

RESEARCH ARTICLE

Substantive Neutrality, Realism, and Government-Sponsored Religious Speech after *Kennedy v. Bremerton School District*

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Abstract

Douglas Laycock's theory of substantive neutrality has had much to say about contemporary debates in U.S. law and religion, particularly for courts and scholars grappling with the problem of religious exemptions from general laws. It is fair to say that the U.S. Supreme Court has in many respects adopted Laycock's approach in free exercise cases. But Laycock's work on the Establishment Clause side has unfortunately been less influential on the Supreme Court. In the context of Establishment Clause challenges to government-sponsored religious expression, Laycock has argued that the government endorsement of religion through official sponsorship of religious speech violates substantive neutrality because government endorsement of religion encourages religious belief without leaving room for private individual choice. But the court has moved away from any consideration of endorsement or substantive neutrality in cases considering challenges to official religious expression, focusing instead on vaguely-described historical practices and understandings. In this article, the author explains the correctness and insightfulness of Laycock's theory, which elucidates and justifies the Supreme Court's now-abandoned endorsement doctrine and explains why the Supreme Court's current approach to the issue of official religious speech is much more problematic than the substantive neutrality approach.

Keywords: law and religion; Establishment Clause; substantive neutrality; endorsement test; historical practices and understandings; *Kennedy v. Bremerton School District*

Douglas Laycock has been justly celebrated for coining and elaborating the concept of substantive neutrality to explain and defend his conception of the Religion Clauses of the U.S. Constitution.¹ Laycock defines his concept as referring to a law or government action that “neither encourages [n]or discourages religious belief or disbelief, practice or non-practice, observance or nonobservance.”² It thus requires neutrality in terms of *incentives* to engage in or refrain from religious conduct.³

¹ See, e.g., Thomas Berg, *Defining Neutrality, Combating Polarization: Laycock's Essential Contributions*, 40 JOURNAL OF LAW AND RELIGION (2025) (this issue); Steven D. Smith, Book Review, *Religious Liberty, Volume One: Overviews & History* by Douglas Laycock, 89 TEXAS LAW REVIEW 917, 922 (2011).

² Douglas Laycock, *Substantive Neutrality Revisited*, 110 WEST VIRGINIA LAW REVIEW 51, 54–55 (2007) (alteration in original) [hereinafter Laycock, *Revisited*] (quoting Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL LAW REVIEW 993, 1001 (1993) [hereinafter Laycock, *Neutrality*]) (internal quotation marks omitted).

³ *Id.*

Laycock's theory of substantive neutrality has had much to say about contemporary debates in law and religion, and it has perhaps been most influential on both courts and scholars grappling with the problem of religious exemptions from general laws.⁴ Indeed, Laycock has weighed in on many of the most important cases involving religious exemptions, either as counsel of record or as counsel for *amici curiae*.⁵ It is fair to say that the U.S. Supreme Court has in many respects adopted Laycock's approach in free exercise cases. For example, twenty years after Laycock's withering criticism of the Supreme Court's decision in *Locke v. Davey*,⁶ affirming the constitutionality of a Washington state scholarship program that could be used for any degree except devotional theology,⁷ the court has largely switched to the approach Laycock has advocated. Laycock has long argued that a rule excluding even explicitly religious activities that provide secular benefits from secular funding programs is discriminatory and violates the principle of substantive neutrality.⁸ Today, it is fair to describe the court's approach to funding of religious institutions as closer to Laycock's position than to that of Justice Rehnquist's majority opinion in *Locke*.⁹

The theory of substantive neutrality likewise applies in the Establishment Clause context, and particularly with respect to government-sponsored religious expression. Laycock has argued that the government endorsement of religion through official sponsorship of religious speech is prohibited by the Establishment Clause, because government endorsement of religion encourages religious belief without leaving room for private individual choice.¹⁰ But while Laycock has argued cases, authored amicus briefs, and written extensively about substantive neutrality's application in this area, his work on the Establishment

⁴ For the influence of Laycock's theory on scholarship, see, for example, Nelson Tebbe, *Free Exercise and the Problem of Symmetry*, 56 HASTINGS LAW JOURNAL 699, 748 n.9 (2005) (describing Laycock as one of "[t]he most prominent critics" of the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 892 (1990), based on its failure to adopt a substantive neutrality approach); Berg, *supra* note 1. Regarding his influence on courts, see sources cited *infra* note 5.

⁵ Laycock argued *Holt v. Hobbs*, 574 U.S. 352 (2015), on behalf of a prisoner seeking a religious exemption under the Religious Land Use and Institutionalized Persons Act (RLUIPA) from the prison's beard-length policy, and he argued *City of Boerne v. Flores*, 521 U.S. 507 (1997), defending the constitutionality of the Religious Freedom Restoration Act (RFRA). In addition, he served as attorney for *amici* in numerous free exercise, RFRA, and RLUIPA cases in both the U.S. Supreme Court and lower courts, including *Ramirez v. Collier*, 595 U.S. 411 (2022), *Fulton v. City of Philadelphia*, 593 U.S. 592 (2021), *Tanzin v. Tanvir*, 592 U.S. 43 (2020), *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), and *Mozert v. Hawkins County Public Schools*, 827 F.2d 1029 (6th Cir. 1987). In addition, Justice Souter favorably cited Laycock's seminal article on substantive neutrality in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 561–62 (1993) (Souter, J., concurring in part and concurring in the judgment) (citing Laycock, *Neutrality*, *supra* note 2).

⁶ 540 U.S. 712 (2004); Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARVARD LAW REVIEW 155, 162–218 (2004).

⁷ *Locke*, 540 U.S. at 725.

⁸ Laycock, *supra* note 6, at 199 ("Funding secular programs, but not religious equivalents that provide the same secular benefit, is rank discrimination, with the immediate and obvious effect of discouraging or penalizing the free exercise of religion.").

⁹ *Carson v. Makin*, 596 U.S. 767, 781 (2022) (holding that the state must include private religious schools in a funding program that includes secular private schools because "[a] State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise"); *Espinoza v. Montana Department of Revenue*, 591 U.S. 464, 487 (2020) ("A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 466 (2017) (distinguishing *Locke* and striking down the exclusion of a religious school from a playground renovation funding program).

¹⁰ Laycock, *Revisited*, *supra* note 2, at 71–72.

