RESPECTING AN ESTABLISHMENT OF RELIGION: A LOOK AT THE ESTABLISHMENT CLAUSE AND THE ACCOMMODATION APPROACH

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I. INTRODUCTION

An often-litigated portion of the First Amendment, conversations surrounding the Establishment Clause remain as vibrant as they were centuries ago. The Establishment Clause restricts the government from establishing a state-sponsored religion, but it goes much further than that. But how far does it go? Some argue that the American people should be free from religion, while others argue the government should neutralize the playing field when it comes to religion in the public sphere. Still others advocate for a more "accommodating" approach that acknowledges that one cannot leave their religion at the door, advocates for the free exercise of religion, and maintains a separation between church and state.

The First Amendment prevents a theocracy. However, even though it prohibits the establishment of a theocracy, it does not guarantee freedom *from* religion. As Americans, we cannot and should not ask citizens to leave their religious beliefs and perspectives at the door. Although some may try, a complete separation from religion in the public sphere is not possible. Attempting to be "neutral" to or "separate" from religion in the public sphere may seem like a noble goal, but the accommodation approach to religion is the most realistic, accepting the truth of what it means to be human. When considered along with our country's history and tradition, religion is an important part of who we are as individuals and collectively as a country. When drafting the First Amendment, our Constitution's framers did not envision a country without religion. Rather, they understood that religion had a place in the public sphere, as their primary concern was an institutional separation between government and religion. In light of that history and our country's traditions, the "history and tradition" test ensures First Amendment protections and maintains the intent of the

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Framers. This paper aims to bring a broader understanding to contrasting viewpoints on the Establishment Clause and the current state of First Amendment jurisprudence. Further, this paper argues that the most appropriate approach to the First Amendment, and specifically the Establishment Clause, is the accommodation approach with a history and tradition test. Finally, this paper will briefly discuss prayer in schools in accordance with these approaches.

II. SETTING THE STAGE: AN OVERALL LOOK AT THE ESTABLISHMENT CLAUSE

As the first portion of the First Amendment, the Establishment Clause is the first provision of the Bill of Rights.[1] The First Amendment reads as follows, "*Congress shall make no law respecting an establishment of religion*, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[2] The Establishment Clause's purpose was, and remains, to prevent the government from placing pressure on religious minorities to be coerced to conform to the religion of the majority.[3] Coming from Europe, many Americans had left countries where religious minorities were prohibited from participating in government and alienated from society.[4] The Establishment Clause was based on the concept that one's personal religious convictions were too important for the government to stand in the way of, and, in the birth of a new nation, those rights deserved protecting.[5] As James Madison, one of the country's Founders and the Fourth President, wrote:

> We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true that the majority may trespass on the rights of the minority.[6]

It has been clear that from the very founding of our country, rights of religious minorities are to be maintained.[7] However, this issue is far from

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[1] *See* U.S. CONST. amend. I.
[2] *Id.* (emphasis added).
[3] *See* Engel v. Vitale, 370 U.S. 421, 431 (1962) (citing JAMES MADISON, *Memorial and Remonstrance against Religious Assessments*, *in* THE WRITINGS OF JAMES MADISON 182, 190 (1785)).
[4] *See id.* at 431 (stating that "[t]he history of governmentally established religion, both in England and in [America], showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs").
[5] *See id.* at 431–32.
[6] 2 JAMES MADISON, *Memorial and Remonstrance against Religious Assessments*, *in* THE WRITINGS OF JAMES MADISON 187 (Gaillard Hunt ed., G.P. Putnam's Sons 1900) (1785).
[7] *See id.*

straightforward.[8] Since every American has their own perspective on religion, they take that perspective into the workplace, the community, and the government itself.[9] In addition, the country has become more religiously diverse since its founding, resulting in a melting pot of religious perspectives.[10]

Religious freedom for minorities, dissidents, and those who are religious in general, remains an important point of discussion in the United States today.[11] However, there is a legislative effort across the country to ensure religious freedoms are protected,[12] even as religious diversity increases.[13] Of course, the Establishment Clause does not solve all of today's problems involving religious groups and their beliefs, nor has it done so throughout American history.[14] However, looking to our history and our traditions has proven to be the most consistent approach to see the role religion plays in the public arena.[15] Practically speaking, our history and traditions do not indicate that there should be a push against religion in the public sphere.[16] Neither do they require the government to play referee between religions.[17] Instead, our founders acknowledged that religion exists and will continue to exist in all environments, and understood it is not the role of the government to sequester an individual's religious beliefs from specific arenas.[18]

III. AN OVERVIEW OF THE APPROACHES TO THE ESTABLISHMENT CLAUSE

There are three primary approaches to Establishment Clause analysis.[19] The three are the "strict separation" approach, the "neutrality" approach, and

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[8] *See generally* Cnty. of Allegheny v. ACLU, 492 U.S. 573 (1989) (holding that a Christian nativity scene inside the county courthouse violates the establishment clause, but a large menorah and Christmas tree outside of a city-county building does not violate the establishment clause).

[9] *See* McCreary Cnty. v. ACLU, 545 U.S. 844, 884 (2005) (O'Connor, J., concurring) (noting the impacts of the increasing religious diversity in the United States).

[10] *See* KAREN BARKEY & GRACE GOUDISS, UC BERKELEY, RELIGIOUS DIVERSITY IN AMERICA: AN HISTORICAL NARRATIVE 4, 6, 37–41 (2018) (discussing the shift in America's religious demographics from a Protestant majority to an increasingly diverse set of beliefs); *see also* Samuel J. Levine, *A Look at the Establishment Clause Through the Prism of Religious Perspectives: Religious Majorities, Religious Minorities, and Nonbelievers*, 87 CHI.-KENT L. REV. 775, 798–99 (2012) (noting the effects of religious diversity in the United States).

[11] *See, e.g.*, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).

[12] *See* Hillel Y. Levin, *Rethinking Religious Minorities' Political Power*, 48 U.C. DAVIS L. REV. 1617, 1645 (2015) (noting the passage of the Religious Freedom Restoration Act in the United States).

