RECONCILING THE SUPREME COURT'S FOUR ESTABLISHMENT CLAUSES

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It is by now axiomatic that the Supreme Court's Establishment Clause jurisprudence is a mess—both hopelessly confused and deeply contradictory. On a purely doctrinal level, the Court cannot even settle on one standard to apply in all Establishment Clause cases. At some point during the last ten years, one or more of the nine Justices have articulated ten different Establishment Clause standards. Many of the Justices have endorsed several different—and often conflicting—constitutional standards. Justice O'Connor alone authored or signed opinions that relied on five different (and again, often contradictory) standards for enforcing the Establishment Clause.

The situation is even more confused at the theoretical level. In cases involving verbal and symbolic governmental endorsement of religion, the Court has not moved noticeably from the separationist theory that the Court first staked out in the 1940s and reinforced in the school prayer decisions in the 1960s. Aside from brief deviations to approve the hiring of legislative chaplains, the state promotion of secularized Christmas displays, and a longstanding Ten Commandments display, the Court has been remarkably steadfast in resisting attempts by government officials to advance religion symbolically or

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1 See infra notes 11-157 and accompanying text.

2 See Engel v. Vitale, 370 U.S. 421, 430 (1962) ("Under [the First] Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity."); Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947) ("Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbelief, for church attendance or non-attendance.").


verbally. Especially when the symbolic or verbal endorsement occurs in a public school, the Court has repeatedly emphasized that the no-establishment command means literally no establishment.

In other types of Establishment Clause cases, however, the Court has essentially abandoned any effort to separate church and state. In its recent school-funding decisions, the Court has announced that the Constitution permits substantial infusions of government money into overtly religious private education and sectarian social services. The Court has constructed various diaphanous screens to mask the transfer of funds, but as a matter of economic reality, the Court has renounced Madison’s axiom that religious liberty is violated when the government “can force a citizen to contribute three pence only of his property for the support of any one establishment.” These recent financing cases are infused with the spirit of what Chief Justice Burger used to call “benevolent neutrality” and directly contradict the Court’s assertion fifty years earlier that “[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions.” On the other hand, this embrace of sectarian favoritism has been made more complicated recently by the Court’s apparent willingness to permit states to embrace policies regarding church/state financing that are significantly more separationist than what the Establishment Clause now requires. These contrasting rulings may portend the Court’s adoption of federal constitutional rules that largely deconstitutionalize church/state doctrine, leaving religious and secular groups free to fight it out in the political process of each state, to determine the extent to which each state’s population will permit government to use its coercive powers of taxation and regulation to support religious institutions.

At the deepest level, these inconsistencies in the Court’s church/state jurisprudence can be attributed to serious internal con-


7 Everson, 330 U.S. at app. 65-66 (1947) (Rulledge, J., dissenting) (quoting James Madison, Memorial and Remonstrance Against Religious Assessments ¶ 3 (1785)).

8 See Walz v. Tax Comm’n, 397 U.S. 664, 669 (1970) (“Short of [] expressly proscribed governmental acts there is room [in the Religion Clauses] for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.”).

9 Everson, 330 U.S. at 16.

flicts over the essential meaning of the Establishment Clause. The Justices in the middle of the recent church/state controversies on the Court—that is, the Justices who have taken a separationist stance in endorsement cases, but then abandoned that position in the financing cases—have been unwilling or unable to make the most basic determination about the nature of government in the American constitutional system. That determination turns on whether the nature of government is secular or theocratic. Their failure to resolve this most basic issue makes it doubtful that the present Court will ever produce a coherent Establishment Clause doctrine.

After reviewing the problematic Establishment Clause landscape created by the modern Supreme Court, this Article will turn to the basic issue concerning the nature of the government created by the American Constitution. Three premises frame the following discussion. The first premise is that the Court will never be able to articulate a coherent body of Establishment Clause doctrine or theory without first making the crucial choice between a secular and theocratic government. The second premise is that the choice between a secular and theocratic government will largely settle most doctrinal and theoretical disputes, because there is no logical half-measure between these two mutually exclusive political species. Government cannot be a semi-theocracy. More precisely, it is impossible to logically structure a semi-theocratic form of government. Aside from a few necessary restrictions on the means by which a theocracy may punish or oppress religious dissenters, there is no reason why a constitutional structure that permits government to be a weak theocracy should not also tolerate a government that is a strong theocracy. Once the Establishment Clause is interpreted in a way that permits government to base its policies on specifically religious goals that advance the cause of a particular religious enterprise, the nature of those goals and the vigor with which the religious and political majority pursues them should not be a matter of constitutional concern. In such a system, only an outright mandate that religious dissenters must worship the majority's particular God in a particular way—which would violate free exercise and free speech protections—would violate the Constitution.

The third, and final, premise of the following discussion is that any interpretation of the Establishment Clause that would permit a mild or strong theocratic government would also contradict the basic structure of democracy, as set forth in the Constitution. This premise rests on the assumption that the governmental structure described in the American Constitution is derived from certain basic notions of democracy, among which are the demands that all power be both temporal and temporary. A properly democratic government must therefore be defined by both political and religious agnosticism—a renunciation of the idea that any political majority is permitted to de-
fine and enforce any set of absolute political or religious truths. According to this theory, a system of theocratic majoritarianism is not only contrary to the basic themes set forth in the Establishment Clause and the Bill of Rights, but is also contrary to the basic theoretical requisites of any proper constitutional democracy.

I. TEN STANDARDS IN SEARCH OF AN ESTABLISHMENT CLAUSE

Current Establishment Clause doctrine and theory is a hopeless muddle at every level of analysis. From a doctrinal standpoint, the modern Court’s approach to the Establishment Clause fails to meet even the most mundane requirement of doctrinal clarity. From a theoretical standpoint, the Court has failed to achieve even a rudimentary level of consistency in its First Amendment pronouncements regarding church and state. Lower court judges often cannot even determine which standard the Supreme Court’s current majority wants them to apply, because presently, a majority of the Court cannot settle on one standard that should apply in all Establishment Clause cases. At one point or another in recent years, one or more of the nine Justices have signed opinions proposing ten different standards for enforcing the Establishment Clause. Thus, the lower courts are frequently forced to apply several different constitutional standards, while pretending that each of the chosen standards magically produces the same constitutional result.

It would be bad enough if the Justices simply could not agree among themselves about which test to use in adjudicating Establishment Clause cases, but this unsatisfactory state of affairs is made even worse by the fact that some Justices seem to be personally conflicted about which standard they prefer. In recent years, Justice O’Connor was the worst offender in this respect. She either authored or joined opinions embracing no fewer than six different Establishment Clause

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11 For a discussion of the ten different standards, see infra notes 22–157 and accompanying text.

12 See, e.g., Mellen v. Bunting, 327 F.3d 355, 370–76 (4th Cir. 2003) (analyzing the Lemon, endorsement, and coercion tests to strike down supper prayer at a state-operated military college); DeStefano v. Emergency Hous. Group, Inc., 247 F.3d 397, 410–19, 423 (2d Cir. 2001) (applying the Lemon, endorsement, coercion, and neutrality tests, and holding that the Establishment Clause would be violated if a government facility incorporated the religiously-based Alcohics Anonymous treatment plan); Doe v. Beaumont Indep. Sch. Dist., 240 F.3d 462, 473 (5th Cir. 2001) (remanding for the factual assessment of a public school’s clergy-in-school program, after applying the Lemon, endorsement, and coercion tests); Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 343, 349 (5th Cir. 1999) (striking down an anti-evolution disclaimer read to students before the teaching of evolution in public schools, after applying the Lemon, endorsement, and coercion tests; noting that the court’s “multi-test analysis in past cases has resulted from an Establishment Clause jurisprudence rife with confusion”); Turner v. Hickman, 342 F. Supp. 2d 887, 893, 894 n.5 (E.D. Cal. 2004) (discussing various tests and the situations in which they apply and/or overlap).
standards—including one opinion in which she argued that there should be no consistent standard at all. Justice O'Connor has not been alone in sending mixed signals, however. Justice Kennedy has embraced four different Establishment Clause standards. Chief Justice Rehnquist embraced three standards, although his list of doctrinal preferences was somewhat different than Justice Kennedy's and very different than Justice O'Connor's. And with Justice O'Connor's departure from the Court, Justice Breyer may have taken up the mantle of the Justice most conflicted about the Establishment Clause's meaning. The disagreement among these Justices would not necessarily be a problem, except that the votes in Establishment Clause cases are now very close, and one of these Justices usually provides the majority's winning margin. To cite just one area of frequent Establishment Clause litigation, Justices Kennedy, O'Connor, and Rehnquist provided three of the five votes for the majority in recent decisions upholding government financing of private religious schools. In contrast, two of these Justices provided the winning margin in votes to strike down various manifestations of public school


14 Bd. of Educ. of Kiryas Joel Vill. v. Grumet, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring) (arguing that the Court should abandon the effort to articulate one standard for Establishment Clause cases in favor of an ad hoc approach that turns on the factual circumstances of each case).

