. *Trinity Lutheran v. Comer*: Neutrality and the Wall Illustrated

In 2017, the Supreme Court had an opportunity to review its decision in *Locke*.[327] The dispute in *Trinity Lutheran* arose from recycled tires, of all things.[328] The Missouri Department of Natural Resources Scrap Tire Program offered grants to reimburse the cost to qualifying nonprofit organizations that purchased playground surfaces made from recycled tires.[329] The Missouri Scrap Tire Program grants were awarded on a competitive basis to nonprofit organizations scoring the highest in several categories.[330]

In 2012, the Trinity Lutheran Church Child Learning Center (the Center), a pre-school operating on church property, sought to replace its playground's gravel surface with a rubber surface through the Missouri Scrap Tire Program.[331] Unfortunately, the Missouri Department of Natural Resources had a policy of denying grants to any applicant owned or

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318. *See* sources cited *supra* notes 269–75.
319. McConnell, *supra* note 271, at 104.
320. *Locke*, 540 U.S. at 733–34.
321. *See Locke*, 540 U.S. at 732–33; *McDaniel*, 435 U.S. at 621, 628–29.
322. *See Locke*, 540 U.S. at 732–33; *McDaniel*, 435 U.S. at 621, 628–29.
323. *See* sources cited *supra* notes 269–75, 289–94 and accompanying text.
324. *See supra* notes 285–94 and accompanying text.
325. *See supra* notes 285–94 and accompanying text.
326. *See supra* notes 266–68, 304–20 and accompanying text.
327. *See* Trinity Lutheran v. Comer, 137 S. Ct. 2012 (2017).
328. *Id.* at 2017.
329. *Id.*
330. *Id.*
331. *Id.*

controlled by a religious entity, such as a church.[332] The Department's policy stemmed from their interpretation of article I, section 7 of the Missouri constitution, which obliged "[t]hat no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, priest, preacher, minister or teacher . . . ."[333] Although the Center scored fifth among forty-four applicants, the Department determined that article I, section 7 of the Missouri constitution made the Center ineligible to receive a grant.[334]

The District Court found in favor of Missouri and dismissed the Center's claim for declaratory and injunctive relief on the ground that the denial of the grant was discriminatory.[335] According to the District Court, the denial of benefits was similar to the denial of benefits in *Locke*, and the Free Exercise Clause did not require Missouri to provide the money to the Center.[336] The Court of Appeals for the Eighth Circuit, in affirming the District Court's decision, held that while Missouri could award a grant, the Free Exercise Clause did not mandate that Missouri ignore the "antiestablishment principle reflected in its own Constitution."[337] Judge Gruender, dissenting, opined that the states did not have limitless power to exclude religious organizations from generally available benefits.[338]

In a 7–2 decision, the Supreme Court agreed with Judge Gruender and overturned the Eighth Circuit.[339] Chief Justice Roberts began the majority opinion by stating that both sides agreed that the Establishment Clause does not prevent Missouri from giving a grant to the Center.[340] As such, the question before the Court was whether the Free Exercise Clause was violated by Missouri's categorical denial of a grant of money.[341] Chief Justice Roberts laid out the "basic principle" 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.'"[342] Further, the Free Exercise Clause is not violated when a government's law or regulation is "neutral and generally applicable" without concern for religious identity.[343]

Chief Justice Roberts summed up this point of view of Free Exercise Clause jurisprudence:

332. *Id.*
333. *Id.*; *see also* MO. CONST. art. I, § 7.
334. *Trinity Lutheran*, 132 S. Ct. at 2018.
335. *Id.*
336. *Id.*
337. *Id.*
338. *Id.* at 2019.
339. *Id.* at 2025.
340. *Id.* at 2019.
341. *Id.* at 2019–25.
342. *Id.* at 2019 (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978)).
343. *Id.* at 2020–21.

> [T]he Court recounted the fundamentals of our free exercise jurisprudence. A law, we said, may not discriminate against "some or all religious beliefs." Nor may a law regulate or outlaw conduct because it is religiously motivated. And, citing *McDaniel* and *Smith*, we restated the now-familiar refrain: The Free Exercise Clause protects against laws that "impose[] special disabilities on the basis of . . . religious status."[344]

Put plainly, Missouri's categorical denial of the Center's grant award was a form of express discrimination.[345]

As the preacher in *McDaniel*, the Center was left with a choice to either participate in a generally available benefit program or to continue as a religious institution.[346] Although the Missouri Scrap Tire Program permitted the Center to continue as a church, the cost of their freedom of free exercise was an absolute bar from a public program for which they qualified.[347] A program that forces a religious organization to disavow its religious character "inevitably deter[s] or discourage[s] the exercise of First Amendment rights."[348]

