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RISA GOLUBOFF: Hi and welcome to *Common Law*, a podcast from the University of Virginia School of Law. I'm Risa Goluboff, the dean.

LESLIE And I'm Leslie Kendrick, the vice dean.

KENDRICK:

[MUSIC PLAYING]

RISA GOLUBOFF: So we're doing something a little bit different today, Leslie.

LESLIE We are, very different.

KENDRICK:

RISA GOLUBOFF: Actually, it's different in a number of ways, right? The first one is the topic. As our listeners know, we've been talking about the future of law this season. And mostly, though not exclusively, that's been about technological changes coming, and how they affect the economy and institutions on the law. But today, it's going to be more about our ideological and constitutional future.

LESLIE That's right. But there's another difference, as well, that has to do with our guests, and

KENDRICK: namely, how many of them there are and who they are. A couple of these folks are, full disclosure, related to us, legally anyway.

RISA GOLUBOFF: Legally related. It's totally true. We know these guys pretty well, as will become clear in a minute. But we actually do have a really good reason for having so many. So these three particular guests are in the studio all at once today, and that's because they're all experts in a major area of constitutional law that's likely to see some changes in the near future.

LESLIE Right. So a lot of commentators looking at the Supreme Court think that its new makeup could

KENDRICK: mean changes in the area of church and state. And that's what these three folks have been writing about for quite a long time and they've been writing about it together. So we want to talk with them about the future of religious freedom and the Supreme Court.

RISA GOLUBOFF: Yeah, I mean, it's really a three-for-one deal. So should we let them introduce themselves?

LESLIE Let's do it.

KENDRICK:

RICH Well so thanks for having me. I'm Rich Schragger. I'm a professor at the UVA Law School, and

SCHRAGGER: I'm really pleased to be here. I've been desperate to be on this show for a long time. So I'm glad I've finally made the cut.

RISA GOLUBOFF: Is there nothing else you want to add about who you are?

RICH Oh, I happen to be the husband of the dean, but that does not--

SCHRAGGER:

[LAUGHTER]

--that does not-- this is-- there's no, yeah, favoritism in this.

RISA GOLUBOFF: That's why it's taken so long, in fact, right?

RICH That's why it's taken so long. That's exactly right.

SCHRAGGER:

NELSON TEBBE: I'm Nelson Tebbe. I teach at Cornell Law School, and I happened to be in town, in Charlottesville, and these fine people included me in the podcast. I'm delighted to be here.

MICAH And I'm Micah Schwartzman. I'm also a professor at the University of Virginia School of Law.

SCHWARTZMAN: And I'm married to the vice dean. So only Nelson is not married to someone else in this room.

NELSON TEBBE: Right, in this room, yeah.

RISA GOLUBOFF: But he is-- as our kids would say, he's a kind of work spouse for the two of you, which is why we wanted to have all three of you on together. So why don't you talk about your collaborations and-- and what it is you all do together?

MICAH Well, so the three of us have been writing about law and religion issues for the past-- I don't

SCHWARTZMAN: know how many years now. Five or six years, maybe more. We've been writing articles-- popular pieces, amicus briefs-- about issues involving the First Amendment and church and state.

NELSON TEBBE: Yeah, it has been informal, but consistent over these few years. And we're interested in the

kind of common set of questions about the free exercise clause of the Constitution, the establishment clause of the Constitution, and various statutory and regulatory provisions that-- that embody values of religious freedom and equality, how they interrelate.

RICH
SCHRAGGER: There have been a lot of controversies in cases in this area. Folks might be familiar with a case from a number of years ago called *Hobby Lobby*, which was about whether there should be exemptions for a company that had sort of religious views about contraception, and whether they should have required exemptions from providing contraception coverage for their employees.

There was a case called *Town of Greece* a couple of years ago, in which the question was whether a city council can open the city council meeting with a prayer when those prayers were mainly Christian in content. And more recently, there's a case called *Masterpiece Cakeshop*, which has been discussed in the media, which is about whether a Christian baker, who doesn't want to provide a wedding cake for lesbian and gay people, is permitted not to-- not to do so under the free exercise clause of the US Constitution. And so these issues are really central these days, and quite salient.

LESLIE
KENDRICK: You guys, in fact, have some sort of agglomeration name, right? The three of you-- I don't remember what it's called. What do you call yourselves?

RICH
SCHRAGGER: What is the name? It's like Schwartz--

MICAH
SCHWARTZMAN: It's TSS. And they vary between Tebbe, Schwartzman, and Schragger, and Tebbe, Schragger, and Schwartzman. It's just a matter of who started writing the thing first.