15 See Zelman, 536 U.S. at 662-63 (joining Chief Justice Rehnquist's opinion based on a formal neutrality standard); Santa Fe, 530 U.S. at 314 (2000) (joining Justice Stevens' majority opinion applying the Lemon analysis); Lee, 505 U.S. at 596-99 (authoring the majority opinion in which he applied a broad coercion analysis); County of Allegheny v. ACLU, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in part and dissenting in part) (applying a narrow coercion analysis).

16 See Zelman, 536 U.S. at 651-52 (2002) (arguing in favor of a formal neutrality analysis); Lee, 505 U.S. at 631 (joining Justice Scalia's dissenting opinion and arguing in favor of a narrow coercion analysis); Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (arguing in favor of a nonpreferential standard, under which the government can establish religion generally, as long as it refrains from establishing a particular church).

17 See Van Orden v. Perry, 125 S. Ct. 2854, 2869 (2005) (Breyer, J., concurring) (arguing that the Court should abandon the effort to define a consistent analysis for Establishment Clause cases, in favor of an ad hoc analysis to pursue general goals of disestablishment).

18 See Zelman, 536 U.S. at 662-63 (upholding a Cleveland school voucher program); Agostini v. Felton, 521 U.S. 203, 240 (1997) (upholding a government program providing remedial education services to religious schools).
prayer activities, such as graduation ceremonies and football games. Justice Breyer alone was responsible for distinguishing between one Ten Commandments display and another. The lower courts may be forgiven for wondering what they are supposed to make of this mess. Many of them have simply given up in trying to identify one standard to follow in Establishment Clause cases, in favor of applying a random sampling of standards from the Supreme Court’s Establishment Clause church/state smorgasbord.

The situation is actually far worse than this brief description indicates, because several of the ten standards currently commanding support on the Supreme Court mean different things to different Justices. Some of the more prominent standards have been so twisted and manipulated over the years to fit the Supreme Court’s shifting ideological center of gravity that they may now be susceptible to virtually any meaning—which is another way of saying that they do not mean anything at all. The unfortunate reality is that the Court cannot settle on one standard (or a definitive meaning of one standard), because members of the Court are deeply conflicted about what any of these standards are supposed to achieve. This internal conflict over purposes and objectives is reflected in a constitutional doctrine that more often resembles a Rorschach test than a definitive legal analysis.

The simplest way to illustrate the sad state of current Establishment Clause doctrine is to review the range of standards competing for influence within the Court. Even the most cursory review of how the Court has applied and explained these standards will reveal the fissures within the Court as a whole and the conflicting inclinations of individual Justices regarding the proper relationship of religion and government within the American constitutional scheme. After reviewing the various Establishment Clause standards, the next Section will turn to the even deeper underlying conflicts within the Court over the basic theory of church and state.

A. The Lemon Test

No review of Establishment Clause standards could proceed without first addressing the much-maligned three-part test first an-

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19 See Santa Fe, 530 U.S. at 317 (barring prayers during public high school football games); Lee, 505 U.S. at 599 (ending a practice of prayer before a public high school graduation).
20 See Van Orden, 125 S. Ct. at 2872 (Breyer, J., concurring) (voting to uphold the display); McCreary County v. ACLU, 125 S. Ct. 2722, 2727 (2005) (joining the majority in striking down the display).
21 See supra note 12.
22 The notorious Lemon test is the best example of this phenomenon. See infra notes 32–37 and accompanying text.
nounced in *Lemon v. Kurtzman*. In this 1971 decision, Chief Justice Burger introduced the test by noting that "over many years" the Court had developed several "cumulative criteria" for assessing compliance with the Establishment Clause. Chief Justice Burger singled out three such "cumulative criteria" as especially important: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster 'an excessive government entanglement with religion.'" These three factors became known as the *Lemon* test, which has been the primary focus of virtually all of the Court's subsequent Establishment Clause decisions.

Two of the three components of the *Lemon* test had been part of the Supreme Court's jurisprudence for almost a decade prior to *Lemon*. Notwithstanding the ancestry and longevity of the *Lemon* criteria, conservatives inside and outside the Court have been both urging and predicting the demise of the *Lemon* test almost since the test's inception. Even the test's author seemed ambivalent about his creation. Almost immediately after he announced the test, Chief Justice Burger began diminishing its importance, arguing at one point that all Establishment Clause standards "should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired." Chief Justice Burger went on to cite *Lemon* for the proposition that "candor compels the acknowledgement that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication." Other Justices have expressed an even more intense aversion to *Lemon*. Then-Justice Rehnquist once rejected the *Lemon* test on the ground that it "has no basis in the history of the [First] Amendment it seeks to interpret, is difficult to apply and yields unprincipled results." Justice Scalia has also repeatedly ridiculed

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23 403 U.S. 602 (1971).
24 *Id.* at 612.
25 *Id.* at 612-13 (citation omitted).
29 *Id.*
30 *Wallace*, 472 U.S. at 112 (Rehnquist, J., dissenting).
Lemon and once provided perhaps the most grandiloquent expression of the conservatives' derisive sentiments about that opinion: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school [board] attorneys . . . ."

There are multiple levels of irony in the vociferous opposition to Lemon among the Court's conservatives. After all, one of the Court's most conservative members authored the opinion that gave us the Lemon test, and Chief Justice Burger's ideological descendants have had no problem co-opting Lemon for their own distinctly nonseparationist objectives. In Agostini v. Felton,\textsuperscript{32} for example, the conservatives abandoned the third (no entanglement) prong of the Lemon test by subsuming it into the secular effect analysis.\textsuperscript{33} In Zelman, the same faction on the Court went even further and simply reduced the entire Lemon test to a broad neutrality requirement.\textsuperscript{34} Two years earlier, the implications of this approach were made clear when four of the conservatives voted in Mitchell v. Helms\textsuperscript{35} to uphold direct allocations of government money to pervasively religious schools—even if the schools openly divert the government funds to finance their distinctly religious activities.\textsuperscript{36} Given the ease with which the Lemon test can be manipulated to serve almost any purpose, perhaps Justice Scalia is correct in noting that "[t]he secret of the Lemon test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will."\textsuperscript{37} But if that is the case, then what explains the historic (and in Justice Scalia's case, histrionic) resistance to an infinitely malleable opinion?

One suspects that the desire expressed frequently by Justice Scalia and others on the Court to kill off Lemon once and for all reflects

\textsuperscript{32} 521 U.S. 203 (1997).
\textsuperscript{33} Id. at 222–23.
\textsuperscript{34} 536 U.S. 639, 649–52 (2002) (citing the truncated Agostini version of the Lemon test, reviewing various cases that applied Lemon, and concluding that these decisions "make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause").
\textsuperscript{35} 530 U.S. 793 (2000).
\textsuperscript{36} Id. at 824 (arguing that the Establishment Clause is not concerned with the divertibility of funds); Id. at 827–28 (arguing that the Establishment Clause does not prohibit the government from funding pervasively sectarian schools).
their recognition that something in *Lemon* is inherently hostile to the cause of comprehensively integrating church and state. There are two aspects of *Lemon* that may lead them to this conclusion. First, the general tenor of the *Lemon* test distresses conservatives because the tenor of the *Lemon* test is unmistakably secular and separationist. The requirement that all government policies must have a nonreligious purpose and effect can only be explained by reference to an overriding theme that the government must be comprehensively secular. And the best explanation for the prohibition on government entanglement with religion is the normative conclusion that religion should be entirely a private matter and that religion and government should keep their distance from each other.

These principles permeate *Lemon*, no matter how imperfectly the Court has applied the test, and the deeply secularist overtones of *Lemon* unsettle those on the Court who would have the government acknowledge and reflect the political majority's religiosity. Although this faction on the Court has temporarily reached a concordat with the legacy of *Lemon*, members of this faction will never be completely at ease with the principles reflected in *Lemon*. Rejecting *Lemon* outright would, however, require the Court to explain why sectarian legislation is compatible with a constitutional ban on religious establishment. If a religious majority may use its political power to impose its sectarian values on the religious minority, then what is left of the constitutional command that the government avoid any actions "respecting an establishment of religion"? Since the critical fifth member of the Court's conservative bloc has not yet come to terms with this conclusion (a subject that will be addressed in Section II, infra), for the immediate future the Court's majority will hold *Lemon* hostage, but will refrain from executing it.

The second aspect of *Lemon*, the secular purpose requirement, makes conservatives nervous in two different respects. First, as noted in the previous paragraph, conservative opponents of *Lemon* do not like being told that those who run the government have no authority to use their political power to advance their religious objectives. This branch of sectarian opposition to *Lemon* perceives itself to be the victim of an antidemocratic purge of religious believers from government. The rhetoric used to explain this perspective thus frequently conflates limitations on the exercise of power with the total exclusion from power. In Richard John Neuhaus's rendition of this point, he argues that "we have in recent decades systematically excluded from policy consideration the operatives [sic] values of the American people, values that are overwhelmingly grounded in religious belief."

Although this position probably has a certain political appeal in helping to rouse feelings of victimization among those who would have the government behave in sectarian ways, these feelings are to a large extent both inaccurate and unjustified.