Chief Justice Roberts then turned his attention to the *Locke* decision. Missouri and the Eighth Circuit argued that the Department's denial of benefits was similar to that in *Locke*.[349] However, the Center's case was distinguishable from the student's in *Locke*. In *Locke*, the student was not denied because of his or her religious identity but because of what he or she proposed to do.[350] Unlike the Center, the student did not have to make a choice to forgo his or her religious identity to be a part of Washington's scholarship program.[351] Although Chief Justice Roberts did not discuss Missouri's constitution or the Blaine Amendment by name, he also did not discount Missouri's anti-establishment interest.[352] A state's anti-establishment interest did not come into play unless it was determined that a government program required the individual or organization to choose between exercising religion or receiving a public benefit for which they were

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344. *Id.* at 2021.
345. *Id.* at 2021–22.
346. *Id.* at 2022–23.
347. *Id.* at 2022.
348. *Id*.
349. *Id.*
350. *Id.* at 2023–24.
351. *Id*.
352. *Id.* at 2023.

qualified.[353] Because Missouri's program required the Center to make such a choice, it violated the Free Exercise Clause.[354]

In her dissent, Justice Sotomayor opined that the majority's holding turned the church-state relationship upside down by weakening "this country's longstanding commitment to a separation of church and state beneficial to both."[355] Further, the majority's holding, according to Justice Sotomayor, found that the Constitution required the government to deliver public funds directly to a church.[356] Perhaps because Justice Sotomayor sensed a change in the church-state relationship, Justice Sotomayor wrote two dissents: one to the majority's holding and a second to the majority's brushing aside of the Establishment Clause.[357]

In short, Missouri would violate the Establishment Clause if it provided the grant to the Center because the playground was used in conjunction with Trinity Lutheran's religious mission.[358] The Supreme Court's precedent reflected that the "government may not directly fund religious exercise[,]" especially when public funds would "advance religion."[359] Missouri's grant would have advanced religion by allowing the

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353. *Id.* at 2023–24 ("Relying on *Locke*, the Department [of Natural Resources] nonetheless emphasizes Missouri's similar constitutional tradition of not furnishing taxpayer money directly to churches. But *Locke* took account of Washington's antiestablishment interest only after determining, as noted, that the scholarship program did not 'require students to choose between their religious beliefs and receiving a government benefit.'") (citations omitted).

354. *Id.* at 2024–25. Chief Justice Roberts stated:

> Nearly 200 years ago, a legislator urged the Maryland Assembly to adopt a bill that would end the State's disqualification of Jews from public office:
>
> > "If, on account of my religious faith, I am subjected to disqualifications, from which others are free, . . . I cannot but consider myself a persecuted man. . . . An odious exclusion from any of the benefits common to the rest of my fellow-citizens, is a persecution, differing only in degree, but of a nature equally unjustifiable with that, whose instruments are chains and torture." Speech by H. M. Brackenridge, Dec. Sess. 1818, in H. Brackenridge, W. Worthington, & J. Tyson, Speeches in the House of Delegates of Maryland, 64 (1829).
>
> The Missouri Department of Natural Resources has not subjected anyone to chains or torture on account of religion. And the result of the State's policy is nothing so dramatic as the denial of political office. The consequence is, in all likelihood, a few extra scraped knees. But the exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution all the same, and cannot stand.

Id.

355. *Trinity Lutheran*, 132 S. Ct. at 2027.

356. *Id.*

357. *See generally id.* at 2027–41.

358. *Id.* at 2028–31.

359. *Id.* at 2028–30.

Trinity Church to improve the Center to promote "the spiritual growth of the children of its members and to spread the Church's faith to the children of nonmembers."[360] Additionally, government programs providing public funds favor those religious institutions that are organized and funded enough to successfully win such a grant.[361] As such, the government is favoring one religion over the other, violating the spirit of what the Establishment Clause was meant to prevent.[362] In essence, the Establishment Clause was not meant to provide equal opportunity of public funds to religious institutions, but to maintain clear lines of separation between church and state.[363]

The second portion of Justice Sotomayor's dissent focused on whether the Free Exercise Clause permits a line to be drawn based on one's religious status because of anti-establishment principles.[364] For Justice Sotomayor, Missouri's anti-establishment interest, as Washington's interest in *Locke*, permitted such a line to be drawn.[365] Interestingly, Justice Sotomayor pointed to "benevolent neutrality" as justification for singling out religious organizations based on status alone.[366] She stated, "This space between the two [Religion] Clauses gives government some room to recognize the unique status of religious entities and to single them out on that basis for exclusion from otherwise generally applicable laws."[367] In this case, when the state invokes the longstanding anti-establishment principle of no aid to religion, "the government may sometimes close off certain government aid programs to religious entities."[368] Based on this longstanding principle, Missouri's constitutional prohibition was "reasonable and [sound] constitutional judgment."[369]