Clause side has unfortunately been less influential on the Supreme Court.¹¹ Instead, the court has moved away from any consideration of endorsement or substantive neutrality in cases considering challenges to official religious expression, focusing instead on “historical practices and understandings.”¹²

As an Establishment Clause scholar who has written numerous articles about the constitutionality of government-sponsored religious expression, I have found Laycock’s work to be persuasive and enlightening, and it is unfortunate that it has not found the same purchase at the Supreme Court as has his free exercise scholarship. After all, the concept of substantive neutrality is meant to operate as two sides of the same coin, explaining a unifying principle underlying the two Religion Clauses.¹³ What follows serves to defend the correctness and insightfulness of Laycock’s theory in explaining and justifying the Supreme Court’s now-abandoned endorsement doctrine, and explains why the Supreme Court’s current approach to the issue of official religious speech is much more problematic than the substantive neutrality approach.

Substantive Neutrality and Government-Sponsored Religious Speech

Laycock’s conclusions regarding the application of substantive neutrality to government-sponsored religious speech may strike some as surprising. While substantive neutrality leads Laycock to be a strong proponent of free exercise rights—to the point of supporting what some might consider favoritism toward religion¹⁴—he has embraced a firmly separationist approach to official religious speech.¹⁵ Laycock’s conception of substantive neutrality justifies both positions—particularly his position on official religious speech—and it is a powerful and persuasive approach to official religious expression.

As noted above, substantive neutrality is aimed at minimizing government interference with religious exercise and belief by ensuring neutral government incentives.¹⁶ Thus, when the question arises whether a religious believer should be entitled to an exemption from an otherwise broadly applicable law, Laycock has favored exemptions that reinforce private choice and that put believers on equal footing with those who have no religious objection to the law, at least when there are other secular exemptions.¹⁷ As he explained early on, “[e]xemptions for secular interests without exemptions for religious practice reflect a hostile indifference to religion,” because denial of exemptions in such circumstances “reflects a legislative judgment that the free exercise of religion is less important than the demands of some special interest group of no constitutional significance.”¹⁸

But his embrace of substantive neutrality has led Laycock to a more separationist perspective when it comes to official religious expression. When government endorses

¹¹ Laycock argued *Town of Greece v. Galloway*, 572 U.S. 565 (2014), and authored amicus briefs in some of the court’s most significant Establishment Clause cases involving government religious expression, including *Lee v. Weisman*, 505 U.S. 577 (1992); *McCreary County v. American Civil Liberties Union*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005); and *American Legion v. American Humanist Association*, 588 U.S. 29 (2019).

¹² *American Legion*, 588 U.S. at 61; see also *Kennedy v. Bremerton School District*, 597 U.S. 507, 535 (2022).

¹³ Laycock, *Revisited*, *supra* note 2, at 65.

¹⁴ For example, Andrew Koppelman recently described how Laycock argued for “most-favored nation status” for religion as far back as 1990. Andrew Koppelman, *The Increasingly Dangerous Variants of the “Most-Favored-Nation” Theory of Religious Liberty*, 108 IOWA LAW REVIEW 2237, 2245 (2023) (“In 1990, while *Lukumi* was still being litigated, Laycock suggested that it would be appropriate ‘that religion get something analogous to most-favored nation status.’” (quoting Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUPREME COURT REVIEW 1, 49)).

¹⁵ Laycock, *Revisited*, *supra* note 2, at 71–72.

¹⁶ *Supra* text accompanying notes 2–3.

¹⁷ See, e.g., Laycock, *supra* note 2, at 49–51.

¹⁸ *Id.*

religion or a religious viewpoint, it encourages religious observance, at least to some degree.¹⁹ This is the nature of endorsement.²⁰ With respect to school-sponsored prayer, for example, Laycock explains that in hosting such prayer, “[g]overnment is taking a whole series of positions on religion,” including “that there is a God, that praying to God is a good thing, that all students are encouraged to join in prayer, that the form of prayer offered at the school is good or efficacious way to pray—maybe the best way to pray.”²¹

Even with respect to so-called passive religious symbols on government property that do not involve a call to participation in worship or other religious activity, the problem of official encouragement remains. Quoting *Pleasant Grove City v. Summum*, Laycock has explained that “[g]overnments have long used monuments to speak to the public,” and that “[i]t certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated.”²² Moreover, “[b]ecause government is highly visible, and because its speech about religion is always heavily influenced by political motives, it cannot speak about religion without influencing and usually distorting the religious teachings it tries to promote—and implicitly or explicitly rejecting the religious teachings it does not promote.”²³ Thus, government speech endorsing religion inevitably encourages religious belief or exercise, though it may also be counter-productive given its tendency to distort those beliefs.

Endorsement through official speech is constitutionally problematic, in Laycock’s view, not just because it encourages religious belief—and sometimes very specific, sectarian religious belief—but also because it does so in a way that eliminates the possibility of individual, private choice.²⁴ Unlike when the government directs funds to individuals, who may then use those funds for religious or nonreligious services, or when the government distributes funds neutrally to religious and secular service providers, among which individual service recipients may freely choose, there is no opting out of a prominent public religious display—for example, of a large Latin cross in the middle of “a busy intersection.”²⁵ Even in the case of school prayer, “[e]veryone in the room will either participate in the particular prayer the school or its appointed agent selected, or they will conspicuously not participate.”²⁶ A student who wishes simply not to be put to this choice is out of luck. Moreover, unlike when government funds social services provided by religious entities, “there is no secular value added” in the case of religious speech; “[g]overnment is verbally supporting religion as religion.”²⁷ And there is no value—in terms of religious free exercise or in terms of secular benefit—that is lost when the government *declines* to speak religiously.

Laycock’s theory persuasively reconciles the Free Exercise Clause with the Establishment Clause, viewing the two clauses as minimizing, in different ways, government interference with religious belief and conduct and advancing substantive liberty interests in both the exercise and the non-exercise of religion. This is surely one of its greatest strengths. But an

¹⁹ *Id.* at 71.

²⁰ Cf. B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICHIGAN LAW REVIEW 491, 513–14 (2005) (explaining that government endorsement is a “speech act” expressing government approval of religion).

²¹ Laycock, *Revisited*, *supra* note 2, at 71.