[13] *See* Levine, *supra* note 10, at 799.

[14] *See, e.g.*, Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights*, 87 WASH. L. REV. 1133, 1167–68 (2012) (noting religious discrimination against Native Americans under "War Policy").

[15] *See* Am. Legion v. Am. Humanist Ass'n, 588 U.S. 19, 75 (2019).

[16] *See infra* Part IV.B.

[17] *See infra* Part V.

[18] *See infra* Part VI.

[19] *See generally* Shahin Rezai, Note, County of Allegheny v. ACLU*: Evolution of Chaos in*

the "accommodationist" approach.[20] In short, the strict separation approach advocates for a "wall of separation" between religion and government.[21] The neutrality approach pushes for an environment in which all religions can be equally represented.[22] Finally, the accommodation approach advocates for an environment in which religion can exist in public and government-controlled spaces while maintaining the separation between the institutions of church and state.[23] Although some middle ground may exist between the three,[24] each approach has been articulated by legal scholars and jurists.[25] In fact, in fairly recent cases, Supreme Court Justices have authored opinions favoring each of these approaches.[26] Each approach advocates against the literal establishment of religion, but only one, on balance, best articulates the position of the founders and applies it practically to where we are today.[27]

IV. THE STRICT SEPARATION APPROACH

Proponents of the strict separation approach argue that there should be a clear separation between government and religion, and that this separation should be so clear that government and religion should not comingle at all, if possible.[28] Rooted in the Jeffersonian concept of a "wall of separation" between religion and government, this approach asserts that religious matters are merely "between man and his God."[29] Proponents of this view assert that one's beliefs should be left "inviolately private" and have no direct role to play in governmental processes.[30] According to strict separationists, the Establishment Clause should be construed to both prevent a state-sponsored church or religion, and restrict any government action that may impact religion and the practice thereof.[31] They emphasize that religions should succeed or fail based on their own merit, not based on any partiality from the government.[32]

Establishment Clause Analysis, 40 AM. U.L. REV. 503 (1990) (noting the discrepancies in the definitions of the Constitution's religion clauses that gave rise to the three doctrinal interpretations).

[20] *See id.* at 503–04.

[21] *See infra* Part IV.

[22] *See infra* Part V.

[23] *See infra* Part VI.

[24] *See* Richard H. Fallon, Jr., *Tiers for the Establishment Clause*, 166 U. PA. L. REV. 59, 72 n.50 (2017) (noting some middle ground between conservative and liberal viewpoints on separation, neutrality, and accommodation).

[25] *See* Rezai, *supra* note 19, at 503–04.

[26] *See id.*; *see also, e.g.*, Cnty. of Allegheny v. ACLU, 492 U.S. 573, 621 (1989).

[27] *See generally* Rezai, *supra* note 19 (noting that the Supreme Court rejected a strict approach in favor of a balancing process).

[28] *See* Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947).

[29] Rezai, *supra* note 19, at 507, 507 n.50.

[30] *Everson*, 330 U.S. at 16, 58.

[31] *See* Rezai, *supra* note 19, at 507.

[32] *See id.* at 509; *see also* Zorach v. Clauson, 343 U.S. 306, 313 (1952) ("We sponsor an attitude on the part of government that shows no partiality to any one group and lets each flourish according to the zeal of its adherents and the appeal of its dogma.").

A. AN ANALYSIS OF THE STRICT SEPARATION APPROACH

But, how does that look, practically speaking? Is it truly possible for the two to be *completely* separate? It would be unfair to say the strict separationist believes in a world where government is completely free from any religious influence whatsoever.[33] For the strict separationist, this separation is worth striving for, although it may not be possible for religion and government to be completely separate.[34] Consider, for example, religious schools.[35] A strict separationist would not advocate for government restrictions on religious education but must acknowledge that the existence of religious schools creates government involvement by necessity.[36] The government may need to manage roads, provide emergency personnel to the school, or allow that school to hook up to local utility services.[37] Thus, a complete separation of the two becomes nearly impossible.[38]

Under strict separation, rather than a complete separation from anything affiliated with religion, "[s]tate power is no more to be used so as to handicap religions than it is to favor them."[39] But, under this approach, "[t]he First Amendment has erected a wall between church and state."[40] And, because the "wall must be kept high and impregnable," there should not be even "the slightest breach."[41]

B. DIFFICULTIES WITH THE STRICT SEPARATION APPROACH

But how can such a wall be "impregnable?"[42] Each American has their own perspectives on religion.[43] One's religious beliefs are not a switch one can turn off.[44] The American system is not built on a complete disregard for one's religion, or a freedom from religion.[45] In the prison system, for instance, prisoners (in some cases) are granted special meals because of religious dietary

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[33] *See Everson*, 330 U.S. at 17.
[34] *See Zorach*, 343 U.S. at 313.
[35] *See Everson*, 330 U.S. at 17.
[36] *See id.*
[37] *See id.* at 17–18; Mark Tushnet, *Accommodation of Religion Thirty Years On*, 38 HARV. J.L. & GENDER 1, 3–4 (2015).
[38] *See* Tushnet, *supra* note 37, at 3–4.
[39] *Everson*, 330 U.S. at 18.
[40] *Id.*
[41] *Id.*; *see also* Rezai, *supra* note 19, at 507 (quoting 16 THOMAS JEFFERSON, *Replies to Public Addresses*, *in* THE WRITINGS OF THOMAS JEFFERSON 281, 281–82 (A. Lipscomb et al. eds., 1904) (1802)) (noting the Jeffersonian idea of a "wall of separation").
[42] *Everson*, 330 U.S. at 18.
[43] *See generally* BARKEY & GOUDISS, *supra* note 10, at 4–5 (discussing the range of religious views and the importance of protecting the views of minority religious groups).
[44] *See* C.H. v. Oliva, 195 F.3d 167, 175 (3d Cir. 1999) (noting "that religion is an important part of the human experience").
[45] *See* Nelson v. Miller, 570 F.3d 868, 879 (7th Cir. 2009).