RICH
SCHRAGGER: Yeah, who wrote the most-- mostly Nelson writes everything and we sign on.

[LAUGHTER]

Because it's just-- it's just-- there's safety in crowds, so it's like--

MICAH
SCHWARTZMAN: It's not-- it's not true, Schragger. Sometimes I write the stuff--

RICH Oh, that's true.

SCHRAGGER:

MICAH --and you guys sign off, or sometimes Nelson writes the stuff and you sign off.

SCHWARTZMAN:

[LAUGHTER]

RISA GOLUBOFF: So you don't do any of the writing, Schragger?

RICH Well, a pattern is emerging.

SCHRAGGER:

[LAUGHTER]

A pattern is emerging.

RISA GOLUBOFF: You do the talking, though.

RICH Yeah, that's right. I'm the face of TSS, which is kind-- we're kind of a law firm. We're like a little

SCHRAGGER: mini-- yeah, it's pretty awesome.

LESLIE A partnership.

KENDRICK:

NELSON TEBBE: We have been called TSS mostly by people who disagree with us.

[LAUGHTER]

When, in fact, we are often STS or SST or--

RICH Right, right. That's right.

SCHRAGGER:

RISA GOLUBOFF: Well, let's-- can we step back a little bit and talk? Just give the broad framework. Where do these rules about religion come from in the Constitution? And they're in the First Amendment. We often think about the First Amendment and speech, but the First Amendment has many clauses in it, several of which have to do with religion. So tell us a little bit about what those clauses say.

MICAH So the First Amendment starts out by saying that "Congress shall make no law respecting an

SCHWARTZMAN: establishment of religion." That's the Establishment Clause. And then it says, "or prohibiting

the free exercise thereof." We call that the Free Exercise Clause. And the court has body of jurisprudence under both clauses, and they're related to each other in various ways. The Establishment Clause tends to focus on government support of religion, either through symbols, or sometimes through funding-- through aid to religious organizations.

And the Free Exercise Clause often focuses on what we think of as freedom of conscience. Sometimes laws burden people's religious practice in different ways. And the question is, should the government accommodate those practices? Should it grant exemptions, for example, from general laws? And the court's jurisprudence, under both clauses, has been changing in recent years. It's been developing in important ways.

There's been a shift in the composition of the court. We've got new justices. Most recently, Justice Kavanaugh, but also Justice Gorsuch. We don't know exactly what will happen in the court's interpretation of the religion clauses of the First Amendment, the Establishment Clause and the Free Exercise Clause.

And so part of what we're thinking about, and part of what we're arguing about, is the future of the religion clauses. What's going to happen in how we govern the relationship between church and state going forward? And that's what these current debates are all about.

RISA GOLUBOFF: Can you give us a little sense, before we get to the present and the future, where we come from? What has been the baseline before?

NELSON TEBBE: Sure. I mean, the court has a substantial body of jurisprudence on-- as Micah said-- with regard to both these clauses. But it's relatively young, actually. The court didn't start to hand down decisions with respect to either Free Exercise or the Establishment Clause that were consequential until really after World War II, in the 1940s and '50s.

Once the Supreme Court decided the provisions of the First Amendment applied against the states, then the cases came kind of fast and furious. And the court had to figure out, what do these provisions entail? What do they require? Some of their entailments were fairly obvious, right? So the government can't discriminate on the basis of religion, against particular religious minorities, or really anyone.

But some of them were less clear. Here's a big one. Do religious actors get exemptions from general laws that apply to everyone else just because those laws conflict with their religious beliefs? That's been a question that the court has, as a constitutional matter, vacillated on, to

some degree, over time.

RISA GOLUBOFF: So give an example of some exemptions. What kinds of things would be an exemption?

NELSON TEBBE: Well, for example, I mean, Rich mentioned the Hobby Lobby case, right? So the Obama administration, acting under authority of the Affordable Care Act, had required all employers of a certain type, who were providing health care insurance, to include insurance for contraception for women. And Hobby Lobby said that conflicts with our religious beliefs. We don't think that that law should be applicable to us. We're not asking the court to strike down that law as applied to everyone else. We just don't think it should be applied to us because it burdens our religious convictions. So that's an exemption issue.

And at first, under the Warren Court, the court said, there is, presumptively, a constitutional right to an exemption for religious actors from general laws. But then later, in 1990, the court reversed course on that question. So then, after 1990, the court said, there is not presumptively constitutional right to exemption from general laws for religious actors.

LESLIE And that was a Justice Scalia opinion that said--

KENDRICK:

NELSON TEBBE: It was, yeah.

LESLIE --neutral, generally applicable laws, people have to follow.