The sectarian perception of victimization is inaccurate because prohibiting a political faction from exercising unfettered power does not deny that faction access to the same constitutional authority exercised by their opponents. To cite an unflattering analogy, Strom Thurmond and his sympathizers constitutionally were prohibited from enacting segregationist legislation after the Supreme Court decided *Brown v. Board of Education,* but they were not ejected from the United States Senate or otherwise prohibited from exercising political power. Similarly, the Establishment Clause does not bar evangelical Christians from office, it simply prohibits evangelical Christians from using the government to support or endorse their church. This is how a system of limited constitutional government works. Certain matters are taken off the political table—or “excluded from policy consideration,” to use Neuhaus’s terms—in order to ensure that multiple different political, social, and cultural factions can coexist peacefully. The cultural and political majority’s consolation for conceding total political power is that all religious factions are protected to the same extent. The same limitations that inhibit evangelical Christians also protect them against legislation incorporating the views of other religious sects or, for that matter, atheists.

The claim that religious practitioners are victimized is not only inaccurate; it is also unjustified. There is no empirical support for the proposition that strong Establishment Clause protection against sectarian government action has led to the exclusion of religious believers from achieving high political office or prevented believers from defending their religious ideals once they get there. No one observing, for example, the ostentatiously pious political response to the recent controversy over the Pledge of Allegiance would think that religious proponents are inadequately represented in the nation’s centers of political power.

However overwrought these responses to the *Lemon* secular purpose requirement may be, at least they forthrightly acknowledge that opposition to the secular purpose requirement is based on opposi-

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After a Ninth Circuit Court of Appeals panel held that the inclusion of the words “under God” in the Pledge of Allegiance violated the Establishment Clause, the United States Senate voted 99-0 in favor of a resolution denouncing the court and instructing Senate lawyers to file a brief seeking reversal of the court of appeals. See 148 CONG. REC. S6105-06 (2002) (listing the votes in favor of S. Res. 292, 107th Cong. (2002) (enacted)). The House of Representatives passed a similar resolution by a vote of 416-3. See 148 CONG. REC. H4135 (2002) (detailing the results of the vote on H.R. Res. 459, 107th Cong. (2002) (enacted)).
tion to the entire notion of secular government. A second set of responses to the secular purpose requirement, however, seems to be based on the desire to cloak religiously based legislation in a thin secular guise. The secular purpose requirement is problematic from this perspective on sectarian governance because the secular purpose requirement gives the Court a mechanism with which to reject duplicitous governmental efforts to advance religion.

The Court’s prohibition of government efforts to inject the religious doctrine of creationism into public school classrooms provides the best example of how the Court can use the first Lemon prong to prevent the government from surreptitiously advancing a sectarian agenda. In Edwards v. Aguillard, the most recent of the Court’s creationism cases, the Court reviewed a Louisiana statute requiring state public school teachers to teach “creation science” whenever they taught evolution. The legislature defended this legislation as serving the legitimate secular purpose of protecting academic freedom. The Supreme Court rejected this claim, noting that “[w]hile the Court is normally deferential to a State’s articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham.” After analyzing the religious background of the controversy between evolution and creationism and reviewing the preferences for religion embedded in the Louisiana legislative history, the Court concluded that the Louisiana statute was “designed either to promote the theory of creation science which embodies a particular religious tenet by requiring that creation science be taught whenever evolution is taught or to prohibit the teaching of a scientific theory disfavored by certain religious sects.”

In his dissent, Justice Scalia responded to the majority’s conclusion by attacking the standard that gave the Court the authority to review the legislature’s purpose at all: “Our cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held unconstitutional.”

42 See Edwards, 482 U.S. at 581 (quoting LA. REV. STAT. ANN. §§ 17:286.1–7 (1982) (forbidding the teaching of evolution in public schools that do not teach creationism as well)).
43 Id.
44 Id. at 586–87.
45 See id. at 590–91 (discussing religious antagonism toward evolution).
46 See id. at 587–89 (chronicling legislators’ attempts to prevent the teaching of evolution in public schools).
47 Id. at 593.
48 Id. at 636 (Scalia, J., dissenting).
argued that the Court should abandon the *Lemon* secular purpose prong and simply take the legislature's stated purpose at face value.\(^{49}\) Thus, he concluded that the Louisiana legislature is entitled "to have whatever scientific evidence there may be against evolution presented in their schools,"\(^{50}\) even if the "scientific evidence" is little more than a faith-based theory that is devoid of empirical support and is overwhelmingly rejected by mainstream scientists. From Justice Scalia's perspective, the notion that a Supreme Being created the world in essentially its present form should be construed as a secular scientific conclusion, simply because the legislature said so.

Justice Scalia has joined the recent efforts of other conservatives to retain the *Lemon* test but subsume it into a broad and lenient neutrality analysis.\(^{51}\) One suspects, however, that at the first opportunity, Justice Scalia would happily return to his previous stance and renounce *Lemon* once and for all.\(^{52}\) In any event, even if *Lemon* is never formally interred, future generations of sectarian Justices can pretty much do what they want anyway. Justice Scalia's scientific understanding may be lacking,\(^{53}\) but he is correct to note that *Lemon* has always been notoriously pliable. Even a brief perusal of the Court's pre-*Zelman* school financing decisions will reveal the ease with which *Lemon* can be translated into both the proposition X and its polar opposite.\(^{54}\) This flexibility should not be viewed as a flaw inherent in the *Lemon* test itself. In contrast to the views expressed by Justice Scalia and other like-minded critics, *Lemon* could be an effective tool in enforcing the Establishment Clause, especially if its terms were bolstered by something like the "least religious means" analysis once

\(^{49}\) See id. at 639 ("Given the many hazards involved in assessing the subjective intent of governmental decisionmakers, the first prong of *Lemon* is defensible, I think, only if the text of the Establishment Clause demands it. That is surely not the case.").

\(^{50}\) Id. at 634.

\(^{51}\) See infra notes 95-112 and the accompanying text.

\(^{52}\) See McGreary County v. ACLU, 125 S. Ct. 2722, 2751 (2005) (Scalia, J., dissenting) (referring to the "brain-spun 'Lemon test,'" and arguing that a majority of the Court has repudiated the test).


\(^{54}\) See Mitchell v. Helms, 530 U.S. 793 (2000) (applying *Lemon* to uphold a government program providing government funds to purchase educational materials such as computers for private religious schools); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (applying *Lemon* to uphold a program providing state-financed sign language interpreters to students attending religious schools); Sch. Dist. v. Ball, 473 U.S. 373 (1985) (applying *Lemon* to prohibit teachers employed by public schools from conducting "enrichment" classes in private schools); Aguilar v. Felton, 473 U.S. 402 (1985) (applying *Lemon* to prohibit state use of federal education grants to finance remedial instruction at private schools); Wolman v. Walter, 433 U.S. 229 (1977) (applying *Lemon* to prohibit the state from loaning secular teaching materials to parents of children in religious schools); Meek v. Pittenger, 421 U.S. 349 (1975) (applying *Lemon* to prohibit the state from providing instructional materials and auxiliary services to private schools).
suggested by Justice Brennan.\textsuperscript{55} But this assumes that the Court is serious about enforcing a coherent view of the secular governance mandate at the heart of a properly interpreted Establishment Clause. Without such a theory, \textit{Lemon} will never mean anything more or less than what each new beholder wants it to mean. This conclusion does not, alas, distinguish \textit{Lemon} from the various alternatives competing to be deemed the dominant Establishment Clause standard.

\textbf{B. The Endorsement Analysis}

For many years, Justice O'Connor viewed the first two \textit{Lemon} factors through the prism of an endorsement analysis. According to this analysis, the first two \textit{Lemon} factors turn on "whether government's actual purpose is to endorse or disapprove of religion... [and] whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid."\textsuperscript{56} Justice O'Connor applied this test in a range of different contexts, including constitutional challenges to public school prayer,\textsuperscript{57} government religious displays at holidays,\textsuperscript{58} private religious displays on public land,\textsuperscript{59} and the Pledge of Allegiance.\textsuperscript{60}

Although at first glance the endorsement analysis seems like little more than a narrowing of the traditional \textit{Lemon} focus, the impetus of the endorsement analysis provides a conceptual footing that the Court has never fully provided for \textit{Lemon} itself. In one of her early opinions explaining the endorsement analysis, Justice O'Connor emphasized that the prohibition of governmental endorsement is important because "[e]ndorsement sends a message to nonadherents

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\item \textsuperscript{55} See Sch. Dist. v. Schempp, 374 U.S. 203, 295 (1963) (Brennan, J., concurring) (asserting that the Establishment Clause is violated whenever the government uses "essentially religious means to serve government ends, where secular means would suffice").
\item \textsuperscript{57} See Wallace v. Jaffree, 472 U.S. 38, 67 (1985) (O'Connor, J., concurring) (concluding that an Alabama silent meditation statute had the unconstitutional purpose and effect of endorsing school prayer).
\item \textsuperscript{58} See County of Allegheny v. ACLU, 492 U.S. 573, 627–32 (1989) (O'Connor, J. concurring in part and dissenting in part) (asserting that the placement of a Nativity scene at a county courthouse violated the Establishment Clause, but a city display of a menorah, Christmas tree, and sign saluting liberty did not); \textit{Lynch}, 465 U.S. at 694 (O'Connor, J., concurring) (explaining that a city display of a Nativity scene was not intended as an endorsement of Christianity).
\item \textsuperscript{59} Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 782 (1995) (O'Connor, J., concurring) (concluding that the state's tolerance of a Ku Klux Klan display of crosses did not constitute government endorsement of religion).
\item \textsuperscript{60} Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 37 (2004) (O'Connor, J., concurring) (arguing that the phrase "under God" contained within the Pledge of Allegiance constitutes ceremonial deism that does not violate the First Amendment).
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that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.\textsuperscript{61} These messages of inclusion and exclusion are problematic from a political standpoint because they impermissibly "make religion relevant, in reality or public perception, to status in the political community."\textsuperscript{62} These statements of separationist principle nicely encapsulate the structural function of the Establishment Clause, which is designed to divorce political participation from religion. The prohibition of establishment puts everyone on an equal political footing, regardless of their idiosyncratic religious beliefs or lack of belief and prevents the poisonous Bosnian-style joinder of piety and power. Justice O'Connor's explanation of her endorsement analysis provided a rare articulation of this structural reality.