restrictions.[46] Federal courts have held that prisoners must receive these meals when eating regular food would force them to have "an improper choice between adequate nutrition and the tenets of [their] faith."[47] For the strict separationist, the government should strictly adhere to a wall between government action and an individual's religious faith, and should deny any governmental acknowledgement of one's religious beliefs.[48] If "[s]tate power is no more to be used so as to handicap religions than it is to favor them," such actions would be subject to a high level of scrutiny.[49]

Ultimately, this approach fails.[50] The strict separation approach does not provide any flexibility, preventing the government itself from allowing individuals to express and practice their religion freely.[51] The approach ignores the reality that religion is not a hat one can take off.[52] Instead, religion does and will continue to exist on American soil, in American minds and hearts, and ultimately, in government buildings.[53] Although such an approach may seem to prevent the establishment of a state religion, it prevents Americans from holding firmly to the faith they hold dearly.[54] Faith is not left at the doors of our courthouses or legislatures.[55] Instead, it is a part of who we are as people, playing a role in our republican form of government.[56]

Further, creating such a separation and lack of flexibility was not Jefferson's intent behind this "wall."[57] Although he did reference the idea of a "wall" in his writings,[58] our third president pointed to a wall between the established church and the state.[59] After recently cutting ties with England, our founders were aware of established religion and its role in leaving religious minorities out of the process.[60] In light of that, he was more concerned with particulars,

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[46] *See id.*
[47] *Id.*
[48] *See* Zorach v. Clauson, 343 U.S. 306, 319–20 (1952) (Black, J., dissenting) (criticizing government action that, interfering with a wall of separation, "encourages religious instruction or cooperates with religious authorities" and distinguishes between beliefs).
[49] Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947); *see also* Rezai, *supra* note 19, at 511.
[50] *See* Rezai, *supra* note 19, at 511–13.
[51] *See id.* at 511.
[52] *See id.* at 511–13.
[53] *See generally* BARKEY & GOUDISS, *supra* note 10 (detailing the United States' religious evolution and how religion continuous to play an important role in the lives of Americans and in government).
[54] *See* Rezai, *supra* note 19, at 511–13.
[55] *See id.*
[56] *See id.*
[57] *See* John S. Baker Jr., *Wall of Separation*, FREE SPEECH CTR. (July 2, 2024), https://firstamendment.mtsu.edu/article/wall-of-separation/.
[58] *See* Carol Walker, *Thomas Jefferson*, FREE SPEECH CTR. (July 9, 2024), https://firstamendment.mtsu.edu/article/thomas-jefferson/.
[59] *See* Baker, *supra* note 57.
[60] *See* Erin Rahne Kidwell, *The Paths of the Law: Historical Consciousness, Creative Democracy, and Judicial Review*, 62 ALB. L. REV. 91, 144 (1998).

like ending government support of religious denominations with tax dollars.[61] Jefferson was not proposing direct separation of religion from American government.[62] Rather, Jefferson was referring to a specific metaphor on the two institutions previously used by Roger Williams, arguing for a "wall of separation between the garden of the Church and the wilderness of the world."[63] As president, Jefferson himself attended religious services in government buildings, urged that land be made available for Christian purposes, and even appropriated federal dollars for religious causes.[64] Jefferson was not the strict separationist he has often been portrayed to be.[65]

The Establishment Clause is not about keeping an individual's religious beliefs at an arm's length from government.[66] Rather, it is focused on maintaining the government and the church as two separate entities.[67]

> The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter.[68]

Not only is the strict separation approach inflexible and unable to bend to accept the realities of our world and American society, but it is also not an accurate representation of what the founders envisioned in the First Amendment.[69] A different approach is needed to better articulate that vision and accept the realities of American society.[70]

V. THE NEUTRALITY APPROACH

An alternative approach some have advocated for is the neutrality approach.[71] Under this approach, the government is disallowed from making an "endorsement" of religion.[72] The neutrality approach asserts that "[t]he Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a

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[61] *See* Thomas S. Kidd, *What Did Jefferson Mean by "Wall of Separation"?*, HIST. NEWS NETWORK, https://historynewsnetwork.org/article/what-did-jefferson-mean-by-wall-of-separation (last visited Nov. 5, 2024).
[62] *See id.*
[63] Baker, *supra* note 57; *see also* JAMES MADISON, *supra* note 6, at 187. (noting that the Christian religion does not depend on "the support of human laws," but exists independently from them).
[64] *See* David Barton, *The Image and the Reality: Thomas Jefferson and the First Amendment*, 17 NOTRE DAME J. L. ETHICS AND PUB. POL'Y 399, 403–04 (2003).
[65] *See id.*
[66] *See id.* at 405.
[67] *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 220 (1963).
[68] *Id.* (quoting Zorach v. Clauson, 343 U.S. 306, 312 (1952)) (internal quotations omitted).
[69] *See id.* at 225, 233, 238.
[70] *See id.* at 295.
[71] *See* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 592–93 (1989).
[72] *See id.*

religion relevant in any way to a person's standing in the political community.'"[73] Using the endorsement test, the government determines whether the action facilitates a particular religion.[74] Proponents of this approach argue that "[w]hen the citizens of [the United States] approach their government, they do so only as Americans, not as members of one faith or another."[75] Although religion may not be the core of American government, such a position ignores the realities of humanity and American society in general.[76]

A. AN ANALYSIS OF THE NEUTRALITY APPROACH

To reach a better understanding of neutrality, consider Justice Blackmun's opinion in *County of Allegheny v. ACLU*, which is one of the primary examples of this approach.[77] In that case, Allegheny County had allowed religious displays in its courthouse during the Christmas season.[78] They had made room for a nativity scene, a menorah, and a Christmas tree.[79] In analyzing this particular case, Justice Blackmun stated that:

> [G]overnment may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs.[80]

He also argued the government should neither aid religion, influence one's religion, nor financially support religion.[81]