KENDRICK:

NELSON TEBBE: Right. The justices who signed onto that new rule were sort of cross-cutting, in terms of ordinary political alliances and so forth. And now the thought is that maybe the court is getting ready to change course on that question again. There are a lot of complexities here, but when we're thinking about just the broad history of the Free Exercise Clause, the main point is we can see shifts. And we can look into the future and anticipate further shifts.

RISA GOLUBOFF: So what do you think they'll look like, and how far does that depart from what you think they should look like?

RICH Well, these are--

SCHRAGGER:

[LAUGHTER]

These are tough.

RISA GOLUBOFF: Nobody wants to answer that question.

MICAH We all want to answer the question.

SCHWARTZMAN:

RISA GOLUBOFF: I see, OK.

MICAH We're on-- we've written together on these issues, and one of the positions we've taken very

SCHWARTZMAN: strongly is that free exercise exemptions are permissible under certain circumstances. And in a wide array of circumstances, they're non-controversial. Listen, if it's very low-cost for the government to accommodate you, the government should if you have strong religious beliefs that conflict with government regulations.

LESLIE So wait, just on that. What's an example of that, where it's low-cost?

KENDRICK:

MICAH So there was a case about beard length in prisons. And the prison said, oh, you can't have a

SCHWARTZMAN: certain length beard. And a religious inmate, who said, no, this is part of my religious belief system to have a certain beard length, challenged that. And the court said, there's no good reason that the prison has given for why the beard length here is different. And they treated some other prisoners differently in regards to this. And said, listen, if you don't have a good reason, Government, then we-- we're not convinced that this is something that should override the religious conscience of the prisoner.

And that seems perfectly acceptable. We should try to accommodate religious believers when we can. But our position has been, when there are pretty significant costs on non-believers-- or people that don't share your religion-- and those costs are imposed on those individuals, that's a problem. And it's a problem for those individuals who have their own free exercise rights, and it's a problem from the standpoint of the government putting a thumb on the scale for one religion over another.

RISA GOLUBOFF: So I take it you think Hobby Lobby's in that category.

MICAH Yeah, so we think Hobby Lobby is wrongly decided, and have said this repeatedly, which is in

SCHWARTZMAN: the original case, there was-- the decision was based on this idea that, well, even though Hobby Lobby won't fund the contraception in this case-- or the insurance that would ultimately

be used by individuals who could choose to access contraception-- the government will fill in. There was a kind of mechanism by which the government could then get that contraception to the people that needed it without costs. It turns out, there were costs. And it turns out also, the Trump administration has moved towards just exempting religious businesses from contraception without filling that in.

So that means that's an enormous cost to the employees and their families who don't share that religion, who might have religious beliefs otherwise, who don't particularly abide by those kinds of rules. And that's an imposition of religion on those people.

LESLIE
KENDRICK: So you guys have called this a Third Party Harms argument. And the idea is that, in this case, granting an exemption to the employer imposes costs on third parties. Those parties being the employees who want access to contraception, and what's standing in their way is the religious beliefs of their employer. So how do the wedding vendor cases fit into this, into your Third Party Harm theory?

NELSON TEBBE: So the federal government and many states have statutory protections for customers. They're called Public Accommodations Laws. And they protect customers against being excluded from hotels, retail establishments, and so forth, on the basis of certain protected characteristics. Typically race, nationality, gender, and so forth.

LESLIE Religion.

KENDRICK:

NELSON TEBBE: And religion, yeah, importantly. And in Colorado, the Public Accommodations Law includes LGBT customers as part of the protected class. So there was this baker. Jack Phillips is his name. He ran a bakery called Masterpiece Cakeshop. And he encountered, one day, a gay couple-- two men-- who came into the shop, along with the mother of one of the men, to inquire about a wedding cake for their impending celebration. And when Jack Phillips saw that they were a same-sex couple, he said, I'm sorry, I can't serve you because I have religious objections to same-sex marriage. And the couple brought an action arguing that this was a violation of Colorado's Public Accommodations Law. And the state entities ruled in favor of the couple. Jack Phillips' argument was, I deserve an exemption from this regulatory regime because I have a strong religious belief that prohibits me from serving gay couples.

LESLIE
KENDRICK: So you can imagine that this-- if these types of religious exemptions were granted, then theoretically, you could have business owners that refuse to provide service on the basis of

sexual orientation or on the basis of religion, or on the basis of race, on the basis of gender, right? If you get religious exemptions from this general law, you could have a religious objection to serving people on any one of those bases, right?