Unfortunately, Justice O'Connor's application of the endorsement analysis never lived up to the theory's promise. There are several reasons for this. First, for all her apparent sensitivity to a religiously exclusive politics, Justice O'Connor often seemed only halfheartedly in favor of separating church and state. In the holiday display cases, for example, she indicated that she had no problem with permitting the government to celebrate religion publicly.\textsuperscript{63} In the Pledge case, she dismissed the seriousness of complaints by religious dissenters about expressions of faith by the government.\textsuperscript{64} And in the Cleveland school voucher case, she failed even to mention the issue of endorsement, much less question how the endorsement analysis would apply to government programs funneling millions of tax dollars to private religious education.\textsuperscript{65}

The second reason Justice O'Connor's endorsement analysis failed to solve the problems presented by the Establishment Clause is that the mechanism Justice O'Connor devised for ascertaining endorsement is seriously flawed. Justice O'Connor suggested that the endorsement analysis should be assessed through the eyes of "a reasonable observer [who] evaluates whether a challenged governmental practice conveys a message of endorsement of religion."\textsuperscript{66} According

\textsuperscript{61} Lynch, 465 U.S. at 688 (O'Connor, J., concurring).
\textsuperscript{62} Id. at 692.
\textsuperscript{63} See id. at 693 (holding that a city's display of a Christmas crèche "does not have the effect of communicating endorsement of Christianity").
\textsuperscript{64} See Newdow, 542 U.S. at 43 (O'Connor, J., concurring) (discussing the reference to God in the Pledge of Allegiance as "a minimal reference to religion").
\textsuperscript{65} See Zelman v. Simmons-Harris, 536 U.S. 639, 663-76 (2002) (O'Connor, J., concurring) (arguing that a Cleveland school voucher program was consistent with the Establishment Clause because it provided nonreligious as well as religious options).
to Justice O'Connor, this observer should be "deemed more informed than the casual passerby" and must be deemed aware of both the general and specific history of the community and the forum in which the Establishment Clause dispute arises. The problem with the reasonable observer mechanism is that the observer will never be truly objective. The results a judge obtains from applying the reasonable observer analysis therefore will depend entirely on what background knowledge and cultural assumptions the judge feeds to the observer.

The malleability of the endorsement analysis is compounded by its context-specific focus. Even though the addition of the "reasonable observer" introduces an unfortunate level of uncertainty into the endorsement analysis, it is at least relatively simple to understand the point of limiting the government's active endorsement of religion in cases involving school prayer, holiday displays, and other forms of governmental symbolism. It is much more difficult to ascertain the point of endorsement in financing cases such as Mitchell and Zelman. In those cases, the violation of religious liberty goes beyond mere symbolism. In the financing cases, the government is not only actively touting the virtues of one religion over another; it is also using its coercive taxing authority to force one person to support another person's faith.

Applying a constitutional standard that focuses on limiting endorsement therefore cannot fully account for the problems that arise when government finances religion. Indeed, the endorsement standard actually makes matters worse by forcing judges to assess the message being communicated by the straightforward act of writing a government check to a church. This search for a message, in turn, allows judges inclined to uphold the financing scheme to muddy the waters by diverting the attention of the "reasonable observer" from the concrete reality of cash transfers, to matters of ambiance. Thus, in Zelman, Justice O'Connor joined the other conservatives in upholding a multi-million dollar government program to finance religious education under a "neutral" funding format. In effect, the symbolic message of neutrality drowned out the concrete reality that the government was financing overtly religious activity.

This suggests that a test that focuses on coercion may be more protective of the religious liberties of dissenters than the ostensibly

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68 Id. at 780.
69 Compare the results Justice O'Connor obtains from her reasonable observer analysis, for example, id. at 779–82, to the conclusions that Justice Stevens draws from his analysis, id. at 797–815 (Stevens, J., dissenting).
70 See infra notes 113–22 and accompanying text.
protective endorsement analysis. But as the next subsection will illustrate, in many ways the coercion analysis is actually less protective of religious liberty than the endorsement analysis, in that it fails to provide either a coherent or a consistent approach to enforcing the Establishment Clause.

C. The Broad Coercion Analysis

For many years, some prominent academic commentators on church/state issues have favored using coercion as a dominant motif in applying the Establishment Clause. Some of the current Justices, including Justices Kennedy and Scalia, have also periodically advocated this approach. Unfortunately, coercion theory suffers from many of the same problems that plague Justice O'Connor's endorsement theory. Specifically, coercion theory has been (and probably inevitably will be) interpreted in inconsistent ways, for reasons that undermine the entire project of using coercion as the standard for enforcing the Establishment Clause. The underlying problem with coercion theory is that an intellectually coherent version of the theory produces so few limits on government involvement with religion that it leaves the Establishment Clause in tatters. If the term "coercion" is used as commonly understood to mean the act of restraining or dominating by force, then few government actions reasonably can be described as "coercing" reluctant individuals to engage in religious activity against their will.

The only way of avoiding the unacceptable result of eviscerating the Establishment Clause is to ameliorate coercion theory by broadening the meaning of "coercion" to the point that even government inaction in the face of attenuated social pressure is considered unconstitutionally "coercive." Once coercion theory reaches this point, it becomes as unclear and unpredictable as other forms of Establishment Clause theory and therefore presents the same kinds of uncertainty problems that coercion theory was intended to resolve. The choice, therefore, seems to be between a narrow version of coercion theory, which produces coherent but unacceptable results, or a broad version of coercion theory, which is incoherent and unpredictable,

71 See, e.g., Jesse H. Choper, The Religion Clauses of the First Amendment: Resolving the Conflict, 41 U. Pitt. L. REV. 673, 675 (1980) (proposing that the Establishment Clause should only prohibit government action with the purpose of coercing, compromising, or influencing religious beliefs); Michael W. McConnell, Coercion: The Lost Element of Establishment, 27 WM. & MARY L. REV. 983, 940 (1986) (rejecting a noncoercion standard as inadequately protective of both religious "believers" and "nonbelievers"); Paulsen, supra note 27, at 797 (arguing that Lemon has been replaced by a coercion test).

72 For the specific implications of this version of coercion, see infra notes 83–94 and accompanying text.
but can lead to intuitively acceptable consequences. Proponents of both forms of coercion theory presently are represented on the Court, and (not surprisingly) the constitutional results stemming from the application of coercion theory have differed wildly depending on which version of coercion theory is used.\textsuperscript{7}

The broad version of coercion theory is the one that has (at least in one case) garnered the votes of a majority of the Court. This version of the theory is deemed "broad coercion" in the sense that it defines the term "coercion" very broadly and therefore prohibits a broader range of government actions relating to religion. This version of coercion theory was used by Justice Kennedy in \textit{Lee v. Weisman} to hold unconstitutional a Connecticut public high school's practice of inviting local clergy to give a brief ecumenical prayer at its official graduation ceremonies. Justice Kennedy's majority opinion held that the graduation prayer was unconstitutionally coercive because the objecting students' "attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma."\textsuperscript{74}

Much of Justice Kennedy's \textit{Lee} opinion is laudable. The opinion is especially sensitive to the issues raised by religious disputes in the public school context. Whatever credence should be given to Justice Scalia's suggestion that adults who belong to minority religious faiths should be willing to accept their minority fates quietly,\textsuperscript{75} this theory has little merit when applied to juveniles who have not yet developed either a strong sense of self or social self-defense mechanisms.\textsuperscript{76} Justice Kennedy's analysis, on the other hand, takes these characteristics into account. Justice Kennedy's opinion is also laudable in its rendition of the special role the Establishment Clause plays in the First Amendment.\textsuperscript{77} In contrast to the general tenor of the Constitution, which protects minorities but permits the majority to incorporate its views into political policy, the Establishment Clause is intended specifically to prohibit the majority from infusing the public sphere with its own religious views.\textsuperscript{78} As Justice Kennedy notes, there are specific

\textsuperscript{73} Compare \textit{Lee v. Weisman}, 505 U.S. 577, 599 (1992) (holding a public school graduation prayer unconstitutional under a broad coercion analysis), \textit{with id.} at 642 (Scalia, J., dissenting) (arguing that the prayer clearly is constitutional under a narrow coercion analysis).