Turning first to the nativity scene, the Court noted that the angel stated "Glory to God in the Highest!"[82] The court said this was "indisputably religious" and constituted an endorsement of the Christian religion.[83] Arguing the Constitution requires "respect for religious diversity," the Court concluded this endorsement was unconstitutional.[84] In articulating that view, Justice Blackmun provided a distinction between religious decorations and secular

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[73] *Id.* at 593–94 (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).
[74] *See id.* at 601–02 (holding that "endorsing a patently Christian message" violates the Establishment Clause).
[75] Town of Greece v. Galloway, 572 U.S. 565, 637–38 (2014) (Kagan, J., dissenting).
[76] *See id.*
[77] *See* 492 U.S. at 620–21 (holding that a creche, another name for a nativity scene, in a courthouse had an unconstitutional effect, but that a menorah did not).
[78] *See id.* at 578–80.
[79] *See id.*
[80] *Id.* at 590–91.
[81] *See id.* at 591; *see also* Everson v. Bd. Of Educ., 330 U.S. 1, 15–16 (1947) (holding that governments cannot "pass laws which aid one religion . . . force nor influence a person to go to or remain away from church against his will . . . [or financially] support any religious activities or institutions").
[82] *Allegheny*, 492 U.S. at 573, 598.
[83] *Id.* at 598, 612–13.
[84] *Id.* at 612–13.

ones.[85] He argued "the Constitution mandates that the government remain secular, rather than affiliate itself with religious beliefs or institutions, precisely in order to avoid discriminating among citizens on the basis of their religious faiths."[86] At its foundation, Justice Blackmun's opinion distinguishes between a religious Christmas and a secular one.[87] From a neutral standpoint, the government should allow the celebration of Christmas, but it should also leave references to Christ's birth outside of government-owned property.[88]

Next, the Court considered the Christmas tree, with a sign in front from the mayor declaring the tree a "salute to liberty."[89] Justice Blackmun said it was "not itself a religious symbol" and "typif[ied] the secular celebration of Christmas."[90] Drawing on the previous distinction made between religious and secular displays, the Court ruled that the Christmas tree was constitutional.[91] The distinction between religious and secular displays is a primary aspect of the neutrality approach.[92]

Using the endorsement test, if a display conveys to an objective observer that the government is endorsing religion, or has the effect of advancing religion, then it must be unconstitutional.[93] On the other hand, if it does not convey endorsement and does not have any effect of "advancing religion," it is allowable.[94] However, a display can be constitutional even if there is an incidental benefit to religion.[95]

Finally, like the tree, the Court concluded that the menorah, although an inherently Jewish symbol, was constitutional.[96] This menorah was placed next

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[85] *See id.* at 610–11.

[86] *Id.*

[87] *See id.* at 611.

[88] *See Allegheny*, 492 U.S. at 611–12.

> If the government celebrates Christmas as a religious holiday (for example, by issuing an official proclamation saying: "We rejoice in the glory of Christ's birth!"), it means that the government really is declaring Jesus to be the Messiah, a specifically Christian belief. In contrast, confining the government's own celebration of Christmas to the holiday's secular aspects does *not* favor the religious beliefs of non-Christians over those of Christians.

Id.

[89] *Id.* at 581–82.

[90] *Id.* at 616–17.

[91] *See id.* at 620 (explaining that when measured against the "reasonable observer" standard, the Christmas tree alone does not violate the Establishment Clause as it does not endorse Christian belief, therefore, making it Constitutional).

[92] *See id.* at 592, 594. (first citing Lemon v. Kurtzman, 403 U.S. 602 (1971); and then citing Lynch v. Donnelly, 465 U.S. 668 (1984)).

[93] *See* Robert A. Sedler, *Understanding the Establishment Clause: A Revisit*, 59 WAYNE L. REV. 589, 637–39 (2013) (explaining the application of the endorsement/symbolic union doctrine and the advancing or inhibiting religion principle for finding displays unconstitutional under the Establishment Clause).

[94] *See id.* at 620, 644.

[95] *See id.* at 639.

[96] *See Allegheny*, 492 U.S. at 620–21.

to the Christmas tree.[97] The Court ruled that along with the tree and sign, the menorah was merely a "secular recognition" of the significance of the season, and not a recognition of any asserted truth derived from the religious tenets of Judaism.[98] Here, any benefit to or recognition of those who practice Judaism was incidental, and thus was not an endorsement of the religion itself.[99]

An area where this issue comes to light is on prayer in the public sphere.[100] In *Town of Greece v. Galloway*, Greece, New York, had established the practice of opening their monthly board meetings in prayer.[101] Inviting pastors from different churches, many of these prayers were made in Jesus' name.[102] Although the Court determined that this was constitutional by applying the accommodationist approach's rationale,[103] Justice Kagan's dissent articulates the neutrality approach.[104]

In that dissent, Justice Kagan said these prayers violated America's "norm of religious equality" and the country's public institutions are not religious just as they are nondenominational.[105] She articulated that although pluralism and religious inclusion are acceptable in American society, the prayers offered at Greece's town meetings were biased toward specific denominations, and the city "did nothing to recognize religious diversity."[106] The dissent asserts the Establishment Clause mandates neutrality, particularly between religion and nonreligion in the public sphere.[107] In addition, Justice Kagan emphasized possible coercion directed toward citizens who merely attended government functions to participate in the process or receive a particular service.[108] For example,

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[97] *See id.*
[98] *See id.*
[99] *See id.*
[100] *See* Nikolas Lanum, *Fifth-Grade Girl Speaks Out After Washington School Denied Request to Start Interfaith Prayer Group*, FOX NEWS (Apr. 11, 2024, 9:00 PM), https://www.foxnews.com/media/fifth-grade-girl-speaks-out-washington-school-denied-request-start-interfaith-prayer-club (discussing recent instances of prayer in the public sphere and First Amendment implications). *See generally* Town of Greece v. Galloway, 572 U.S. 565 (2014) (discussing government intervention when prayer enters the public sphere).
[101] *See* Galloway, 572 U.S. at 569–70.
[102] *See id.* at 571.
[103] *See id.* at 591; *see also* Marsh v. Chambers, 463 U.S. 783, 795 (1983) (holding that the Nebraska legislature's practice of opening sessions with a prayer led by a chaplain was constitutional and an "unbroken practice").
[104] *See Galloway*, 572 U.S. at 637–38 (Kagan, J., dissenting).
[105] *Id.* at 615–16.
[106] *See id.* at 616.
[107] *See id.* at 619.
[108] *See id.* at 620–21.