MICAH We do actually have an example of this already extending out beyond LGBT status. There is
SCHWARTZMAN: an adoption service agency in South Carolina that just refuses to serve people of other faiths. If you're a Catholic or you're Jewish, this organization refuses to work with you. And they've received a waiver from the government, which allows them to discriminate according to their religious principles. And so there is an important question. If you can discriminate against gay and lesbian people, can you discriminate against other people who are also otherwise protected by public accommodations laws like the one that exists in Colorado and other states? So there is a really important line drawing question that's raised by these cases.

But I would add, it's not only that they can't get a cake, right? So one of the arguments of Masterpiece Cakeshop is that the gay couple could go down the street and get a cake from another baker. Why can't they go out and find someone else in the market who will serve them? And an important part of public accommodations law, of civil rights law, is that people should have equal citizenship, equal status in the market. We shouldn't have to try to figure out which companies, when we go out into the market, will serve us and which ones won't.

In the civil rights era, in the '50s and '60s, there was something called a Green Book. It was a guide for African-Americans to tell them which businesses would serve them and which businesses wouldn't. And we don't think that the market should work that way, that you should have to have a guide to figure out who will serve you and who will not. We should think of each other as equals when we enter into the marketplace, and we think that the religion clauses of the First Amendment help to protect that idea against challenges that are otherwise raised in the form of religious exemptions.

RICH Yeah, this is a really important point. So we talk about weddings and wedding vendors and
SCHRAGGER: that kind of stuff. But weddings are stressful and difficult and challenging, and there's some folks--

LESLIE There are people around the table who can attest to this.

KENDRICK:

RISA GOLUBOFF: What weddings do you have in mind?

[INTERPOSING VOICES]

RICH Well, you know, you go into the cake shop and your mother-in-law is behind you, and they lay
SCHRAGGER: out all the things to taste. You've been there, right? And you're tasting the brown cake and the white cake and the different flavors. And then you get into your first fight about cakes before the weddings even-- you're not even married and you're fighting about the cakes. And then you're fighting about the invitations. And then you're fighting about the tablecloths. And then you have to decide whether you're going to actually go through with it or you're just going to elope and abandon those people who are driving you guys-- and leave the mother-in-law behind, right? This is-- right? This is now. Now, add to that--

RISA GOLUBOFF: You know this podcast is for public consumption, right? You know the mother-in-law is going to be listening.

RICH I love you, Mother-in-law. You're fabulous. [INAUDIBLE] Very supportive. But you add to that--
SCHRAGGER: let's say you go in this shop and then the person tells you--

MICAH Wait, where are you eloping to? You got to go some place, right?
SCHWARTZMAN:

RICH I know, you got to go some place.
SCHRAGGER:

LESLIE Vegas.
KENDRICK:

RICH They go to Vegas. It's always Vegas.
SCHRAGGER:

MICAH In Vegas, no one will discriminate against you.
SCHWARTZMAN:

RISA GOLUBOFF: I was going to say, Vegas takes all commerce.

LESLIE All commerce, so to speak.
KENDRICK:

RICH But you might have to go to Vegas, right? Because nobody will serve you, or at least, add to

SCHRAGGER: that the stress of then they say, well, we're not part of-- we're not on board with this.

RISA GOLUBOFF: They go away and you have to go--

RICH You have to go find somebody else. And maybe there's somebody else down the street.

SCHRAGGER: Maybe there's not. But again, the claim on the other side is, listen, the religious beliefs are really important, and your stress and your mother-in-law is not so important. And you should bear that cost because religious conscience is so important.

And again, we're not saying anything about the importance of religious conscience. We believe strongly that it's quite important. But there's religious conscience on both sides here. And particularly in the marketplace, which is a distinction that we certainly draw. We're not saying that priests have to preside over same-sex marriages. That's clearly not the case. Or religious organizations have to change their religious doctrine to embrace same-sex marriage. That's, again, not the case. Those are very strict lines that we want to abide by. But we are saying when you're in the market, you've got to serve, and just serve at a basic baseline.

LESLIE So you mentioned that Masterpiece Cakeshop ended up going off on grounds that had to do
KENDRICK: with the specifics of that case, and the court didn't really get to address the issues that you guys have raised, which means those are still out there and there are other wedding vendor cases in the pipeline. Where are we on that right now?

MICAH So the Supreme Court, on Masterpiece, held that Jack Phillips was entitled, in his particular
SCHWARTZMAN: case, to refuse to serve a gay couple. And mainly because the court found that the Colorado courts had not treated him fairly. That some of the members of the Civil Rights Commission in Colorado had made statements that were biased against his religious beliefs, and it resolved the issue on that grounds.

What it didn't do-- and this is the important part-- it didn't reach the substantive question of whether, as a constitutional matter under the Free Exercise Clause of the First Amendment, Jack Phillips, or some other wedding vendor, is entitled-- has a right-- to refuse to serve gay couples because they have a religious objection to participating in a same-sex wedding celebration. And there are a lot of other cases that raise that substantive question.