²² Brief of Baptist Joint Committee for Religious Liberty, et al., as Amici Curiae in Support of Respondents, *American Legion v. American Humanist Association*, 588 U.S. 29 (2019), 2019 WL 495118, at *14–15 (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 470–71 (2009) (internal quotation marks omitted)).

²³ *Id.* at *16–17.

²⁴ Laycock, *Revisited*, *supra* note 2, at 71.

²⁵ *American Legion v. American Humanist Association*, 588 U.S. 29, 44 (2019).

²⁶ Laycock, *Revisited*, *supra* note 2, at 71.

²⁷ *Id.* at 72.

overlooked virtue is that Laycock's approach to government religious expression is also grounded in realism. Put simply, it is concerned with how symbols work, and what they mean, in the real world. It relies on an understanding of language and symbolism that avoids formalistic traps or wishful thinking. For this reason, his theory informs and resonates deeply with my own approach to religious symbolism and other public religious expression.

For example, while recognizing that *of course* some religious symbols—take the highly sectarian Latin cross—may have some secular meanings, Laycock distinguishes between these secondary secular usages and the cross's obvious, overwhelmingly religious primary usage.²⁸ It is a simple enough task to list nonreligious settings in which the cross has been used—as Justice Alito did in his *American Legion* opinion, referring to its use in advertising insurance companies and aspirin²⁹—but relying on such a superficial observation to make a constitutional argument is simply to blind oneself to the reality of how actual believers and nonbelievers understand the cross, especially when it appears as a standalone symbol.

Or take the case of *Kennedy v. Bremerton School District*,³⁰ in which Laycock and Christopher Lund authored an amicus brief on behalf of the Baptist Joint Committee and other religious groups, arguing that a public school football coach's practice of praying publicly at the fifty-yard-line after games violated the Establishment Clause.³¹ Drawing on the factual record below, Laycock and Lund explained that Kennedy's prayer "put genuine religious pressure on his students. Whether or not he intended to do so, he clearly did so."³² Rather than focusing on the lack of formal coercion—as the majority in *Kennedy* did, noting for example that "Mr. Kennedy did not seek to *direct* any prayers to students or *require* anyone else to participate"³³—Laycock and Lund's brief recognized the reality that coaches carry enormous influence in high school settings, and that not all coercion or pressure is explicit and formal.³⁴ They also explained that Kennedy could have taken practical measures to avoid placing "religious pressure" on students while still fulfilling his own religious obligation to pray—for example by simply waiting a few minutes until the students left, or praying in a different, less obvious location.³⁵

This much-needed realism about government religious speech is also reflected in Laycock's 2011 article, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernism*.³⁶ In that article, Laycock calls out the insincere claims that certain widely-known and obviously religious symbols and practices are actually secular, or have become secularized.³⁷ For example, Justice Alito argues in *Summum* that monuments—such as the *World Peace Prayer Fountain* in Fayetteville, Arkansas—have multiple meanings, and therefore cannot be reliably viewed as religious. Laycock's response cuts to the chase in classic Laycock fashion: "[W]hat is the message of the large bronze statue displaying the

²⁸ Brief of Baptist Joint Committee for Religious Liberty, et al., *supra* note 22, at *5–12 (explaining that treating the Latin cross as secular would "desacralize what to Christians is the most precious symbol of the central promise of their faith: 'that whosoever believeth in him should not perish, but have everlasting life'" (quoting *John* 3:16)).

²⁹ *American Legion*, 588 U.S. at 39 ("A cross appears as part of many registered trademarks held by businesses and secular organizations, including Blue Cross Blue Shield, the Bayer Group, and some Johnson & Johnson products.").

³⁰ 597 U.S. 507 (2022).

³¹ Brief of Baptist Joint Committee for Religious Liberty, et al., *supra* note 22.

³² *Id.* at *13.

³³ *Kennedy*, 597 U.S. at 538.

³⁴ Brief of Baptist Joint Committee for Religious Liberty, et al., *supra* note 22, at *14 ("Football coaches are often beloved by their players; players will want to do what their coach does. ... Few things matter more to student athletes than playing time; they cannot risk offending the coach, and some no doubt feel that they cannot pass up a chance to cater to the coach's preferences.").

³⁵ *Id.* at *15–16.

³⁶ 61 CASE WESTERN RESERVE LAW REVIEW 1211 (2011).

³⁷ *Id.* at 1212.

word ‘peace’ in many world languages ...? There is simply no ambiguity there. The dominant message is ‘peace,’ and any other message is distinctly secondary.”³⁸ He thus rightly rejects the many instances in which justices, likely seeking to avoid an inevitable conclusion of unconstitutionality, engage in contorted logic to argue that governmental expressions such as a Latin cross or the assertion that the United States is “one nation under God” are lacking in ascertainable religious content.³⁹

Laycock’s focus on neutrality of “incentives” likewise demonstrates his focus on how governmental actions resonate among actual people in the real world.⁴⁰ Determining whether a law is neutral in terms of the incentives it creates to engage in or avoid religious observance requires common-sense judgments about how the world works. Thus, using the example of permitting children under the legal drinking age to take communion wine, Laycock observes that “[e]xempting communion wine from the ban on under-age consumption of alcohol is extraordinarily unlikely to induce anyone to become a Christian,” whereas threatening parents with criminal penalties for allowing their children to drink communion wine is quite likely to deter this form of observance.⁴¹ These are not formalistic legal conclusions, but rather insights grounded in the reality of people’s lives, attitudes, and beliefs.

Thus, in a series of articles dealing with various forms of religious expression—religious symbolism, ceremonial deism, and the like—I have argued for an approach to such religious expressions that recognizes the importance of context in determining whether they violated the Establishment Clause.⁴² The endorsement test, which was long the dominant legal framework for discerning the constitutionality of religious symbols and expression, asks whether the governmental speech or action “sends the ... message to members of the audience who are nonadherents ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.’”⁴³ Laycock and I both appear to agree that the endorsement approach is the proper one and that the court was wrong to abandon it.⁴⁴

To be sure, one might question whether Laycock’s theory sufficiently explains his views toward so-called passive religious symbols and expressions, particularly with respect to adult observers, who are situated quite differently from children in public schools. It is reasonable to argue that children, who are largely captive audience members in the school setting and who are often susceptible to peer pressure, will feel coerced to adopt the beliefs presented to them in that setting, or at least to conform their outward conduct to those beliefs.⁴⁵ The approval of their peers is likely a strong incentive for adopting particular

³⁸ *Id.* at 1244 (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 475 (2009) (internal quotation marks and footnote omitted)).