> Perhaps she feels sufficient pressure to go along–to rise, bow her head, and join in whatever the others are saying: After all, she wants, very badly, what the judge or poll worker or immigration official has to offer. Or perhaps she is made of stronger mettle, and she opts not to participate in what she does not believe–indeed, what would, for her, be something like blasphemy. She then must make known her dissent from the common religious view . . . .

Id.

if someone wants to be well-received at a town board meeting, they may consider bowing their head during a Christian prayer, even if that is not a part of their religion, or even contrary to it.[109] This sort of coercion, Kagan argued, is exactly what the Constitution prohibits.[110]

The dissent further contended that one's "religious beliefs [should] not enter into the picture."[111] Since the prayers were Christian and Catholic, and other religions had not been invited, the dissent explained that "no one can fairly read the prayers from Greece's town meetings as anything other than explicitly Christian."[112] Concluding this sort of division and societal pressure to participate was unconstitutional, Justice Kagan asserted the public should not be coerced in this fashion.[113]

B. DIFFICULTIES WITH THE NEUTRALITY APPROACH

Although neutrality and strict separation are very similar, it would be unfair to consider them one and the same.[114] For advocates of the neutrality approach, they do not ask that religion be left at the door.[115] In a sense, the neutrality approach exists in a middle space between the strict separationist and accommodationist.[116] The approach asserts the government "may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another."[117]

However, even in the early days of America, public expressions of religion, including ceremonial prayers like those made in Greece, New York, have been accepted as a part of our society.[118] Religion and discussions about it arise in the public sphere routinely.[119] It is not the government's responsibility to create equal speaking time and appear neutral at all times to every religion and point-

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[109] *See Galloway*, 572 U.S. at 620–21 (Kagan, J., dissenting).
[110] *See id.* at 621 ("That is not the country we are, because that is not what our Constitution permits. Here, when a citizen stands before her government, whether to perform a service or requests a benefit, her religious beliefs do not enter the picture.").
[111] *Id.*
[112] *Id.* at 627.
[113] *See id.* at 637–38.
[114] *See id.* at 616 ("I do not contend that principle translates here into a bright separationist line.").
[115] *See Galloway*, 572 U.S. at 616 ("[P]luralism and inclusion in a town hall can satisfy the constitutional requirement of neutrality; such a forum need not become a religion-free zone.").
[116] *See* Thomas R. Hensley & G.R. Jarrod Tudor, *An Analysis of the Rehnquist Court's Establishment Clause Jurisprudence: A New Marriage of Legal and Social Science Approaches*, 1999 L. REV. M.S.U.-D.C.L. 869, 879–80 ("The neutrality approach occupies a middle ground between the accommodationist and strict separation approaches, arguing that governmental policies should neither advance nor inhibit religion.").
[117] Epperson v. Ark., 393 U.S. 97, 104 (1968).
[118] *See Galloway*, 572 U.S. at 584.
[119] *See id*.

of-view.[120] Religious balancing is and should not be a requirement.[121] In fact, our country's founders were concerned with providing government with the responsibility to promote tolerance or lift up certain viewpoints.[122] Rather, the First Amendment is concerned with liberty, maintaining a separation between church and state, and maintaining Americans' right to express their religion freely.[123]

Our government and the public square in general are filled with diverse religious perspectives.[124] One's religion plays a key role in how they think, how they speak, and what they advocate for.[125] Government officials, professionals, and every citizen in this country has their own views and perspectives.[126] Certainly, the government should not take a position of favoritism toward one religion or another.[127] However, to force the government to enforce neutrality between all viewpoints is not only impossible, but would force the government to silence majority voices to uplift those of the minority.[128] Rather, a more appropriate approach would be to provide an environment where all voices can be heard.[129]

VI. THE ACCOMMODATION APPROACH

A third viewpoint advocates for an environment that allows for religious expression in the public sphere.[130] The accommodation approach asserts that, to the greatest extent possible, religion should be allowed in the public sphere.[131] Of course, there are some limitations and some areas of obscurity.[132] However, in acknowledging the lack of separation between one's religious

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[120] *See id*. ("Our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith.").
[121] *See id*. at 585.
[122] *See* JON MEACHAM, AMERICAN GOSPEL 68 (2006).
[123] *See id*. at 69.
[124] *See* BARKEY & GOUDISS, *supra* note 10, at 6.
[125] *See* Joel Hefley, *Congress and Religion: One Representative's View*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 335, 357 (2006) (noting how religion plays a role in public life).
[126] *See id*. ("Many members of the Senate agree that religion plays a role in their public life.").
[127] *See generally* U.S. CONST. amend. I. (prohibiting government establishment of religion and ensuring free exercise).
[128] *See generally* Hefley, *supra* note 125, at 357.
[129] *See generally id.*
[130] *See* Samantha Thompson Lipp, *The Rise of Public School Prayer with the Demise of* Lemon v. Kurtzman, 74 MERCER L. REV. 1221, 1224 (2023) ("[T]he accommodationist approach advocates that the government should recognize the importance of religion in society and accommodate religion.").
[131] *See id.* ("Adherents of this approach believe that religion should be accommodated in public life as part of a pluralistic society.").
[132] *See, e.g.*, Cnty. of Allegheny v. ACLU, 492 U.S. 573, 578–80 (1989) (holding that displaying a nativity creche is an endorsement of religion, whereas displaying a menorah is not); *see also, e.g.,* Am. Legion v. Am. Humanist Ass'n, 588 U.S. 19, 36–39 (2019) (holding that displaying a cross at the Bladensburg memorial was constitutional because the cross's placement at the memorial has special significance beyond mere endorsement of the Christian religion) .