\textsuperscript{74} \textit{Id.} at 586 (majority opinion).

\textsuperscript{75} \textit{See id.} at 639 (Scalia, J., dissenting) (noting that the \textit{Lee} majority did not question whether adults could be forced to sit quietly during government-sponsored religious exercise).

\textsuperscript{76} \textit{See id.} at 593-94 (majority opinion) (citing social science literature relating to peer-group pressure and its relationship to the enforcement of religious orthodoxy).

\textsuperscript{77} \textit{Id.} at 590-92 (noting the different mechanisms used by the First Amendment to protect religion and speech).

\textsuperscript{78} \textit{Id.} at 589-90 (noting that the majority is not only prohibited from incorporating its own sectarian views into law, but also from incorporating a generic version of civic religion).
historical reasons for barring members of the political majority from implementing their most cherished sectarian values as public policy, and the lessons from this history "are as urgent in the modern world as in the 18th century when [the First Amendment] was written."79

The flaw in Justice Kennedy's analysis is that none of the Establishment Clause's values and functions that he discusses have the slightest thing to do with coercive government activity. All of the problems Justice Kennedy identifies as arising from the joiner of government and religion can arise without the government directly coercing either religious belief or practice. Even in Lee v. Weisman itself, it is difficult to characterize the school's obvious Establishment Clause infraction as having "coerced" Deborah Weisman into engaging in religious behavior against her will. As Justice Scalia repeatedly points out, all Ms. Weisman had to do was sit in silence while others prayed.80 The coercion with which Justice Kennedy is concerned is not the sort of direct force used by authoritarian governments to force unwilling citizens to obey the government's directives. Rather, Kennedy is concerned with the subtle message of social and political exclusion communicated by the government's endorsement of religious values. It is relatively simple to identify truly coercive governmental mechanisms, such as mandatory taxes to support religion and mandatory church attendance laws. But it is a much more indeterminate affair to identify government coercion that is manifested as the indirect consequences of government action that does not directly penalize disobedience. Virtually any governmental favoritism toward religion could be construed as "coercive" in the latter sense, because all such actions provide intangible benefits to those who choose the favored faith. But if every government action is potentially "coercive" in this broad sense, then the theory does nothing more than rephrase other theories such as the endorsement analysis or Lemon and ends up serving the Establishment Clause's unstated function in the same imprecise way.

A good indication of the incoherence inherent in the broad coercion analysis can be found in Justice Kennedy's own votes on Establishment Clause matters. After producing one of the most protective possible renditions of the coercion standard in his Lee majority opinion, Justice Kennedy then proceeded to join two other opinions that greatly expanded the extent to which the government could use its directly coercive taxing and spending authority to finance religious activity.81 This is ironic because government use of tax money to fi-

79 Id. at 592.
80 Id. at 638–39 (Scalia, J., dissenting).
81 See Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding the Cleveland school voucher program, which funneled millions of dollars of government funds into private religious
nance religious activity has historically been used as the prime example of government coercion on behalf of religion. There is no clear explanation for why one of the Court's most forceful proponents of coercion theory does not identify the most obvious form of the phenomenon. (Although this fact may provide further evidence for the proposition discussed in the next Section that the Court's Establishment Clause dilemma these days lies not in its tendency to develop imperfect standards, but in its inability to settle more basic questions regarding what the Establishment Clause means). For purposes of the present discussion of the Court's potpourri of Establishment Clause standards, Justice Kennedy's inconsistency is merely one of many indications that the coercion analysis is not the comprehensive solution to the Court's Establishment Clause malaise that its proponents think it is.

D. The Narrow Coercion Analysis

The second version of the coercion theory can be termed "narrow coercion," in the sense that it defines the term "coercion" very narrowly and therefore prohibits only the most egregious and overt government actions benefiting or advancing religion. In Justice Scalia's variation on the narrow coercion theme, he views government actions as unconstitutional only if they fall within the narrow historical pattern of "coercion of religious orthodoxy and ... financial support by force of law and threat of penalty." By "coercion of religious orthodoxy," Justice Scalia means nothing more than an explicit legal mandate to join a specific sect or worship the tenets of its faith. He illustrates his view of coercion by citing the pre-Revolutionary Virginia practice under which "ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs

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82 Jesse Choper is one of the more prominent academic proponents of coercion theory, and he has argued that "[w]hile public subsidy of religion may not directly influence people's beliefs or practices, it plainly coerces taxpayers either to contribute indirectly to their own religions or, worse, to support sectarian doctrines and causes that are antithetical to their own convictions." Choper, supra note 71, at 678. Professor Choper does not follow the implications of this statement to their logical conclusion, however, because he would generally uphold government voucher plans financing religious schools if the value of the government funds did not exceed the value of the secular education provided by the sectarian institutions. See Jesse H. Choper, The Establishment Clause and Aid to Parochial Schools, 56 CAL. L. REV. 260, 265-66 (1968).

83 Lee, 505 U.S. at 640 (Scalia, J., dissenting) (emphasis omitted).
of building and repairing churches.\textsuperscript{84} From Justice Scalia's perspective, this (and very little else) constitutes impermissible religious coercion.

Unlike some other Establishment Clause standards, the narrow coercion theory seems at first blush to be generally consistent. But the theory's consistency is purchased at a very high cost. The narrow coercion theory of the Establishment Clause would prohibit few, if any, government actions that would not also run afoul of the Free Exercise or Free Speech Clauses of the First Amendment. For example, the Free Exercise Clause standing alone presumably would invalidate a pre-Revolutionary Virginia-styled mandate of church attendance or legal prohibition of non-Episcopalian marriage ceremonies. In these circumstances, therefore, a narrow coercion interpretation would essentially render the Establishment Clause redundant.

On the other hand, the narrow coercion theory would not protect against many abuses that seem inconsistent with our intuitive understanding of religious liberty. For example, a narrow coercion theory would not necessarily prevent a state from enacting a modern version of Patrick Henry's 1784 "Bill Establishing a Provision for Teachers of the Christian Religion" because such a bill would not coerce religious orthodoxy. As Leonard Levy points out, Henry's Bill:

\begin{quote}
[D]eclared the "liberal principle" that all Christian sects and denominations were equal before the law, none preferred over others. It did not speak of the "established religion" of the state, contained no articles of faith, and purported to be based on nonreligious considerations only—the furtherance of public peace and morality rather than Christ's kingdom on earth or the encouragement of religion.\textsuperscript{85}
\end{quote}

Henry's Bill would have required citizens of Virginia to pay a tithe, but it would not have required them to support a particular sect identified by the state, since taxpayers could designate the church to receive their payment.\textsuperscript{86} If one were to broaden the scope of the statute somewhat to encompass non-Christian faiths, then the modern version of Henry's statute falls within the permissible scope of narrow coercion theory. After all, is this hypothetical statute significantly different from the statute in \textit{Zelman}, in which tax money funded a program in which virtually all the recipients of aid attended religious schools?\textsuperscript{87} Thus, the narrow coercion theory would seem to accept as constitutional a slightly modified version of the statute that instigated

\textsuperscript{84} Id. at 641.


\textsuperscript{86} Id.

\textsuperscript{87} See \textit{Zelman} v. Simmons-Harris, 536 U.S. 639, 647 (2002) (noting that ninety-six percent of the students receiving money under Cleveland's school voucher program attended religious schools).
James Madison to write the “Memorial and Remonstrance” opposing Henry’s Bill, which in turn helped convince the Virginia Legislature to reject the Bill and adopt, instead, Jefferson’s Bill for Religious Freedom. An Establishment Clause theory that leads to the conclusion that Patrick Henry was correct and James Madison was wrong about the basic requisites of religious liberty is a very strange theory, indeed.

There are signs that Justice Scalia understands that his standard falls far short of the public’s intuitive understanding of religious liberty—although he may view this as more of a political than a theoretical problem. Scalia responds to this problem by falling into the same inconsistency trap that bedevils the various other standards proposed by his colleagues. In Lee v. Weisman, for example, Justice Scalia argues that under his narrow coercion theory, it was not unconstitutional for the school board to invite a local religious leader to give a short prayer at a high school graduation ceremony. He even mocks the notion that any student in the audience would be subjected to religious coercion by this prayer. “[T]he Court’s notion that a student who simply sits in ‘respectful silence’ during the invocation and benediction (when all others are standing) has somehow joined—or would somehow be perceived as having joined—in the prayers is nothing short of ludicrous.”