³⁹ *Id.* at 1214–18, 1237–44.

⁴⁰ Laycock, *Revisited*, *supra* note 2, at 55.

⁴¹ *Id.*

⁴² Hill, *supra* note 20; B. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning over Time*, 59 DUKE LAW JOURNAL 705 (2010) [hereinafter Hill, *Ceremonial Deism*]; B. Jessie Hill, *Anatomy of the Reasonable Observer*, 79 BROOKLYN LAW REVIEW 1407 (2014) [hereinafter Hill, *Reasonable Observer*].

⁴³ *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 309–10 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)).

⁴⁴ It may be unsurprising, then, that Laycock and I also both arrived at the view that there should be a legal presumption against such religious expressions. Hill, *Reasonable Observer*, *supra* note 42, at 1451; Laycock, *supra* note 36, at 1249–50; Hill, *supra* note 20, at 539–44.

⁴⁵ See, e.g., *Lee v. Weisman*, 505 U.S. 577, 593 (1992) (“The undeniable fact is that the school district’s supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.”).

beliefs, and as explained above, children have no meaningful opt-out from school-sponsored or school-endorsed religious expression, such as the Ten Commandments displays that a state law in Louisiana requires to be posted in public schools.⁴⁶ But what about adults who are free to come and go as they please? Can official religious expression really be said to have the same impact on them? Do such expressions truly incentivize them, or even put pressure on them, to change their belief systems? Do they lack any choice in the matter?

Realistically, it may be the case that not every instance of government religious expression encourages the observer to reconsider long-held religious beliefs. That said, the governmental act of *endorsing* religious beliefs—as opposed to simply acknowledging them, for example—entails that nonadherents to those beliefs will be out of alignment with the set of values and tenets officially held by those in power. While a city choosing to feature a Christian prayer at the start of every council meeting may not actually cause non-Christians with official business before that body to change their private beliefs, it may well encourage them not to wear their Judaism or atheism on their sleeves. The tendency to suppress alternative displays of religious (or non-religious) belief may also give the false impression that the officially endorsed views are more common than they are, which then perpetuates individuals' inclination toward self-censorship. Indeed, while it is easy to point to examples on one end of the spectrum, in which the endorsement test seems to be an overstatement—does a holiday display in the city hall at Christmas really put pressure on visitors to change their views?⁴⁷—it is just as easy to come up with alternative scenarios. If a city were to erect a permanent crucifix on the city hall, or to adopt the slogan “Springfield is a Christian town, with Christian values,” would it be so easy to dismiss the pressure that such expressions would place on nonadherents? What if every item of official communication—emails, websites, and letterhead—carried that message? It does not seem a stretch to suggest that citizens seeking political benefits from the government might try to conform their requests and their conduct to the expressed values.

Therefore, it should not be so easy to dismiss such expressions as merely passive. Governments speak for a reason. When they endorse a particular viewpoint—be it Christianity, democracy, or climate denial—they intend their expression to influence observers. While it may be simple enough to deny the persuasive impact of one or two stray religious observances, prominent and pervasive endorsements of Christianity are not so easy to dismiss. In endorsing one set of religious beliefs, as Justice O'Connor has argued, the government “sends a message” that adherents are political and social “insiders,” and others are on the outside.⁴⁸ This message—a designation of outsider status—creates an incentive to conform one's conduct to the insider religion to gain the benefits of political membership. A devout atheist may not adopt a belief in Jesus Christ after hearing an officially sponsored Christian prayer, but she may grit her teeth and feel that she is being untrue to herself as she sits in silence, leaving blatant falsehoods un rebutted.⁴⁹ In other words, the incentive created by such expressions may or may not actually work as intended, just as it may or may not work in other contexts where government actions place pressure on religious entities to

⁴⁶ LOUISIANA REVISED STATUTES § 17:2124. The Louisiana law was challenged under the Establishment Clause, and the Fifth Circuit court of appeals affirmed the trial court's preliminary injunction, agreeing that the law was unconstitutional, but the court subsequently granted en banc review and vacated the injunction, holding that the controversy was not yet ripe. *Roake v. Brumley*, 141 F.4th 614, 645 (5th Cir.), *vacated by* 2026 WL 482555, at *2 (5th Cir. Feb. 20, 2026).

⁴⁷ *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 578–79 (1989), *abrogated by* *Town of Greece v. Galloway*, 572 U.S. 565 (2014).

⁴⁸ *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

⁴⁹ Cf. *Lee*, 505 U.S. at 593–94; see also Abner S. Greene, *The Pledge of Allegiance Problem*, 64 *FORDHAM LAW REVIEW* 451, 461–62 (1995) (explaining Justice Kennedy's view that failure to protest a prayer in the graduation setting is equivalent to participation in that prayer).

conform. Indeed, religious adherents—even children—have been known to be impervious to threats designed to encourage them to abandon their ways, even in the face of serious consequences.⁵⁰ The point, in Laycock’s view, is not whether the government is successful in its bid for conformity, but rather whether it has put a thumb on the scale.⁵¹

For these reasons, the endorsement test, while not without its flaws, asks the correct question: whether the government has acted in such a way as to injure someone’s standing within the political community based on their religious beliefs or lack thereof. Moreover, the application of the endorsement test, which requires considering what the “reasonable observer” would understand about the display, in light of its history and context, is a useful test for implementing this principle.⁵² It is sensitive to the physical setting, historical and recent events relevant to the display’s creation, and the composition of the community. This reasonable observer is therefore not, as Justice Gorsuch has suggested, “lazy, uninformed about history, and not particularly inclined to legal research.”⁵³ Instead, the reasonable observer is simply a heuristic representing the act of interpreting social meaning; as a device, it signals that the court should take both text and context into account in determining whether the government has endorsed religion.⁵⁴

Key to understanding how to interpret social meaning is the concept of “context.”⁵⁵ This context may include not only the physical setting of the challenged display or message, but also the broader social and historical context.⁵⁶ It thus looks not just to the text or symbol itself, but to what the text or symbol is likely to convey to observers. It is also concerned with impact, not abstract meaning or intent, and it is informed by facts on the ground.⁵⁷ The

⁵⁰ See generally Christopher C. Lund, *Martyrdom and Religious Freedom*, 50 CONNECTICUT LAW REVIEW 959, 965–70 (2018) (discussing examples of martyrdom in the U.S. in the face of laws prohibiting religious beliefs and conduct, including one nineteenth-century case in which an eleven-year-old Catholic child accepted beatings rather than read aloud Protestant versions of the Lord’s Prayer and the Ten Commandments—an example of direct rather than indirect coercion).