beliefs and other aspects of their life, the accommodation approach seeks to acknowledge that Americans take their religious beliefs with them, not leaving them at the door.[133]

A. AN OVERVIEW OF THE ACCOMMODATION APPROACH

The accommodation approach pushes for a government that is not hostile toward religion.[134] Rather, advocates for this approach believe the government should be charitable in allowing religion to enter the public sphere.[135] Further, they assert Americans should neither be forced to leave their religious beliefs at the door, nor should the government be forced to create a meticulously-level playing field for each religious belief.[136] Instead, consistent with the free exercise clause, Americans have the right to practice their religion, incorporating it in all aspects of their lives if they so choose.[137] The approach advocates for "a presumption of constitutionality for longstanding monuments, symbols, and practices," looking to history and tradition to determine whether religious practices and displays are constitutional.[138]

B. A LOOK AT THE HISTORY AND TRADITION TEST

But what does it mean to look at history and tradition? In looking to history and tradition, courts refer to the framers' intent in writing the Constitution.[139] In place of prior tests, the Supreme "Court has instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'"[140] In drawing a line between what is constitutional and what is not, courts must consider what accurately reflects the original understanding of the framers of the Constitution.[141]

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[133] *See* Lipp, *supra* note 130 (noting that accommodating religion in the public space aligns with a pluralistic society).

[134] *See Allegheny,* 492 U.S. at 655 (Kennedy, J., dissenting) ("This view of the Establishment Clause reflects an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents, and I dissent from this holding.").

[135] *See* Rezai, *supra* note 19, at 514.

[136] *See id.* at 514–15 (noting how certain facially neutral government actions hinder free exercise of religion and thus require accommodation).

[137] *See id.* ("Both the establishment and free exercise clauses . . . are strict restrictions on the powers of the state and are nor a license for government actions on matters involving religion.").

[138] Am. Legion v. Am. Humanist Ass'n, 588 U.S. 19, 51–53 (2019); *see also id.* at 63 ("Where categories of monuments, symbols, and practices with a longstanding history follow in that tradition, they are likewise constitutional.").

[139] *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 20–24 (2022) (holding a New York gun regulation was unconstitutional under the history and tradition test because the framers would not have intended for an exception to the Second Amendment to allow state governments to force citizens to prove need for a firearm).

[140] Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 510 (2022) (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

[141] *See id.*

In drafting the Establishment Clause of the First Amendment, the framers were almost certainly well-aware of the Church of England's attachment to the state.[142] Like many of our country's settlers, the framers wanted to be free from legally-established religion.[143] Their experiences would have included government control over doctrine, church attendance, church discipline, funding of church causes, and even carrying out various civil functions through the church.[144]

Rather than focusing on the appearance of endorsement, the accommodation approach focuses on coercion, and whether a practice or display fits within our history and traditions.[145] When "[i]t is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens," the history and tradition test produces a result of constitutionality.[146] Although displays of religion may offend people at times, coercion is in a different category.[147] Government coercion by directing its citizens to participate in religious activities is exactly what the framers wanted to prevent, a key distinction when applying the history and tradition test.[148] Although wary of coercion, the history and tradition test presumes there are times and places where religion exists in the public sphere as an expression of one's religion.[149] The mere existence of religion in the public sphere does not mean the government is forcing religious practices upon its citizens.[150]

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[142] *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2110 (2003) (noting that, by the time the framers drafted the Constitution, the Church of England was formally established by law in England and in five southern colonies).

[143] *See id.* at 2107–08 (noting that early settlers came to the colonies for the explicit purpose of having religious freedom).

[144] *See id.* at 2131; *see also* Shurtleff v. City of Bos., 596 U.S. 243, 286 (2022) (Kavanaugh, J., concurring) (noting the ties between the Church of England and the colonies).

[145] *See Galloway*, 572 U.S. at 587 (holding that the accommodation approached is analyzed "against the backdrop of historical practice").

[146] *Id.*

[147] *See id.* at 589 ("In their declarations in the trial court, respondents stated that the prayers gave them offense and made them feel excluded and disrespected. Offense, however, does not equate to coercion.").

[148] *See id.* at 588–90; *see also Shurtleff*, 596 U.S. 243 at 286–87 (Kavanaugh, J., concurring); *see also* Charles Adside, III, *The Establishment Clause Forbids Coercion, Not Cooperation, Between Church and State: How the Direct Coercion Test Should Replace the* Lemon *Test*, 95 N.D. L. REV 533, 558–59 (2020) (illustrating the fact that the framers sought to avoid "religious persecution through government power").

[149] *See Galloway*, 572 U.S. at 582–87; *see also* TAVIA BRUXELLAS MCALISTER, FROM SHIELD TO SWORD: STRAYING FROM THE ORIGINAL MEANING OF THE ESTABLISHMENT CLAUSE 10, 35 (2024) (explaining that the Establishment Clause is meant to prevent government coercion through religion, "not the censorship of it in the public square").

[150] *See* MCALISTER, *supra* note 149, at 10.