But Scalia is oddly reluctant to say that he would overrule the Court’s classroom prayer or Bible-reading decisions. According to Scalia, those decisions “do not support, much less compel, the Court’s psychojourney[,]” because unlike graduation prayer, classroom prayer occurred “within a framework in which legal coercion to attend school (i.e., coercion under threat of penalty) provides the ultimate backdrop.” But as Scalia himself points out, the legal coercion to attend school did not include legal coercion to recite the official prayer or listen to the state-sanctioned Bible passage. In both of the classroom religion cases, the statutes specifically permitted dissenting students to leave the room while the religious exercises took place. In light of this fact, it is unclear why the general school-attendance mandate provides the “force of law and threat of pen-

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88 See LEVY, supra note 85, at 54–60.
89 Lee, 505 U.S. at 637 (Scalia, J., dissenting).
91 Lee, 505 U.S. at 643 (Scalia, J., dissenting).
92 See Schempp, 374 U.S. at 207 (stating that “[t]he students and parents are advised that the student may absent himself from the classroom or, should he elect to remain, not participate in the exercises”); Engel, 370 U.S. at 430 (noting the Regents prayer program “does not require all pupils to recite the prayer but permits those who wish to do so to remain silent or be excused from the room”).
required to satisfy Scalia's constitutional standard. In both the classroom and the graduation settings, the key to the Court's decisions was the fact that the state's action put students in the position of declaring their dissent publicly and subjecting themselves to the ostracism of their peers.

[By] requiring what is tantamount in the eyes of teachers and schoolmates to a profession of disbelief, or at least of nonconformity, the procedure may well deter those children who do not wish to participate for any reason based upon the dictates of conscience from exercising an indisputably constitutional right to be excused. If Scalia accepts this observation as valid in the classroom context, then why do the Court's similar observations in the graduation case cause Scalia to berate the Court for embarking on a "psychojourney"?

As suggested above, perhaps the answer to this question is more political than analytical. Perhaps Justice Scalia understands that reversing the classroom prayer and Bible-reading decisions would be politically difficult. Perhaps Scalia has made the implicit judgment that the majority of the country would be uncomfortable with state-authorized prayers being recited daily in public school classrooms across the land. If so, then this is another way of saying that maybe Justice Scalia is afraid that a consistent application of the narrow coercion analysis would be revealed as failing to capture the essence of how the country perceives religious liberty.

E. The Formal Neutrality Analysis

Although the narrow coercion theory would accomplish the goal of eradicating most vestiges of the separation principle from Establishment Clause jurisprudence, it is not the only theoretical stratagem for radically revamping the constitutional law of church and state. In recent years, the Justices who are inclined to disfavor the separation of church and state have enjoyed their greatest successes by employing the concept of formal neutrality. The most important victories for the formal neutrality analysis have come in the school financing cases. In *Zelman v. Simmons-Harris* and *Mitchell v. Helms*, a majority of the Court employed the formal neutrality analysis to overrule several older decisions barring government aid to religious schools. These decisions inaugurated a new era in which governments may funnel significant amounts of tax funds into religious institutions. Under this new interpretation of the Establishment Clause, the gov-

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93 *Lee*, 505 U.S. at 640 (Scalia, J., dissenting).
94 *Schempp*, 374 U.S. at 289.
96 530 U.S. 793 (2000).
government is constrained by little more than a few simple drafting requirements.

In *Zelman*, the Court upheld the Cleveland school voucher program under which the government provided vouchers to parents who sent their children to private schools—including religious schools. The program provided each student with an annual grant of approximately $2,000. In the year preceding the litigation, 3,700 students received money to attend private schools. Over ninety-six percent of these children attended religious schools. Based on these numbers, the program involved an annual allocation of several million dollars of government funds to religious schools. Nevertheless, the Court upheld the program based upon an application of a formal neutrality theory of the Establishment Clause. Under this theory,

where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.  

Two years earlier, the Court decided a case that in many ways involved an even more radical departure from the Court's prior church/state jurisprudence than did *Zelman*. In *Mitchell*, the Court upheld a program under which government funds were provided to purchase educational materials, such as computers and other educational aids. In the Louisiana Parish in which *Mitchell* arose, the funds were used to provide a range of materials, including computers, slide and movie projectors, television sets, globes, and maps. The program provided these materials to both public and private schools. Approximately thirty percent of the funds went to private schools; and in the most recent year considered by the Court, forty-one of the forty-six private schools participating in the program were religious.  

As in *Zelman*, formal neutrality was central to the Court's decision in *Mitchell*. Four members of the majority relied on a very lenient ver-

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97 The actual amount a student received depended on the student's family income. Families with incomes below 200% of the poverty line received 90% of private school tuition, up to a total of $2,250. *Zelman*, 536 U.S. at 646. All other students received 75% of private school tuition, up to a total of $1,875. *Id.*
98 *Id.* at 647.
99 *Id.*
100 *Id.* at 652.
102 The program operated slightly differently with regard to public and private schools. With regard to public schools, the money was provided directly to the schools, which used the funds to purchase the educational materials. With regard to private schools, the money was allocated to a local educational authority, which purchased the educational materials and lent them to the private schools. *Id.* at 802-03.
103 *Id.* at 803.
sion of formal neutrality as the basis for their decision. According to the plurality, the program was constitutional "because it determines eligibility for aid neutrally, allocates that aid based on the private choices of the parents of schoolchildren, and does not provide aid that has an impermissible content." Thus, to the plurality it did not matter that the government aid freed up other private funds that could be used by the religious schools for the religious portion of their curriculum, nor did it matter that the religious schools diverted the government-funded equipment to specifically religious activities. According to the plurality, conforming to formal neutrality insulated the program from attack even if the government aid was diverted to religious uses by the schools: "[W]e fail to see how indoctrination by means of (i.e., diversion of) such [governmental] aid could be attributed to the government."

There are two ways of interpreting the Court's formal neutrality approach in Mitchell and Zelman. The first interpretation is that the Court devised a scheme that amounts to little more than a framework of plausible deniability to cloak the constitutionally dubious consequences of certain government funding programs. Under this interpretation, formal neutrality is the fig leaf covering the obvious fact that the government is diverting a substantial amount of government aid to finance the sectarian activities of politically powerful religious groups. This approach allows the Court to effectively abandon the principle of separation without having to defend its new theory. Formal neutrality ostensibly preserves the traditional principle that the government cannot tax one set of religious adherents to support the religious activities of another, while at the same time it allows the political majority to satisfy its desire to provide financial aid to religious organizations. The Court's assertion that the students rather than the church schools are the true recipients of aid is little more than hollow pretense; after all, the checks in Zelman and the educational materials in Mitchell both were provided directly to the religious schools rather than the students—but at least this fiction maintains the theoretical desirability of churches being financially independent from the government.

Whatever one thinks about the intellectual integrity of the Court's fig leaf approach, the other possible interpretation of the Court's move toward formal neutrality is even more disturbing. The second interpretation assumes that the Court's conservative majority may not want to preserve even the vestiges of the traditional principle barring the government from financially supporting religious organizations and activities, and is moving toward abandoning this principle out-
right. Thus, under this interpretation, formal neutrality is simply the first step toward implementing the notion that separation of church and state discriminates against religion by prohibiting the large majority of religious believers from using "their" government to advance their religious views. Unfortunately, there is ample justification for believing that the second interpretation has substantial support on the Court.\footnote{Whether a current majority of the Court supports this position depends on the approach taken by the two new Justices. While neither Chief Justice Roberts nor Justice Alito had the opportunity to speak on precisely this issue while serving as judges on the court of appeals, both of them expressed views prior to serving on the bench that contribute to the perception that they will join the other three conservatives on most issues relating to church/state issues. While serving in the Reagan White House, for example, Chief Justice Roberts wrote a memorandum describing the opinions in \textit{Wallace v. Jaffree}, 472 U.S. 38 (1985). In describing Justice Rehnquist's dissent in that case, Roberts noted that "Rehnquist took a tenuous five-person majority and tried to revolutionize Establishment Clause jurisprudence, and ended up losing the majority." John G. Roberts, \textit{Memorandum for Fred F. Fielding}, June 4, 1985, at 2, available at \url{http://www.washingtonpost.com/wp-srv/nation/documents/roberts/Box48-JGR-SchoolPrayer1.pdf}. Roberts then went on to praise Justice Rehnquist's attempt to "revolutionize" the Establishment Clause jurisprudence by adopting the theory that the government may endorse religions, so long as it does not endorse a particular sect. "Which is not to say that the effort is misguided. In the larger scheme of things what is important is not whether this law is upheld or struck down, but what test is applied." \textit{Id.} Along the same lines, when Samuel Alito applied for a position as deputy assistant attorney general during the Reagan Administration, Alito wrote on his application that in college he "developed a deep interest in constitutional law, motivated in large part by disagreement with Warren Court decisions, particularly in the areas of criminal procedure, the Establishment Clause, and reapportionment." Samuel Alito, \textit{Non-Career Appointment Form}, Nov. 15, 1985, at 3, available at \url{http://www.law.com/pdf/dc/alitoDOJ.pdf}. Although these statements are by no means definitive predictors of their future behavior, nothing in the later judicial opinions, nor statements made at their confirmation hearings, indicate that either Chief Justice Roberts or Justice Alito have changed their narrow views of the protections offered by the Establishment Clause.}

The attitude of the Justices who support the concept of formal neutrality is encapsulated by Justice Thomas's denunciation as "offensive" the Court's historical refusal to finance pervasively sectarian institutions.\footnote{Mitchell, 530 U.S. at 828.} Justice Thomas conscripts the imagery of invidious discrimination against religious practitioners to explain his pique: "the application of the 'pervasively sectarian' factor collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity."\footnote{\textit{Id.}} The equal protection imagery does not fit Justice Thomas's purpose very well; it is as if Strom Thurmond were to argue that the Constitution discriminated against whites by prohibiting the white majority controlling southern state governments from distributing public benefits to segregationist schools. However ill-fitting the concept of discrimination may be in this context, the use of this language
indicates the depth of frustration felt by the religious majority at its inability to reap the fruits of its political dominance.