Where does the *Trinity Lutheran* decision stand in our discussion of neutrality? At neutrality's most basic level, Missouri Scrap Tire Program's prohibition of religious organizations based on religious status alone is unconstitutional. In Justice Welch's concept of neutrality, if the government provides a benefit to everyone, it cannot subsequently decide to deny a benefit because of religious identity.[370] However, Justice Welch may find it problematic that the program could indirectly favor religious organizations that are better able to seek out government benefits compared to those religious organizations that are less able.[371]

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360. *Id.* at 2029.
361. *Id.* at 2031.
362. *Id.*
363. *Id.*
364. *See id.* at 2031–41.
365. *See id.*
366. *See id.* at 2031.
367. *Id.*
368. *Id.* at 2032.
369. *Id.*
370. *See* sources cited *supra* note 216–25 and accompanying text.
371. *Trinity Lutheran*, 137 S. Ct. at 2030–31 (Sotomayor, J., dissenting) ("Today's opinion suggests the Court has made the leap the *Mitchell* plurality could not. For if it agrees that the funding here will finance religious activities, then only a rule that considers that fact

Chief Justice Roberts paints the concept of neutrality into the pluralist worldview. As mentioned earlier, the pluralist view of neutrality allows a participant in society to keep his or her beliefs open while participating in society.[372] Chief Justice Roberts looks to *McDaniel* and narrowly reads *Locke* in order to to lay the groundwork for the idea that to receive a public benefit, government cannot deny such benefits solely on religious identity.[373] But as in *Minor*, the majority in *Trinity Lutheran* recognized a boundary between state and religion. Although *Trinity Lutheran* narrowed *Locke*'s reach, the majority recognized anti-establishment principles could still be a reason to uphold a law.[374]

However, a state's use of the anti-establishment principles cannot be taken into account until it is determined that an individual does not have to set aside his or her religious status at the door before participating in society.[375] What is unclear is how this view will translate into the broader scheme of the Establishment and Free Exercise Clauses and the "play in the joints" between them. Yet the narrowing of *Locke* suggests that just as the Establishment Clause may limit the Free Exercise Clause, the Free Exercise Clause can also limit the Establishment Clause in certain situations.[376] This suggestion pushes a court to take into equal consideration the interests under both religion clauses.[377] Thus, Chief Justice Roberts's decision in *Trinity Lutheran* necessarily points to a version of neutrality in a pluralist state, rather than a hard wall of separation, and the secularist state.[378]

Justice Sotomayor's version of neutrality is much like the secular state model of neutrality.[379] When Justice Sotomayor discusses "benevolent neutrality," she states that such neutrality will permit religious exercise only "without sponsorship and without interference."[380] By linking religious exercise to the sponsorship of religion, Justice Sotomayor ties the freedom to exercise with the principle of separation.[381] Such a tie between the freedom of exercise and a wall of separation favors the anti-establishment principle more than the free exercise principle.

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irrelevant could support a conclusion of constitutionality. The problems of the "secular and neutral" approach have been aired before. It has no basis in the history to which the Court has repeatedly turned to inform its understanding of the Establishment Clause. It permits direct subsidies for religious indoctrination, with all the attendant concerns that led to the Establishment Clause. And it favors certain religious groups, those with a belief system that allows them to compete for public dollars and those well-organized and well-funded enough to do so successfully.").

372. *See* sources cited *supra* notes 284–94 and accompanying text.

373. *Trinity Lutheran*, 137 S. Ct. at 2022–24.

374. *See generally id.* at 2022–23.

375. *Id.* at 2023–24.

376. *See generally id.* at 2022–24.

377. *Id.*

378. *See* sources cited *supra* notes 286–90 and accompanying text.

379. *See* sources cited *supra* notes 269–77 and accompanying text.

380. *Trinity Lutheran*, 137 S. Ct. at 2031.

381. *Id.*

For example, Justice Sotomayor pointedly accepted that religious status could be singled out in a public benefit program open to the general public because of the anti-establishment/funding principle.[382] Second, Justice Sotomayor, unlike Chief Justice Roberts, does not factor in whether allowing a prohibition based on religious identity forces the individual or organization to let go of religious identity in order to participate in the public sphere as the preacher in *McDaniel*.[383] In essence, Chief Justice Roberts determined that a court must first ask whether an individual or organization must leave its religious identity in order to participate in the public sphere before looking at the anti-establishment principle. Justice Sotomayor, on the other hand, pushes courts to ask whether the anti-establishment principle is justified before examining whether an individual has to make a choice between participating in the public arena or keeping his or her religious identity.