There's a case pending in Washington state called Arlene Flowers, where a florist refused to provide flowers for a gay marriage. And she says, look, I'm willing to provide flowers for gay couples. I don't discriminate otherwise. But in this particular kind of case, right, when we're

dealing with weddings, I don't want to be involved in gay marriage. I can't be seen to support gay marriage. I can't be made complicit in that practice.

And there are cases involving calligraphers and videographers and B&B's that provide venues. If you're going to elope, you have to go off some hotel, some place, right? There are all these cases that are percolating in the courts. There's a case out of Arizona. There are other cases that are coming up to the court. And eventually, the Supreme Court is going to have to address this question. They're going to be forced to come back around and to reach the question that Masterpiece Cakeshop avoided.

RISA GOLUBOFF: So we've been talking about free exercise and the question of exemptions. But you guys also write about the Establishment Clause, especially in the context of monuments and statues and other symbolic expressions. And I thought maybe let's take a turn and turn toward those. So give us a little bit of a context in which those cases often come up.

RICH SCHRAGGER: So you want to talk about even more controversial subjects. It's super fraught. There's a lot of - there's a lot of strong views on all kinds of sides and the symbolic cases are really fraught too. And what we're seeing is there's a case that's-- as we're taping this-- in the court about whether a government-sponsored 40-foot cross in Bladensburg, Maryland is OK, or whether that represents an establishment of religion.

The doctrine before this has been this non-endorsement theory, which is that the government can't really-- and isn't supposed to-- state religious truths, right? The government is not supposed to endorse a particular religion or express support for it. Religion is supposed to be for-- not for the government. There's just not-- they're not supposed to be competent to express religious truth. And that goes to symbolic displays too, like a cross or some other kind of display. And that doctrine is up for grabs, too, for the reasons Micah has talked about.

And in this cross case, the Bladensburg cross case, we predict that the court will say that cross is perfectly OK. And then we have to ask, well, why is it OK? We have written together that we're not very comfortable with that kind of move. And Nelson tell us why since he's the author of all these things.

LESLIE Tell us why, Nelson.

KENDRICK:

NELSON TEBBE: Well, there are lots of ways to think about how the court could resolve cases to do with

government expression that seems to endorse religious symbols. And the one that we've been attracted to-- the one that Justice O'Connor articulated, and that Rich described-- is that it sends a message that people who don't share that religion are somehow outsiders to the democratic community.

Justice Kagan wrote an opinion in the legislative prayer case that Rich described earlier where she said, we don't want a situation where people stand before their government not as just Americans, but as Jewish Americans or Muslim Americans or Christian Americans. That's sort of antithetical to the idea of American democracy, where people just stand before their government as Americans.

So we're worried that the government's endorsement of particular religious symbols-- in this case, the cross, which is the central symbol of Christianity-- could have that kind of differentiating effect. But there are lots of ways that the court could uphold the cross and say that that's consistent with our constitutional traditions. One way is to say that the cross is actually not a religious symbol. It's a secular symbol. In this case, it was erected in the early part of the 20th century as a memorial for World War I veterans who had lived in the area of Bladensburg. And so the court could say, well, the content-- the message-- of the cross is actually a war memorial and it's not an endorsement of Christianity.

Another way would be to say, no, it is an endorsement of Christianity, but there is neutrality because the town of Bladensburg has erected other monuments around the cross that are secular in content, and they're a tribute to veterans of other kinds of conflicts. There's a Vietnam Memorial and one for other kinds of wars that are not as big as the cross, but they're scattered in the vicinity-- the general vicinity-- of the cross.

Another way, which was suggested by Justice Breyer in the oral argument about this case, would be to say it would be a problem for a town to erect a 40-foot high cross even as a war memorial today. But this cross has been around for 100 years, and it's kind of lost its ability to divide Americans. We should grandfather very old kinds of crosses.

Also, it would be, as a pragmatic matter, just divisive to start taking down war memorials all across America, right? So every cross that was like this one would have to be taken down as well. And that would be messy and would lead to lots of conflict among Americans. So we should just leave these crosses up, but recognize that it would be unconstitutional for governments to erect these kinds of memorials today.

So there are these kind of strategies that the court has explored in its case law or in dissent and so forth. And the question really isn't whether the court will strike down this cross. It probably will not. But what kind of strategy will it adopt to leave the cross in place?

LESLIE

KENDRICK:

So as we record this, it's June. It's almost the end of the Supreme Court term. We're going to get a decision about this in the next few weeks. Any predictions on which of the paths that you just laid out they're going to take?