Unfortunately, various members of the Court have begun to express this same sentiment outside the financing context in cases involving explicit governmental endorsement of religion. Justice Scalia, for example, has argued in favor of public school prayer (at least in the context of graduation ceremonies) on the grounds that the Constitution should not be interpreted to prevent members of the public from “joining in prayer together, to the God whom they all worship and seek.” Justice Scalia ignores the fact that the audience at a modern public school graduation ceremony might also include Hindus and Buddhists, who do not worship a single God; or atheists and agnostics, who do not worship God at all; or Jehovah’s Witnesses and traditional Baptists, who do not believe that the government has any business attending to their belief in God under any circumstances. Justice Scalia sees only the religious majority whose members dominate the culture, and who do, in fact, worship and seek the same God. To him, this is neutrality. A more recent manifestation of the same phenomenon is Justice Scalia’s blunt assertion that the monotheistic religious majority can use the government to expressly endorse the central sacred precepts of their faith—and simultaneously disfavor the contrary precepts of their religious opponents.

The same religious myopia recently manifested itself in Justice O’Connor’s attempt to justify an overt violation of the governmental endorsement principles that she supposedly holds dear. Justice O’Connor argued that the government’s insertion of the words “under God” in the official Pledge of Allegiance is constitutional because, after all, we are a religious country, and the country’s official credo should reflect that fact: “Certain ceremonial references to God and religion in our Nation are the inevitable consequence of the religious history that gave birth to our founding principles of liberty.”

Even assuming that Justice O’Connor got her history right, it is de-

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110 See McCreary County v. ACLU, 125 S. Ct. 2722, 2748 (2005) (Scalia, J., dissenting) (asserting that “the Court’s oft repeated assertion that the government cannot favor religious practice is false”).
112 On the matter of ceremonial references to religion, as in most other matters dealing with the country’s religious history, the situation is infinitely more complicated than the opponents of separation are willing to admit. While it is true that most of the early Presidents included religious references in their official pronouncements, at least one prominent early figure—Thomas Jefferson—did not. This was not accidental, as the following famous quote from Jefferson indicates. According to Jefferson,

Fasting and prayer are religious exercises; the enjoining them an act of discipline. Every religious society has a right to determine for itself the times for these exercises, and the
batable whether any religious faction should be able to use its historical domination to justify actions by the government to perpetuate that domination.

In the end, these "love it or leave it" descriptions of religious cultural domination rob the term "neutrality" of all significance. If the government can expressly endorse the dominant group's set of religious principles and use tax money obtained from dissenters to provide religious training for members of majority faiths, then "formal neutrality" means simply that neutrality is merely a formality.

F. The Substantive Neutrality Analysis

Justice O'Connor provided the fifth vote in both Zelman and Mitchell. In both cases, however, she contributed separate opinions detailing her reasons for upholding the programs in question. It is possible to view these opinions as suggesting that Justice O'Connor believed that something more than formal neutrality is required to justify government funding of religious enterprises. Thus, in these opinions Justice O'Connor can be said to have adopted a kind of substantive neutrality approach to government funding issues. (Justice Breyer joined Justice O'Connor's opinion on this score in Mitchell, which presumably means that some version of this perspective is represented on the Court even after Justice O'Connor's departure).

A strong version of substantive neutrality theory has been suggested in the academic literature by Professor Douglas Laycock. In his version of substantive neutrality, "the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance." This does not seem to be the sort of substance Justice O'Connor was speaking of in her Zelman and Mitchell concurrences. On the other hand, it is difficult to say exactly what kind of substantive limitation Justice O'Connor was trying to impose in those cases. Her comments do not suggest any systematic limitation on the term "neutrality." But then again, it is difficult to conceive of any serious limitation on the concept that could survive Justice O'Connor's willingness to advance the implausible propo-
tion that infusing government cash into religious schools does not amount to government aid to religion.

Justice O'Connor had somewhat different concerns with the formal neutrality approach in the indirect and direct aid contexts. In *Mitchell* (the direct aid case), Justice O'Connor focused primarily on the divertibility of the government funds. She objected that the four-member "plurality's treatment of neutrality comes close to assigning that factor singular importance in the future adjudication of Establishment Clause challenges to government school aid programs." This is certainly an accurate rendition of the plurality's focus on "formal neutrality," but it is unclear why the plurality's focus so displeased Justice O'Connor. Although much of her opinion was devoted to detailing the ways in which the plurality's rule permitting schools to divert government aid to religious purposes would contradict the Court's earlier precedents, Justice O'Connor never shied away from reaching out to overrule longstanding precedent to make it easier for governmental aid to reach religious schools.

Aside from her concern about divertibility, Justice O'Connor also argued that direct aid cases should not be considered under the same standard as indirect aid cases, in which money is funneled to religious schools through the parents of students attending those schools. Much of her reasoning in this part of the opinion depended on her conclusion that a reasonable observer would be more likely to see evidence of endorsement in a direct aid case. But for purposes of assessing whether the state is sending a message of endorsement, it is debatable whether the details of diversion are more important than the fact that millions of dollars of government money are being spent to facilitate the enterprise of religious education.

Despite her stated concerns, Justice O'Connor approved the *Mitchell* program anyway, based on her conclusion that the Court should assume that the schools are not misusing government-funded materials unless there is specific evidence to the contrary. Even if her substantive neutrality standard (or the version of the standard that Justice Breyer may decide to advance) does have some theoreti-

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115 *See id.* at 838-41.

116 *See Agostini v. Felton*, 521 U.S. 203 (1997) (illustrating a circumstance in which the Court uses an extraordinary procedural device to reconsider and overrule twelve-year-old precedent that had prohibited local governments from sending public school teachers into parochial schools to provide supplementary educational services). Justice O'Connor authored the majority opinion in that case.

117 *See Mitchell*, 530 U.S. at 842-43 (O'Connor, J., concurring).

118 *See id.* at 857 ("To establish a First Amendment violation, plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes."). In the opinion, Justice O'Connor further states, "presumptions of religious indoctrination are normally inappropriate when evaluating neutral school aid programs under the Establishment Clause." *Id.* at 858.
cal content beyond the plurality's minimally protective formal neutrality analysis, therefore, plaintiffs will have a difficult time challenging the unconstitutional state action. Because Justice O'Connor and Justice Breyer presume that the recipients of government aid programs will use the aid in constitutional ways, they effectively foreclose facial challenges to statutes providing government aid to religious schools, in favor of cumbersome, expensive, and narrow as-applied challenges to specific instances of misuse. Under the O'Connor-Breyer standard, as well as the plurality's, therefore, the basic apparatus of state-funded religious education is generally protected from constitutional attack.

If Justice O'Connor's substantive neutrality proposal added little to the plurality's formal neutrality approach in direct aid cases such as Mitchell, it added nothing whatsoever to the majority's analysis in indirect aid cases such as Zelman. In the indirect aid context, Justice O'Connor shed whatever qualms she expressed about the formal neutrality approach in Mitchell. Although she began her Zelman opinion by recognizing that the Cleveland voucher program is "different from prior indirect aid cases in part because a significant portion of the funds appropriated for the voucher program reach religious schools without restrictions on the use of these funds," she approved the program anyway. Justice O'Connor spent most of her time arguing that although the voucher program benefits religious private schools almost exclusively, this is irrelevant in light of the fact that even more significant amounts of government money flow to other types of educational institutions, such as public schools and charter schools. Furthermore, she argued, the money funneled to the particular type of religious endeavor financed by the voucher program "pales in comparison to the amount of funds that federal, state, and local governments already provide religious institutions" through mechanisms such as tax exemptions. In the end, the key to Justice O'Connor's approach in the indirect aid cases was the same formal neutrality standard used by the other four members of the Zelman majority. If the program is neutral on its face, then as a matter of substance it does not matter that the government is financing a significant amount of religious activity.

Whatever promise the O'Connor-Breyer substantive neutrality theory may represent in the direct aid cases appears to be limited to

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120 Id. at 664.
121 Id. at 665.
122 Id. at 672-76 ("I am persuaded that the Cleveland voucher program affords parents of eligible children genuine nonreligious options and is consistent with the Establishment Clause.").
that context. The standard adds nothing to the few limits that are imposed by the formal neutrality theory in the indirect aid context. Thus, substantive neutrality (at least as practiced by the Court's one current proponent) does little or nothing to stop the slide toward a massive infusion of public funds into private religious education. The question (which will be explored in the next Section) is whether the Court's new majority will take the logic that effectively eviscerates Establishment Clause limits on state funding of religion and apply that logic to cases in which the government expressly endorses religion and uses its power to advance sectarian causes in non-financial ways.