⁵¹ See, e.g., Laycock, *Neutrality*, *supra* note 2, at 1002 (“Government should not interfere with our beliefs about religion either by coercion or by persuasion.”); see also *id.* at 1004 (noting that substantive neutrality “requires judgments about the relative significance of various encouragements and discouragements to religion” and that “[a]bsolute zero” is not attainable).

⁵² *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 780 (1995) (O’Connor, J., concurring in part) (“[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears.”).

⁵³ *Shurtleff v. City of Boston*, 596 U.S. 243, 279 (2022) (Gorsuch, J., concurring).

⁵⁴ As I have argued elsewhere:

Understood in the most useful way possible, the reasonable observer is an accurate model for making sense of the process of interpreting social meaning. When an interpreter engages in discerning the meaning of something—whether a text or a symbolic display—she considers as much information as she has available: the context, the background, and the relevant social facts, as well as the words or symbols themselves. She then uses this information to reconstruct the intent, or purpose, behind the symbolic representation. This reconstructed intent ... is essentially synonymous with “social meaning.” The reasonable observer is, then, simply a reader of social meaning, and the reasonable observer’s role in discerning the meaning of religious symbolism should not be controversial or suspect.

Hill, *Reasonable Observer*, *supra* note 42, at 1410.

⁵⁵ See, e.g., *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 598 (1989), *abrogated by* *Town of Greece v. Galloway*, 572 U.S. 565 (2014) (“Under the Court’s holding in *Lynch*, the effect of a crèche display turns on its setting. Here, unlike in *Lynch*, nothing in the context of the display detracts from the crèche’s religious message.”).

⁵⁶ Hill, *supra* note 20, at 522–33.

⁵⁷ *Id.* at 511–14 (connecting the endorsement test to speech act theory, which is concerned with the effects of utterances, not just their meaning).

endorsement test asks not just what the meaning of a religious symbol or expression is but also what “speech act” it is performing (is it endorsing, proselytizing, or merely acknowledging and depicting?), and it considers the effect of that expression on the political standing of community members.⁵⁸

Finally, the endorsement test, properly understood, implicitly recognizes that the discernment of social meaning is inevitably bound up with power.⁵⁹ The meaning and impact of governmental religious expression are shaped by the social context in which they occur; to take a fairly straightforward example, government sponsorship of Christian symbolism in a majority-Christian city is more likely to be understood as government endorsement of Christianity than government sponsorship of Jewish symbolism would be.⁶⁰ In other words, social context shapes meaning, and social context may include facts such as the historical and political dominance of one religious group over others. This attention to social facts is thus another respect in which the endorsement test, and Laycock’s embrace of it through the concept of substantive neutrality, focuses not just on abstractions but on social reality and the functioning of government expression within that reality.

Despite the virtues of the endorsement test and the efficacy of Laycock’s support for it through his application of the substantive neutrality principle, the Supreme Court was often split over both its application and its applicability, and in 2022, the court officially announced its demise.⁶¹ Unfortunately, the court’s turn away from the endorsement inquiry has proven problematic.

Realism and Abstraction in Establishment Clause Doctrine

Cracks began appearing in the endorsement test’s foundation nearly as soon as it was adopted. After Justice O’Connor introduced the test in a concurring opinion in the 1984 case *Lynch v. Donnelly*, a majority of the court applied it in the 1989 case *Allegheny County v. ACLU*.⁶² Indeed, the endorsement test was often understood as a variation of the so-called *Lemon* test, which was the dominant (but again, not universally applied) test for Establishment Clause challenges.⁶³ While the endorsement test had become largely defunct by the early 2000s, the court arguably applied something quite similar in the 2005 case *Van Orden v. Perry*.⁶⁴ However, other tests—such as the coercion test, or the historical-practices-and-understandings test—competed with the endorsement test, as the court occasionally relied on these other tests in cases involving school prayer and legislative prayer.⁶⁵ Ultimately, the

⁵⁸ *Id.*

⁵⁹ Hill, *Ceremonial Deism*, *supra* note 42, at 761–64.

⁶⁰ *Cf. Allegheny*, 492 U.S. at 579 (reaching different conclusions as to the constitutionality of a crèche display and the constitutionality of a menorah display in downtown Pittsburgh during the holiday season); *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O’Connor, J., concurring) (describing the endorsement inquiry as requiring “judicial interpretation of social facts”).

⁶¹ *Kennedy v. Bremerton School District*, 597 U.S. 507, 534 (2022) (stating that “this Court long ago abandoned *Lemon* and its endorsement test offshoot”); Hill, *Reasonable Observer*, *supra* note 42, at 1413–16.

⁶² *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring); *Allegheny*, 492 U.S. at 594.

⁶³ *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Kennedy*, 597 U.S. at 534 (describing the endorsement test as an “offshoot” of *Lemon*).

⁶⁴ *Van Orden v. Perry*, 545 U.S. 677, 698–702 (2005) (Breyer, J., concurring); *see also* Hill, *supra* note 20, at 501–02 (noting that Justice Breyer’s concurrence, which supplied the fifth vote for the majority, “declined to apply the endorsement test, but ... analyzed the display in light of the physical and historical context in order to determine whether a religious or secular message was conveyed—an analysis that is functionally equivalent to the endorsement inquiry”).