C. THE ACCOMMODATION APPROACH: THE MOST APPROPRIATE APPROACH

Today, the law embraces the accommodation approach, which embodies the vision of our Constitution's framers.[151] The accommodation approach provides a longer leash for Americans to practice their religion, while retaining the separation of church and state.[152] The First Amendment does not provide a freedom *from* religion, but rather creates a right to express one's religion freely.[153]

Although there are several cases to choose from,[154] Justice Kennedy's opinion in *Town of Greece v. Galloway*[155] is a fine example of articulating the accommodation approach and the history and the tradition test.[156] In *Galloway*, Justice Kennedy had to decide whether Greece, New York's practice of opening its board meetings with a prayer was an impermissible establishment of religion.[157] In applying the accommodation approach, the Court considered the purpose of these prayers.[158] The Court looked back at *Marsh v. Chambers*, a case holding that invocations at Nebraska legislative sessions were constitutional.[159] In *Galloway*, Justice Kennedy asserted that the Nebraska legislature's actions, as well as those of Greece, New York, were in line with the intent of the framers and our country's history and traditions:

> [M]any members of the public find these prayers meaningful and wish to join them. But their purpose is largely to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers. For members of town boards and commissions, who often serve part-time and as volunteers, ceremonial prayer may also reflect the values they hold as private citizens. The prayer is an opportunity for them to show who and what they are

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[151] *See, e.g.*, Am. Legion v. Am. Humanist Ass'n, 588 U.S. 19, 32 (2019) (holding that removing a religious display "would not further the ideals of respect and tolerance embodied in the First Amendment").

[152] *See* Rezai, *supra* note 19, at 540.

[153] *See* U.S. CONST. amend. I.; *see also* Michael Stokes Paulsen, *The Competing Claims of Law and Religion: The Priority of God: A Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1218 (2013) ("The Establishment Clause is not a freedom-from-religion provision. It is a freedom-of-religion-from-government provision.").

[154] *See, e.g., Am. Legion*, 588 U.S. at 103 (holding that the display of crosses at a memorial on public land does not violate the Establishment Clause); *see also, e.g.,* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part and dissenting in part) (arguing that the majority's view is too hostile on religion, and instead applying an accommodationist approach in determining that displaying a nativity creche and a menorah on public land does not violate the Establishment Clause).

[155] *See* Town of Greece v. Galloway, 572 U.S. 565, 591–92 (2014).

[156] *See id.*

[157] *See id.* at 569–70.

[158] *See id.* at 587.

[159] *See* Marsh v. Chambers, 463 U.S. 783, 795 (1983).

without denying the right to dissent by those who disagree.[160]

Looking back at our country's history and traditions, allowing religion into the public sphere was and is no foreign concept.[161] Even during the time of our country's founding, prayers were offered at official meetings.[162] Concerned with promoting liberty to all, the framers worked to protect the religious freedom *to* practice religion for all.[163]

In *Marsh* and *Galloway*, the goal of offering prayers was not coercion, but rather to accommodate religious beliefs in the public sphere.[164] "The inclusion of a brief, ceremonial prayer as part of a larger exercise in civic recognition suggests that its purpose and effect are to acknowledge religious leaders and the institutions they represent rather than to exclude or coerce nonbelievers."[165] Of course, coercion is exactly what the First Amendment was designed to protect Americans from.[166] However, because the First Amendment does not require the public sphere to be void of all religion, or require the government to play referee in every instance, the government should accommodate religion, which makes us who we are as humans and as Americans.[167]

D. DOES THE HISTORY AND TRADITION TEST YIELD PROBLEMATIC RESULTS?

Certainly, it is important to understand the framers' intent behind the First Amendment.[168] However, American history is not pure from sin and evil.[169] Could the history and tradition test yield dangerous results?[170] Travesties have occurred in our country, some even in the name of religion.[171]

Although the problems and tragedies of our past should not be forgotten, the history and tradition test does not necessitate negative results.[172] When evaluating religion in the public sphere, we must recognize change that has

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[160] *Galloway*, 572 U.S. at 588.
[161] *See id.*
[162] *See* MEACHAM, *supra* note 122, at 65–66.
[163] *See id.* at 121–22.
[164] *See* Galloway, 572 U.S. at 588–89.
[165] *Id.* at 591.
[166] *See id.* at 608 (Alito, J., concurring).
[167] *See id.* at 591 (majority opinion); *see also* Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29, 66 (2019).
[168] *See* Galloway, 572 U.S. at 577 ("Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.").
[169] *See generally* Dred Scott v. Sandford, 60 U.S. 393, 453–54 (1857) (holding that an American slave of African descent was not a citizen, and did not have standing in the American court system).
[170] *See, e.g.*, *id.*
[171] *See* Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 773–75 (1997) (noting the devastating impacts of some of the "Christianization" policies on Native Americans).
[172] *See id.* at 775; *see also* Timothy Zick, *Framing the Second Amendment: Gun Rights, Civil Rights and Civil Liberties*, 106 IOWA L. REV. 229, 264 (2020).

occurred as a result of new laws: changes resulting in victories for civil rights and changes in judicial doctrines that work to guarantee constitutional equality.[173] We cannot discount history merely because there is trouble in our past, otherwise all laws and precedent would become irrelevant as this country makes progress.[174]

There may be no better example of wrestling with this issue than our sixteenth President, Abraham Lincoln.[175] In dealing with the issue of slavery, President Lincoln asserted that our earliest documents were the answer, arguing the United States was founded on "the proposition that all men are created equal."[176] President Lincoln argued that although all Americans had not yet possessed the rights guaranteed by the Constitution, rights were sacred for all, and were for all Americans.[177]

Turning to the very history of this country, Lincoln did not assert the history and traditions of this country necessitated slavery and discrimination, but rather the complete opposite.[178] Even the Declaration of Independence itself extended the proposition that all men are created equal.[179] According to Lincoln, the founders of this country understood that one of the keys to a free society was equality.[180] There is no doubt that the framers believed that public expression of religion mattered to the health of the republic, something worth protecting then and now.[181] Taking an anti-slavery view of the Constitution and our founding documents, Lincoln looked to the past, despite its faults to assert man's right to liberty in the present.[182] Despite faults and imperfections then and today, America can continue to work to protect First Amendment rights for all in the present.[183]

Merely because minorities were unable to enjoy the protections of constitutional rights in the past does not negate the rights themselves today.[184] Rather, the history and tradition test provides a sense of where America was, where it is, and where it is going.[185] The First Amendment was created to protect the