CONCLUSION

Justice Welch's opinion stands for more than its "doctrine of hands off."[384] The doctrine of hands off is neither a call for an impregnable wall of separation nor a denial of religion's role in government. The *Minor* decision marked a move of American legal thought from Christianity as a part of American law to the hopes of moral republicanism and the principle of separation of church and state.[385] What came out of *Minor* was the genesis of the concept of neutrality.[386]

Rather than an impregnable "wall of separation," neutrality provided a gated wall between the domains of religion and state.[387] In recognizing religion's role in the formation of good government, neutrality provided a way for government to accommodate religion in certain cases.[388]

The days of arguing that Christianity is part of American law and that government is required to support religion simply because it is important to the fate of society are no longer prominent in today's courtrooms.[389] Nonetheless, those arguments brought forward an idea that the religion clauses were more than the anti-establishment principle. The anti-establishment principle must also consider the principle of free exercise (and vice versa).[390] As such, neutrality, without a hard wall of separation, drives towards an equal accommodation of these principles and a fuller understanding of the religion clauses. Thus, Justice Welch's concept of neutrality was more than reading the Bible in schools—it marked a shift in

382. *Id.*
383. *Id.*
384. *See* sources cited *supra* notes 119–23, 217–24 and accompanying text.
385. Bd. of Educ. v. Minor, 23 Ohio St. 211, 254 (1872).
386. *See* sources cited *supra* notes 217–24 and accompanying text.
387. *See* sources cited *supra* notes 211–16 and accompanying text.
388. *See* sources cited *supra* notes 217–24 and accompanying text.
389. *See* sources cited *supra* notes 134–46, 159–69 and accompanying text.
390. Trinity Lutheran v. Comer, 137 S. Ct. 2012, 2023 (2017).

American legal thought.[391] That shift in thought lives on today in *Trinity Lutheran v. Comer*.[392] Recently, the debate over the meaning of neutrality continued at the Supreme Court in *American Legion v. American Humanist Ass'n*.[393] Nonetheless, the law stands where Justice Welch stood, walking a fine line between moral republicanism and Jeffersonian secularism or, in modern parlance, separation and accommodation—with neutrality as its guide.

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391. Although the outgrowth from *Trinity Lutheran* is still new, its concept of neutrality has started to gain traction. *See, e.g.*, Freedom from Religion Found. v. Morris Cty. Bd. of Chosen Freeholders, 181 A.3d 992 (N.J. 2018), *cert. denied*, 139 S. Ct. 909 (2019); Moses v. Ruszkowski, No. S-1-SC-34974, 2018 WL 6566646 (N.M. Dec. 13, 2018); Taylor v. Town of Cabot, 178 A.3d 313, 321 (Vt. 2017). Particularly, in *Morris Cty. Bd.*, Justice Kavanaugh, joined by Justices Gorsuch and Alito, cited *Trinity Lutheran* as affirming the proposition for religious equality in American jurisprudence. Morris Cty. Bd. of Chosen Freeholders v. Freedom from Religion Found., 139 S. Ct. 909 (2019). Justice Kavanaugh added, "The principle of religious equality eloquently articulated by Justice Brennan in *McDaniel* [and a large part of Chief Justice Roberts's rationale in *Trinity Lutheran*] is now firmly rooted in this Court's jurisprudence." *Id.* at 909. As such, the concept of neutrality beginning in *Minor*, and built on in *Trinity Lutheran*, may have a wider impact on our understanding of the Religion Clauses and American jurisprudence.

392. 137 S. Ct. 2012 (2017).

393. *Compare* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2090–91 (2019) (Breyer, J., concurring) ("The Court must instead consider each case in light of the basic purposes that the Religion Clauses were meant to serve: assuring religious liberty and tolerance for all, avoiding religiously based social conflict, and maintaining that separation of church and state that allows each to flourish in its 'separate spher[e].'" (quoting Van Orden v. Perry, 545 U.S. 677, 698 (2005) (Breyer, J., concurring))), *and id.* at 2094 (Kagan, J., concurring) ("But I find much to admire in this section of the opinion—particularly, its emphasis on whether longstanding monuments, symbols, and practices reflect 'respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans.' Here, as elsewhere, the opinion shows sensitivity to and respect for this Nation's pluralism, and the values of neutrality and inclusion that the First Amendment demands." (quoting *id.* at 2089)), *with id.* at 2103–13 (Ginsburg, J., dissenting) ("If the aim of the Establishment Clause is genuinely to uncouple government from church, the Clause does 'not permit . . . a display of th[e] character' of Bladensburg's Peace Cross." (quoting Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 817 (1995) (Ginsburg, J., dissenting))).