⁶⁵ *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014) (applying a test referencing “historical practices and understandings” to uphold a legislative prayer practice); *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 309–10 (2000) (applying a coercion test to student-led prayer at public school football games); *Lee*

court switched gears in *American Legion v. American Humanist Association*, abandoning any explicit inquiry into the social meaning of a religious display and instead adopting a presumption that longstanding monuments and displays are constitutional.⁶⁶ Then, in 2022, the court officially declared both *Lemon* and the endorsement test overruled in *Kennedy v. Bremerton School District*.⁶⁷

These cases nearly span the entirety of Laycock's career.⁶⁸ As noted above, his scholarship and legal work have shaped the Supreme Court's approach to free exercise, and today the Supreme Court's approach to the Free Exercise Clause largely mirrors Laycock's.⁶⁹ On the Establishment Clause front, however, the court's jurisprudence has moved in an entirely different direction, largely sacrificing anti-establishment values in favor of free-exercise values.⁷⁰ This movement has coincided with the court's move to the political right and its increasing embrace of originalism in the form of history-focused constitutional tests.⁷¹

After *Kennedy*, what rules apply to Establishment Clause challenges to government-sponsored religious expression? When, if ever, is such expression unconstitutional? While *Kennedy* was not decided on Establishment Clause grounds, the court was required to decide whether the public high school football coach's practice of praying at the fifty-yard line immediately after games violated the Establishment Clause in order to resolve his free-speech and free-exercise claims.⁷² If the practice violated the Establishment Clause, the school district could have a compelling reason for overriding the coach's rights to free speech and religious exercise.⁷³ In determining that this was not the case, the court held that Establishment Clause questions should be resolved by reference to "historical practices and understandings," rather than the endorsement test or any other of the doctrinal tests used in the past.⁷⁴

The court did not provide much guidance on how to apply this new historical practices and understandings test—even in cases such as the one before it, involving public religious expression.⁷⁵ While notably absent from *Kennedy*, further insight into the meaning of the historical practices and understanding test may, however, be found in legal scholarship that has in turn influenced the case law. In particular, in 2003, Michael McConnell published a careful, largely descriptive work of legal history that was aimed primarily at identifying key characteristics of what the founders likely considered to be religious establishments, based

v. Weisman, 505 U.S. 577, 587 (1992) (striking down a school-sponsored prayer determined to be coercive); Marsh v. Chambers, 463 U.S. 783, 791 (1983) (upholding congressional legislative prayer based on its "unique history").

⁶⁶ *American Legion v. American Humanist Association*, 588 U.S. 29, 57 (2019) ("The passage of time gives rise to a strong presumption of constitutionality.").

⁶⁷ *Kennedy*, 597 U.S. at 534.

⁶⁸ But not exactly. Laycock graduated from the University of Chicago Law School in 1973, two years after *Lemon* was decided.

⁶⁹ *Supra* text accompanying notes 4–9.

⁷⁰ See, e.g., Brief of Baptist Joint Committee for Religious Liberty, et al., *supra* note 22, at *13 (asserting that *Kennedy*'s position, which prevailed, "would subordinate the Establishment Clause to the Free Exercise Clause").

⁷¹ In addition to *Kennedy*, see *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 231 (2022); *New York State Pistol & Rifle Association v. Bruen*, 597 U.S. 1, 26 (2022); see generally Richard Schragger, Micah Schwartzman & Nelson Tebbe, *Reestablishing Religion*, 92 UNIVERSITY OF CHICAGO LAW REVIEW 199, 254–71 (2025) (exploring the political forces leading to the court's favoritism toward religion).

⁷² *Kennedy*, 597 U.S. at 532.

⁷³ *Id.*

⁷⁴ *Id.* at 535.

⁷⁵ Chip Lupu and Bob Tuttle grapple with what, if anything, remains of the court's prior Establishment Clause jurisprudence—especially with respect to placing the Ten Commandments in schools—in an insightful article. Ira C. Lupu & Robert W. Tuttle, *The Ten Commandments in Louisiana Public Schools: A Study in the Survival of Establishment Clause Norms*, 100 CHICAGO-KENT LAW REVIEW 601 (2025).

on their experience in England and with colonial religious establishments.⁷⁶ In more recent years, this account has gained significant traction, as it has been increasingly cited by the Supreme Court.⁷⁷ Additionally, scholars have turned to McConnell's account to make prescriptive claims about the "hallmarks" of establishment, suggesting that the characteristics of early establishments at the founding must be present in order for a modern-day practice or law to be found to violate the Establishment Clause.⁷⁸ These hallmarks fall into six categories: "(1) control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church."⁷⁹ In *Shurtleff v. City of Boston*, Justice Gorsuch's concurrence referenced these hallmarks, arguing that they provided a suitable alternative to the *Lemon* analysis and a helpful gloss on "the Constitution's original meaning," thus "provid[ing] helpful guidance" for courts in the future.⁸⁰

With respect to official displays of religious symbolism or official religious expression, it seems that only the first and second hallmarks could possibly have relevance.⁸¹ Justice Gorsuch appears to argue that these hallmarks depend primarily (but perhaps not exclusively) on a showing of government coercion with respect to religion.⁸² Thus, governmental religious speech is likely unconstitutional if it is coercive; indeed, the court stated three times in *Kennedy* that coercion was a "hallmark" of establishments at the nation's founding.⁸³ The *Kennedy* Court's understanding of coercion, however, was not an exceedingly narrow one; rather than embracing an understanding of coercion that would require participation or conformity on threat of penalty,⁸⁴ the court cited cases such as *Lee*

⁷⁶ Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WILLIAM & MARY LAW REVIEW 2105, 2110 (2003) (stating the goal of the article is to "describe the actual laws and debates over establishment and disestablishment in the United States, in the hope that a more thorough understanding of the issue faced by early Americans will help to foster a richer, and perhaps less brittle and bipolar, understanding of the issues we face today").

⁷⁷ McConnell's article was first cited in a Supreme Court opinion by Justice Thomas, concurring in *Cutter v. Wilkinson*, 544 U.S. 709, 726 n.1, 729 (2005). Nine years later, Thomas again cited McConnell's article in a concurrence. *Town of Greece v. Galloway*, 572 U.S. 565, 605, 608 (2014). In 2020, the article was cited in both *Espinoza v. Montana Department of Revenue*, 591 U.S. 464, 491 (2020) (Thomas, J., concurring), and—for the first time in a majority opinion—in *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. 732, 747 n.9 (2020). The article saw two more citations in 2022, both by Justice Gorsuch. *Kennedy v. Bremerton School District*, 597 U.S. 507, 537 (2022); *Shurtleff v. City of Boston*, 596 U.S. 243, 286 (2022) (Gorsuch, J., concurring). Finally, the article was again cited in Justice Thomas's concurrence in *Catholic Charities Bureau, Inc. v. Wisconsin Labor & Industry Review Commission*, 605 U.S. 238, 262 (2025) (Thomas, J., concurring).