NELSON TEBBE:

My strong sense from oral argument is that Justice Breyer will adopt this kind of grandfathering approach. And then the question is, how many justices will be drawn to it? It's conceivable, although I'm not going to predict this, but it's conceivable that Chief Justice Roberts could sign onto an opinion like that. But I'm not sure.

MICAH

SCHWARTZMAN:

The case is important for a couple of reasons. One, there's this big cross in Maryland and there's a question about whether it should stay or whether it should go. But the case has attracted more attention because it's conceivable that the court will jettison decades of Establishment Clause jurisprudence. That it will use this case to dramatically reshape the law. It will get rid of the endorsement test that Justice O'Connor laid out in the 1980s. It might do away with the idea that there have to be secular purposes. It might adopt something that's been described as a coercion test that is the state only violates the Establishment Clause when it actually forces people to engage in some religious practice.

A lot of jurisprudential change could happen here. I think what Nelson is suggesting is actually, the court will adopt a much narrower approach. This is consistent, maybe, with what Chief Justice Roberts has been doing more recently, which is to take a more minimal, case-by-case approach to controversial areas, and to do things slowly, not to make dramatic reforms in the doctrine.

But the Establishment Clause has long been thought to be chaotic. There are a lot of different tests that are floating around out there for determining when there's been an establishment clause violation. And especially among conservatives, there is a demand that the court clean up this area of the law and provide a clearer test. So the question is-- part of the question, anyway-- is whether the court will take this as an invitation to do that, or will it reach the conclusion that the cross can stay on much narrower case-specific grounds.

And I think we're all predicting that the decision will be narrower. But there is this possibility-- and the strong likelihood is we'll see versions of these more radical arguments represented in

concurring opinions.

RISA GOLUBOFF: As you suggest, a lot of it rides on Roberts, right? On what attitude he takes toward the case.

MICAH Yes. Although, because-- as Nelson mentioned-- Justice Breyer has a particular view, I think
SCHWARTZMAN: he can make a difference in the outcome of this case. As interesting as what the conservatives will do and how they'll divide-- whether Chief Justice Roberts will agree with his more conservative colleagues-- is a question of what will the more liberal and progressive justices do in this case? And I think we're expecting Justice Breyer, maybe Justice Kagan, to join a majority opinion allowing the cross to stay. And if I had to guess, I would expect that we'll see dissenting opinions from Justice Sotomayor and Justice Ginsburg.

And I think, among liberals and progressives, there is a question of, how should dissenting justices approach this question, or justices who are uncomfortable with the direction that the Establishment Clause is heading in? I've argued-- Nelson and I have argued that those justices should stake out strong dissenting positions, and should lay out, for the future, an understanding of the Establishment Clause that protects equal citizenship. And that says, look, the government has no business endorsing the primary symbols of a particular religious faith, and here it's a cross.

There have been some arguments-- and Nelson, again, mentioned one of these arguments-- that the cross is really a secular symbol. And I think that's a stunning claim. Justice Scalia said something like this in a case called *Salazar against Buono* in an exchange with an ACLU lawyer-- a Jewish lawyer named Peter Eliasberg, whose father was a veteran, where he says, the cross is a war memorial, a secular memorial. And Eliasberg says to him, I've never seen a cross on the tombstone of a Jewish veteran. There was laughter in the courtroom and Scalia was outraged by the laughter, I think. And he said, no, no, no, that's not right. These crosses represent all the war dead. And Eliasberg said, no, they don't. They don't represent Jewish war dead. Crosses don't represent Jews.

And there is an obvious reason for that. It's the central symbol of Christianity. And those symbols don't represent the faiths of Jewish veterans. And that principle is playing out here too. There is a question about what's the meaning of the symbol.

RISA GOLUBOFF: And my understanding is that there are Christians who would also say, no, they don't, right?
The cross is the central symbol of Christianity, and to call it a secular symbol would also be

demeaning of Christianity, right? And wouldn't accurately represent their view of their own religion.

MICAH

I think that's right. There would be religious arguments on both sides about the meaning of the

SCHWARTZMAN:

symbol, and Christians might object to this understanding of it. That it trivializes the cross to describe it in this way, as emptied of religious content, as just a secular symbol.

The other thing I would say-- and this is more specific to the facts of the Bladensburg cross case, and it will be interesting to see how the court deals with this. But there's evidence that, of course, there were Jewish soldiers in War World I, and none of their names are on the plaque in Bladensburg, even though some of the names on that plaque come from Baltimore or from other areas around that jurisdiction. And then there's a question, when they decided to use a cross, did they also limit the group of soldiers who it represents?