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[173] *See* Zick, *supra* note 172, at 264.
[174] *See id.*
[175] *See* HERMAN BELZ, ABRAHAM LINCOLN, CONSTITUTIONALISM, AND EQUAL RIGHTS IN THE CIVIL WAR ERA 170 (1998).
[176] *Id.*
[177] *See* BRIAN R. DIRCK, LINCOLN AND THE CONSTITUTION 27–28 (Richard W. Etulain et al. eds., 2012).
[178] *See id.*
[179] *See* JON MEACHAM, AND THERE WAS LIGHT: ABRAHAM LINCOLN AND THE AMERICAN STRUGGLE 117 (2022).
[180] *See id.*
[181] *See* Anita Y. Woudenberg, *Propagating a Lemon: How the Supreme Court Establishes Religion in the Name of Neutrality*, 7 FIRST AMEND. L. REV. 307, 313–14 (2009).
[182] *See* MEACHAM, *supra* note 179, at 117.
[183] *See id.*
[184] *See* Zick, *supra* note 172, at 264.
[185] *See id.*

rights of religious dissidents and minorities, an impactful step in history.[186] Rather than asserting a majority religion, a theocracy, or establishing a distinctly Christian nation, the framers of our Constitution worked to ensure religious liberty for *all*.[187] Although it is appropriate to mourn the turmoil of the past, the First Amendment guarantees rights to all, and that should be celebrated.[188]

VII. A BRIEF LOOK AT PRAYER IN SCHOOLS

An area where differing perspectives play out in is in prayer in schools.[189] Of course, these prayers can play out in different ways.[190] Regardless, this issue helps shed light on the three perspectives.[191]

Generally, under a strict separation approach, prayer should not be offered by schools.[192] To ensure the "wall of separation" is kept intact, religion should be left out of government circles.[193] Although the strict separationist must acknowledge "[t]he history of man is inseparable from the history of religion,"[194] the strict separationist is concerned with establishing one sect of religion over another, especially in a government-run environment.[195] For the strict separationist, religion should remain as personal as possible, and corporate prayer should exist primarily in private environments.[196]

Similarly, under the neutrality approach, prayer in schools is scrutinized.[197] Since, under the neutrality approach, the government must provide an equal playing field for all religions, a specifically Christian, Muslim, Jewish, or another religion's prayer would violate the Establishment Clause.[198] Prayer is

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[186] *See* Engel v. Vitale, 370 U.S. 421, 431 (1962) (citing 2 James Madison, Memorial and Remonstrance against Religious Assessments, *in* The Writings of James Madison 183, 190 (1785)).
[187] *See id.* at 433.
[188] *See id.* at 435.
[189] *See, e.g.*, *Engel*, 370 U.S. at 433–34.
[190] *See, e.g.*, *id.*; *see also* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 509 (2022) (detailing a case in which a coach engaged in a public prayer after a school activity).
[191] *See generally Kennedy*, 597 U.S. at 532 (describing the conflicting perspectives between protection of First Amendment rights and the Establishment Clause).
[192] *See* Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (noting the perspective that religion should not breach the strong wall between church and state).
[193] *See id.* at 16.
[194] *Engel*, 370 U.S. at 434.
[195] *See Everson*, 330 U.S. at 18.
[196] *See* 16 THOMAS JEFFERSON, *Replies to Public Addresses*, *in* THE WRITINGS OF THOMAS JEFFERSON 281, 281–82 (A. Lipscomb et al. eds., 1904) (1802).
[197] *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 558 (2022) (Sotomayor, J., dissenting).

> This case is about whether a school district is required to allow one of its employees to incorporate a public, communicative display of the employee's personal religious beliefs into a school event, where that display is recognizable as part of a longstanding practice of the employee ministering religion to students as the public watched. A school district is not required to permit such conduct; in fact, the Establishment Clause prohibits it from doing so.

Id.
[198] *See supra* Part V.

inherently specific to one individual or one group of religions.[199] Of course, the neutrality approach does not seek to keep people from praying, but rather asks that schools do not engage in prayer specifically.[200] If it could be viewed as an endorsement to religion, advocates for the neutrality approach would contend it is unconstitutional.[201]

Compared to other perspectives, the accommodation approach is far more open to prayer in schools.[202] However, those with this view generally maintain that prayers should not be "publicly broadcast or recited to a captive audience."[203] Maintaining the concern of coercion, students should not be required to participate in prayers.[204] But, acknowledging the fact that people take their religion with them, under the accommodation approach, prayer does have a place in schools.[205] As seen in the *Kennedy* decision, school officials can offer prayers when they are not inherently coercive or forced upon a captive audience.[206] Prayer has its place in the public sphere, and in some instances, schools.[207] "Respect for religious expressions is indispensable to life in a free and diverse [r]epublic . . . ."[208]

VIII. CONCLUSION

As the late Antonin Scalia wrote, "[t]hose who wrote the Constitution believed that morality was essential to the well-being of society and that encouragement of religion was the best way to foster morality."[209] Although limitations may be appropriate to avoid coercion, accommodating religion in the public sphere is appropriate for a country of great diversity in thought, belief, and culture. Religion has and will continue to play an important role in American society. From the founding of our nation, the First Amendment protected the rights of dissidents and minorities. These rights should continue to be celebrated and protected, and the accommodation approach and the history and tradition test protect these rights and allow us to truly be human.

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[199] *See* Town of Greece v. Galloway*,* 572 U.S. 565, 637–38 (2014) (Kagan, J., dissenting).
[200] *See id.* at 638 (arguing that government-sponsored acts, including prayer, should not divide on religious lines).
[201] *See id.*
[202] *See generally Kennedy*, 597 U.S. at 514 (applying an accommodationist approach and stating that "[t]he Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike").
[203] *Id.* at 542.
[204] *See id.* at 541–42.
[205] *See id.* at 543.
[206] *See id.* at 546–47 (Sotomayor, J., dissenting).
[207] *See id.* at 543 (majority opinion).
[208] *Kennedy*, 597 U.S. at 543.
[209] McCreary Cnty. v. ACLU, 545 U.S. 844, 887 (2005) (Scalia, J., dissenting).