⁷⁸ See, e.g., Stephanie H. Barclay, *The Religion Clauses After Kennedy v. Bremerton School District*, 108 IOWA LAW REVIEW 2097, 2104 (2023) ("[T]he Court appears to be adopting an approach that gives distinct meaning to a variety of historical hallmarks relevant to what was viewed as an established religion at the founding."); Mark Storslee, *History and the School Prayer Cases*, 110 VIRGINIA LAW REVIEW 1619, 1640 (2024) ("[T]he Court [in *Kennedy*] said the question is whether, judged by 'historical practices and understandings,' mandatory public-school prayer raises concerns analogous to at least one 'hallmark[] of religious establishment[.]'").

⁷⁹ McConnell, *supra* note 76, at 2131.

⁸⁰ *Shurtleff*, 596 U.S. at 285, 287 (Gorsuch, J., concurring).

⁸¹ This is also how Stephanie Barclay appears to understand the list. Barclay, *supra* note 78, at 2106–08 (discussing the application of the first and second hallmarks to prayer in schools).

⁸² *Shurtleff*, 596 U.S. at 286 ("Most of these hallmarks reflect forms of 'coerc[ion]' regarding 'religion or its exercise.'").

⁸³ *Kennedy v. Bremerton School District*, 597 U.S. 507, 537 & n.5, 539 n.6 (2022). This view was also supported by Justice Scalia. *Lee v. Weisman*, 505 U.S. 577, 642 (1992) (Scalia, J., dissenting) (arguing that coercion is the touchstone of an Establishment Clause violation).

⁸⁴ See, e.g., *Lee*, 505 U.S. at 642 (Scalia, J., dissenting) ("I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty.").

v. Weisman and *Santa Fe Independent School District v. Doe*, which involved a broader understanding of coercion as potentially including something shy of direct legal coercion, at least when students are involved.⁸⁵

Additionally, it seems reasonable to add a second limit to the government's ability to engage in religious expression, drawn from the *American Legion* case. The Establishment Clause would also forbid showing intentional favoritism toward one religious group and disparaging others.⁸⁶ As Justice Alito explained in *American Legion*, the original practice of congressional legislative prayer—which he deemed the most historically analogous practice to the public display of a Latin cross—demonstrated “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.”⁸⁷ And while this “nondisparagement” principle is not mentioned in *Kennedy*, it seems unlikely that the court would have meant to abandon it so quickly, a mere four years after establishing it, without even mentioning it in *Kennedy*.⁸⁸ After all, the plurality also claimed to apply a history-centric approach in *American Legion*.⁸⁹ So the best reading is probably that both *Kennedy* and *American Legion* govern.

To summarize, the court has not yet opened the door to all and any forms of public religious expression but rather continues to recognize that government-sponsored religious speech may sometimes violate the Establishment Clause. The court no longer applies an endorsement approach but does consider whether the speech is coercive or disparaging. Thus, on the whole, the court's current approach may seem to differ in relatively minor ways from its prior approach. Instead of asking whether the speech endorses, the court asks whether it coerces (directly or indirectly) or disparages other religious and nonreligious viewpoints. This approach surely creates a narrower class of speech that may be found to violate the Establishment Clause, but it is a difference from the prior approach in degree rather than kind.

Or is it? Unfortunately, the court's approach is also lacking in the nuance represented by the endorsement test. It does not consider real-world incentives, to use Laycock's terminology, or the broader social context. For example, the court's understanding of what constitutes coercion in *Kennedy* is formalistic, looking only for explicitly directive or persuasive conduct by the school officials rather than considering the broader social context in which the prayers occurred. For example, the court simply observed that no one “expressed any coercion concerns to the District,” nor was there “evidence” of pressure

⁸⁵ For example, by using terms such as “persuade” and “expected,” the *Kennedy* court suggested that something less than forcing the children to participate in prayer could qualify as coercion. *Kennedy*, 597 U.S. at 541 (“[T]here is no evidence anyone sought to *persuade or force* students to participate.” (emphasis added)); *id.* at 542 (“The prayers for which Mr. Kennedy was disciplined were not publicly broadcast or recited to a captive audience. Students were not *required or expected* to participate.” (emphasis added)).

⁸⁶ *American Legion v. American Humanist Association*, 588 U.S. 29, 64 (2019); see Lisa Shaw Roy, *The Replacement Campaign*, 56 *TULSA LAW REVIEW* 255, 274–75 (2021); Carl H. Esbeck, *The World War I Memorial Cross Case: U.S. Supreme Court Takes a New Approach with the Establishment Clause*, 63 *JOURNAL OF CHURCH & STATE* 109 (2021).

⁸⁷ *American Legion*, 588 U.S. at 63 (plurality opinion).

⁸⁸ Depending on how broadly or narrowly one reads McConnell's hallmarks, one might argue that the nondisparagement principle derives from the fourth hallmark—prohibiting worship in dissenting churches. McConnell, *supra* note 76, at 2159–69. But see Barclay, *supra* note 78, at 2107 (suggesting the fourth hallmark is most analogous to modern rules banning “political participation by dissenters,” such as “rules requiring public officials to proclaim a belief in God,” although this type of rule might also map onto the sixth hallmark, limiting political participation to members of the established church). As discussed below, the difficulty of determining the appropriate parameters for making analogic and interpretive leaps from a founding-era hallmark to a modern-day practice is one of the problems with the historical practices and understandings approach. See *infra* text accompanying notes 98–101.

⁸⁹ *American Legion*, 588 U.S. at 61.

or coercion.⁹⁰ The dissent, by contrast, engages in a much deeper dive into the facts of the case and engages the realities of student life.⁹¹ In arguing that the Establishment Clause should be understood to bar the coach's prayers, Justice Sotomayor's dissent emphasizes the "public school context" and the unique pressures to which students are vulnerable.⁹² In addition, the dissent takes a more realist approach to the likely impact on students of the coach's public prayer, noting that "students face immense social pressure," that they "look up to their teachers and coaches as role models and seek their approval," and that a "coach's approval may pay dividends small and large, from extra playing time to a stronger letter of recommendation to additional support in college athletic recruiting."⁹³ For this reason, "existing precedents do not require coercion to be explicit, particularly when children are involved."⁹⁴ We all know how the world works, don't we?