RICH

SCHRAGGER:

Yeah, the cross case is part of a larger and a long-running-- and we've talked a little bit about this-- a long-running question about religious expression in the public square. So there are certainly justices on the court now-- I don't know how many-- who have critiqued the endorsement test in the past, and would certainly be eager to abandon it going forward. What they're left with is, then-- Micah mentioned this-- this coercion test, which just says well, there are no public symbols that would violate the Establishment Clause. You can put crosses up anywhere you want, or other religious symbols. What's objectionable is if you force people to pray, or you force people to go to church, or you force people to pay taxes to a church they don't believe in-- those kinds of things. That could open the door to lots of religious symbols in the public square that are dominated by certain kinds of religious majorities.

NELSON TEBBE:

There's also a live example that I think carries a lot of power for justices across the spectrum of a place where government expression itself on religious questions is definitely unconstitutional. And that is the example of Great Britain, right? So Great Britain has an established church, right? The Anglican Church is the Church of England, right? And if the justices agree on anything, I would expect they would agree that we can't do that in America, right?

And the Anglican Church is very tolerant, right? So religious freedom is robustly protected. In Britain, much has stipulated that that's true. I think it is true. So this is really just pure expression, and it's even maybe accompanied by other expression that says, everybody is welcome in Great Britain, right? So people of all religious faiths are welcome and we have an

established church.

And I think the justices would all agree that you can't do that in America, but it is purely expressive in some sense. There is some money as well, but I think today, it's like a-- it's just something that the-- you know, the nation has endorsed as an official matter. And you can't do that in America. So if you're going to hold onto that intuition, which I think the justices must, then you have to articulate an establishment clause rule or doctrine that accounts for that. And the coercion test doesn't seem to account for it because the Church of England is not coercive, they're not proselytizing. And yet, definitely unconstitutional, right? It's like the actual establishment.

MICAH Look, the court just has lots of religion cases coming to it now, right? There's going to be a lot
SCHWARTZMAN: of action on church-state doctrine. We're going to see establishment clause cases going forward, we're going to see free exercise cases going forward. There's going to be a lot of change coming our way. And we're all struggling and trying to think about what it's going to look like.

LESLIE So you've laid out some of those issues for us, but we're going to see even more, and TSS is
KENDRICK: going to be very busy for the foreseeable future. Is that right?

MICAH We're in business.
SCHWARTZMAN:

[LAUGHTER]

[MUSIC PLAYING]

RISA GOLUBOFF: Well, thank you all for being here.

LESLIE Thank you.
KENDRICK:

RISA GOLUBOFF: Especially Nelson, who traveled the furthest.

NELSON TEBBE: Thanks very much.

RICH Thanks for having us.
SCHRAGGER:

MICAH We finally made it.

SCHWARTZMAN:

RICH I know, it was really exciting.

SCHRAGGER:

RISA GOLUBOFF: Was it all it was cracked up to be?

RICH Yes. I'm star struck.

SCHRAGGER:

RISA GOLUBOFF: If you're lucky, we'll have you back.

[MUSIC PLAYING]

LESLIE So we covered a lot of ground, including the predictions of TSS on what will happen on the

KENDRICK: Bladensburg cross case. That's *American Legion versus American Humanist Association*, which the Supreme Court should be handing down imminently.

RISA GOLUBOFF: Imminently. In fact, by the time you listen to this, they may have already done it, so you'll be able to tell whether those predictions were right and which ones.

LESLIE Yep.

KENDRICK:

RISA GOLUBOFF: And of course, thinking about the future, the wedding vendor cases aren't over either, and I want to go back a little bit to Masterpiece Cakeshop. We don't actually know not only what will they do in religion, but even whether those will be religion cases. Because we often think that legal cases, or constitutional cases, are only really about one issue and they're not. And you actually brief lots of issues, and the court might address multiple issues.

And in that case, there were free speech concerns as well as religion issues, and I think those will continue. And in fact, you and Micah co-wrote an article in the *Harvard Law Review* about Masterpiece Cakeshop, where you talked about the free speech aspects and he was talking about the religion aspects. Can you say a little bit more about what those were, and what you wrote about?

LESLIE Yeah. So they were both Free Exercise arguments and First Amendment freedom of speech

KENDRICK: arguments made by the litigant in Masterpiece Cakeshop. And it wasn't really clear during the litigation which of these the case was going to wind up being about. Is this going to be a case about freedom of religion, or is this going to be a case about freedom of speech? Both claims are active at the same time.

So Micah and I ended up writing a piece talking about both of those things. It ended up being more of a religion case than a speech case, but it could have gone either way.

RISA GOLUBOFF: So what were the speech issues in Masterpiece Cakeshop?

LESLIE The claim by the baker is that a cake is expressive. It's an expressive product. So baking a
KENDRICK: wedding cake is speech. And so a public accommodations law that says you have to serve gay customers is tantamount to saying you have to provide this expressive product that you disagree with. So the claim is that being forced to provide this cake is a form of compelled speech under the First Amendment, like the paradigm cases, children being forced to say the Pledge of Allegiance, which the Supreme Court ultimately determined that that's unconstitutional.

RISA GOLUBOFF: And so what did the court say?

LESLIE So Justice Kennedy, writing for the majority, waved his hands at this and said, there are
KENDRICK: serious issues that come up with this. And it's not really clear what the stopping point would be of calling something like cake-baking speech. But there also complicating factors about how customized the cake is and that kind of thing. So he suggested the kind of anarchy problem that might come about by saying that lots and lots of commercial services are actually speech. But they end up not going down that road, not trying to resolve any of those issues. They, instead, turn to the religious claims.

But free speech and religion claims do sometimes come up together. And I think you're right, that within constitutional litigation, sometimes you never know where the blow may fall. You don't know what it is that the court's going to pick up on, and litigants have lots of reasons to look through the Constitution to find various claims that they could make that frame the issue that they're having a little differently.

RISA GOLUBOFF: And there's lots of litigation strategy by lawyers as to whether you really focus in on one main argument, or you throw the kitchen sink and you offer lots of different arguments about it. And these kinds of cases, I think, certainly have multiple arguments trying to appeal to different

kinds of concerns and different justices.

LESLIE That's right. And they have had that for a long time. So just back to the Pledge of Allegiance cases, that issue first came to the Supreme Court in the late 1930s. And the issue of children having to say the Pledge of Allegiance on pain of suspension or whatnot, that was first framed as a religion claim. And the court said--

RISA GOLUBOFF: They were Jehovah's Witnesses.

LESLIE They were Jehovah's Witnesses. They said, we don't-- it's a form of idolatry to have to salute and pledge the flag. And the Supreme Court rejected the claim. And then just a few years later, in 1943, in the Barnett case, they picked up on the speech side of this and said this is a form of compelled speech. But there were religion claims and speech claims from the very beginning in this line of cases that Masterpiece Cakeshop is a part of.

RISA GOLUBOFF: It sounds like your collaboration with your husband in writing an article together went more smoothly than my collaboration recently with my husband when we were writing about Obama and the Supreme Court. But that's for another day. That was totally fun to do that with TSS.

LESLIE That was really fun. More fun than writing an article, really. I mean, writing an article was fun.
KENDRICK:

RISA GOLUBOFF: I agree.

LESLIE But this was more fun, yeah. Yeah.

KENDRICK:

RISA GOLUBOFF: Absolutely. Although I do feel a little sense of loss because I feel like our podcast time was kind of mysterious and separate, and now they've seen behind the curtain.

LESLIE What we actually do when we go off to do the podcast.

KENDRICK:

RISA GOLUBOFF: Exactly. I worry about that.

LESLIE I think Rich was more interested in what was happening. I think Micah was just like, whatever.

KENDRICK: Just go-- I'll see you when you get back.

RISA GOLUBOFF: Yeah, but I think maybe they also know it takes less time than we had said, and so now we're

going to come up with other excuses when--

LESLIE Shoot.

KENDRICK:

RISA GOLUBOFF: --we're, oh, I'm too busy. I'm out there doing the podcast.

[LAUGHTER]

LESLIE Well, we can tell them it's not always as fun and smooth as it is when you have TSS as guests,

KENDRICK: right?

RISA GOLUBOFF: That's exactly right.

LESLIE They saw the apex.

KENDRICK:

RISA GOLUBOFF: What a pleasure.

[LAUGHTER]

Well, thank you all for joining us. That's it for this episode of *Common Law*. We'd love to hear from any listeners who are not married to us, so please leave us a review and some stars on Apple podcasts, Spotify, or wherever you listen to the show.

LESLIE Or you could tweet at us @CommonLawUVA.

KENDRICK:

RISA GOLUBOFF: The show is produced by Tyler Ambrose, Robert Armengol, Tony Field, and Mary Wood.

Special thanks to the *Virginia Quarterly Review* and Virginia Humanities, where this episode was recorded. I'm Risa Goluboff.

LESLIE And I'm Leslie Kendrick. Please join us next time for our season finale.

KENDRICK:

RISA GOLUBOFF: Season finale.

LESLIE I know. And stay tuned for a new round of shows and a new theme on our second season,

KENDRICK: coming up in the fall.

[MUSIC PLAYING]