In *Kennedy*, the history is flattened, reduced to a single narrative in which the framers were apparently univocal and transparent in their understandings of both religious establishments and the proper relationship between church and state. Thus, after briefly asserting that the Establishment Clause issue must be resolved by reference to history, the court in *Kennedy* immediately and with little explanation asserted that the key factor was the presence of coercion because coercion was a "hallmark" of eighteenth-century religious establishments.⁹⁵ Thus, although the presence of coercion has undoubtedly been used in the past to identify an Establishment Clause violation,⁹⁶ Justice Gorsuch's assertion in *Kennedy* was largely self-referential and lacking in foundation.⁹⁷

In addition, the court's "historical practices and understandings" approach does not clearly provide greater guidance or determinacy than the endorsement test or other social-meaning focused approaches, as Justice Gorsuch seems to suggest it should.⁹⁸ As noted above, McConnell's article primarily focused on describing the characteristics of religious establishments at the founding. But in order to use that descriptive account for identifying current-day Establishment Clause violations, an act of interpretation is inevitably required. Yet the turn to history, in the court's hands, involves interpretive moves such as drawing on analogies that are not self-evident and not defended. For example, the *Kennedy* court's historical analog for prayer by a public-school football coach is compelled religious observances at the founding—a reference to McConnell's second hallmark involving compelled church attendance and financial support at the founding and in England before the

⁹⁰ *Kennedy*, 597 U.S. at 539.

⁹¹ *Id.* at 547–58 (Sotomayor, J., dissenting).

⁹² *Id.* at 559–60.

⁹³ *Id.* at 561–62.

⁹⁴ *Id.* at 563.

⁹⁵ *Id.* at 535–37.

⁹⁶ See Hill, *Ceremonial Deism*, *supra* note 42, at 761–64.

⁹⁷ In the words of Ira Lupa and Robert Tuttle:

A more elaborate list of so-called hallmarks of the Anglican and colonial establishments (most of which involve legal coercion) ... appeared in Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*. Two decades later, concurring in *Shurtleff v. City of Boston*, Justice Gorsuch called approving attention to this list A few months later, in *Kennedy v. Bremerton School District*, Justice Gorsuch referred to state coercion of worship as a hallmark of an established church and cited his own *Shurtleff* concurrence in a footnote. This appears to be an attempt to bootstrap the hallmarks list into a measure of constitutionality.

Lupa & Tuttle, *supra* note 75, at 617 n.97 (internal citations omitted).

⁹⁸ *Shurtleff v. City of Boston*, 596 U.S. 243, 285, 287 (2022) (Gorsuch, J., concurring).

founding.⁹⁹ Because neither public schools nor compulsory education existed at the founding,¹⁰⁰ it is not at all clear, nor is it explained, why compulsory attendance at and financial support for a church—requirements that were applied, of course, to adults—are appropriate analogies to religious expression in public schools.¹⁰¹ Indeed, the example of compulsory church attendance and support is apparently used by Justice Gorsuch to extrapolate to a significantly broader, more controversial principle—that avoiding religious compulsion is the one and only principle animating the Establishment Clause analysis in cases dealing with official religious expression.

Reva Siegel, discussing the court's turn to history in *Dobbs v. Jackson Women's Health Organization*, has similarly noted that the court's turn to history does not live up to its hype—specifically, the claim that it is a more determinate and objective form of interpretation that constrains judges from imposing their own preferences.¹⁰² Instead, the court, in its completely unsystematic and untransparent appeal to historical practices and understandings, “offers no criteria for choosing” which laws, practices, or sources are relevant to its reconstruction of history, nor does it explain its methods for choosing those laws, practices, and sources.¹⁰³ “The history-and-traditions framework is ... a memory game that rationalizes the exercise of power. It functions to conceal rather than to constrain discretion.”¹⁰⁴ Indeed, say what you will about the reasonable observer heuristic—at least the court, in using this device to operationalize the endorsement test, was forced to confront just what the act of interpretation entails, what sort of information and what aspects of the context are relevant, and whose perspective matters.¹⁰⁵ The endorsement test, for all of its flaws, lays bare the interpretive device; the historical practices and understandings test conceals it, asserting legal conclusions based on a particular historical narrative and historical analogs derived by methods that are obscure.

So where does this leave us? The court has adopted an approach to official religious speech that seems to ask similar questions to the endorsement test but provides a narrower scope for finding unconstitutionality, trading a sensitivity to social context and incentives for a historical narrative of uncertain origin. This jurisprudence is surely the poorer for having left Laycock's insights behind.

Conclusion

Laycock's extraordinary career profoundly influenced the field of law and religion. His influence has no doubt arisen from the obvious insightfulness, nuance, and rigorous logical consistency of his scholarship. But the down-to-earth realism—the sensitivity to the social context in which religion exists and affects real people's lives—is also one of his greatest

⁹⁹ McConnell, *supra* note 76, at 2144–46.

¹⁰⁰ *Kennedy*, 597 U.S. at 536–37 (noting that the Establishment Clause forbids the government to “make a religious observance compulsory,” or to “attend church” or “force citizens to engage in ‘a formal religious exercise’” (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952), and *Lee v. Weisman*, 505 U.S. 577, 589 (1992))). *See also* *Shurtleff v. City of Boston*, 596 U.S. 243, 286 (2022) (Gorsuch, J., concurring) (“[T]he government mandated attendance in the established church and punished people for failing to participate.”); McConnell, *supra* note 76, at 2144–46 (discussing the requirement of participation in religious services as an aspect of establishment).

¹⁰¹ *See also* Storslee, *supra* note 78, at 1692–95 (drawing the same analogy between religious exercises in public schools and compulsory participation in worship services, albeit with more explanation for the analogy).

¹⁰² This is a claim of originalism more generally. *See* Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—And Some Pathways for Resistance*, 101 *TEXAS LAW REVIEW* 1127, 1170 (2023) (citing Antonin Scalia, *Originalism: The Lesser Evil*, 57 *UNIVERSITY OF CINCINNATI LAW REVIEW* 849, 864 (1989)).

¹⁰³ *Id.* at 1183.

¹⁰⁴ *Id.* at 1175.

¹⁰⁵ *Supra* text accompanying notes 52–58.

intellectual legacies. The Supreme Court was content to adopt only Laycock's approach to free exercise, while leaving his theory of the Establishment Clause behind. But the court's jurisprudence is far less rich, less grounded in reality, and less transparent because of it.

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