G. The Nonpreferentialist Analysis

At least some of the current Justices have already arrived at the destination indicated at the end of the previous subsection. Almost two decades ago, in Wallace v. Jaffree, then-Justice Rehnquist wrote an opinion arguing that the Establishment Clause should not be interpreted to prohibit "nonpreferential" establishments of religion. New Chief Justice Roberts, who replaced Rehnquist, wrote a memorandum while working for the Reagan Administration in which he seems to have embraced this theory of the Establishment Clause. The nonpreferentialist argument specifically contravenes the Court's longstanding adherence to the proposition that the Justices have "rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another." Justice Rehnquist argued that the modern Court's more restrictive approach toward governmental establishments ignores the historically close relationship between church and state, overlooks the tradition of governmental endorsement of generic religion, and reads too much significance into Jefferson's "misleading metaphor" regarding the wall of separation between church and state.

The Rehnquist opinion in Wallace was based largely on a historical analysis popular among conservative constitutional scholars during the late 1970s and early 1980s. The argument asserted that the Framers intended only to prohibit establishments of particular churches, but not religion in general. This analysis was subjected to

124 See Memorandum for Fred F. Fielding, supra note 106.
126 Wallace, 472 U.S. at 92 (Rehnquist, J., dissenting).
criticism on many different levels. For purposes of reviewing the constitutional standards currently garnering votes on the Court, however, the consequences of the nonpreferentialist analysis are more important than its weak historical support.

The consequences of a constitutional regime governed by the nonpreferentialist interpretation of the Establishment Clause would be extensive. The name of the theory itself indicates that the Establishment Clause would no longer serve as a bar to the incorporation into law of the majority's general religious views. As Justice Rehnquist summarized the gist of the theory, "nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion." Adopting the nonpreferentialist approach to the Establishment Clause would entail overruling all of the Court's school prayer decisions, as well as the other decisions in which the Court prohibited the government from symbolically or verbally endorsing religion. Most of these decisions do not involve the government's explicit advancement of a particular sect. In general, the government actions in these cases attempted to be ecumenical, at least within the tradition of Western (and mostly Christian) faiths. Under a nonpreferentialist regime, a simple nod toward ecumenism would be sufficient to satisfy the Establishment Clause, even if the implementation of the government program would favor (at least in the broad outlines) the majority's form of religious exercise. As in the financing context, an ostensible neutrality process would permit the government to effectively continue to isolate atheists, Jehovah's Witnesses, Hindus, and members of other minority sects. Justice Scalia has already explicitly embraced just such an exclusionary approach, arguing that "it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists."

The consequences of adopting a nonpreferentialist stance in the religious financing area would be less extensive, but only because a majority of the Court has already effectively adopted the nonpreferentialist approach under the aegis of the formal neutrality theory. Under formal neutrality, as long as all religions are given an equal opportunity to enjoy the government's largess, then the Establishment Clause is satisfied. But the theory of nonpreferentialism would not stop there. As Michael McConnell has pointed out, the theory of

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129 Wallace, 472 U.S. at 115 (Rehnquist, J., dissenting).
130 See McCreary County v. ACLU, 125 S. Ct. 2722, 2727 (2005) (Scalia, J., dissenting).
nonpreferentialism would permit a range of government schemes that would entail the direct coercion of religious practice. "It is easy to imagine forms of nonpreferential aid, short of establishing a national church, that nonetheless would have the effect of coercing a religious observance." Indeed, the nonpreferentialist approach would belatedly constitutionalize the system of legally mandated religious tithes that six states continued to impose during the late eighteenth century. As Leonard Levy notes, "[i]n each of the six states where multiple establishments existed, the establishment included the churches of every denomination and sect with a sufficient number of adherents to form a church." Thus, nonpreferentialism presents yet another theoretical mechanism to grant Patrick Henry the victory that James Madison denied him over two centuries ago.

H. The Nonincorporation Analysis

If nonpreferentialism reduces the scope of the Establishment Clause to the vanishing point, Justice Thomas takes the final step and eliminates the clause altogether—at least insofar as the clause restricts state and local establishments of religion. Justice Thomas has become the Court's leading proponent of the nonincorporation thesis. In his Newdow concurring opinion, Justice Thomas argued:

The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments. Thus, unlike the Free Exercise Clause, which does protect an individual right, it makes little sense to incorporate the Establishment Clause [into the Due Process Clause of the Fourteenth Amendment].

This statement reaffirms and elaborates on the position Justice Thomas expressed two years earlier in Zelman, in which he argued that "the States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest." Presumably, this means that unless a state imposes civil or criminal sanctions on the worship of a disfavored religion or the nonworship of a favored religion, the Constitution would permit states to support and explicitly endorse specific religious sects, base legislation on religious proscriptions, combine religious and political symbolism, and use tax money to finance selected religious organizations.

132 LEVY, supra note 85, at 61.
133 See supra notes 85–86 and accompanying text.
As with many of the other interpretations proposed by members of the Court (on both ends of the Establishment Clause spectrum), Justice Thomas ascribes to the framers his normative choices about the scope of the clause. There are many problems with this historical argument, not least of which is the fact that it does not account for the change in constitutional scope and structure wrought by the adoption of the Fourteenth Amendment. While it is true that the rights embodied in the Bill of Rights initially only limited the federal government, it is also true that the nature of those rights changed with the adoption of the Fourteenth Amendment. Specifically with regard to the right to be free from establishments of religion, there is some evidence that the popular conception of establishment changed during the period between the adoption of the First and Fourteenth Amendments in ways that undermine Justice Thomas's account.

Aside from questions about the historical accuracy and theoretical depth of Justice Thomas's rendition of the Establishment Clause, the fact is that the nonincorporation theory proposes the most radical revamping of Establishment Clause theory imaginable. Justice Thomas proposes somehow to unscramble the eggs of modern constitutional jurisprudence in order to separate the distinctive components of federal and state authority over religion. This approach would produce a political world that no modern American citizen would recognize, and few would endorse. As with other originalist accounts of the Constitution (such as Justice Rehnquist's originalist justification of his nonpreferential approach to the Establishment Clause), Justice Thomas essentially argues that the Court should reject everything that is familiar to the modern eye and overturn nearly sixty years of jurisprudence, in order to return to an original position that is probably mythical anyway.

Interpreting the Establishment Clause as a "federalism provision" would not, as Justice Thomas asserts, eliminate the rights-protecting function of the Establishment Clause. Rather, this interpretation would merely change the beneficiaries of the clause's protection. Under the various Establishment Clause standards that now prevail in the Court, the federal Constitution protects religious dissenters in religiously homogeneous states from the majoritarian excesses of pow-

136 Barron v. Mayor & City Council of Balt., 32 U.S. (7 Pet.) 243 (1833) (holding that the Bill of Rights does not apply directly to state and local governments).


138 See supra notes 123–33 and accompanying text.

erful local sects.\textsuperscript{140} Under the Thomas interpretation, on the other hand, the federal Constitution would actually protect religious majorities in the states, allowing them to exercise their political clout freely. Locally powerful sects would be protected from legal rules imposed by the more religiously diverse nation as a whole, and would therefore be free to use their regionally powerful concentrations of power to form sectarian enclaves in which particular religious views dominate the political atmosphere and define public life.

Under this approach, we would return to a landscape that would have been recognizable to American religious dissenters in the late eighteenth century. In that landscape, individuals could enjoy religious liberty only by congregating geographically with a critical mass of others who shared their faith. Of course, it is a much larger country today than it was during the years of the early Republic, so the opportunities for a localized scheme of religious liberty are commensurately greater. Thus, if the Establishment Clause were deemed inapplicable to state and local governments, evangelical Protestants could roam freely in the South, Catholics and Jews could find comfort in the urban areas of the Northeast, Buddhists could migrate to certain Asian communities on the West coast, and (as in the early Republic) freethinkers could always move to Rhode Island. Even the smallest minorities could find an enclave. New Agers could have Marin County, California, and Muslims could take Dearborn, Michigan.

This Bosnian view of the Constitution would take some getting used to. It would probably require a comprehensive educational campaign to familiarize the public with the odd notion that their state governments could establish a state church. And it would require some intellectual juggling to reconcile the enhanced power of sectarian state governments with the national power to provide statutory protection of the dwindling rights protected by the Free Exercise and Free Speech Clauses. If the Establishment Clause were viewed as a federalism provision, then presumably the interest in sectarian hegemony would become part of the burgeoning category of state sov-

\textsuperscript{140} A recent study of the nation's religious demographics indicates wide variation in the degree of religious domination among the states. See Barry A. Kosmin et al., American Religious Identification Study 42 (2001) (compiling religious identification statistics for forty-eight states and the District of Columbia, excluding Hawaii and Alaska for reasons of cost). This study reports that fifteen states have populations that identify overwhelmingly (i.e., thirty-five percent or more) with one sect and have no other sect reporting identification rates within twenty percentage points of the dominant sect. \textit{Id.} Other states have a large proportion of related sects (Protestant Christians, for example), which could easily achieve political dominance by joining together in a political alliance of convenience in opposition to other, dissimilar sects. In short, in the absence of the protections offered by the Establishment Clause, there is a very real prospect that many states will be vulnerable to religious dominance by one or a few sects, with all the attendant mischief such dominance portends.
ereignty interests protected by the Court under the Tenth and Eleventh Amendments. Thus, any effort by the federal government to interfere with the states’ sovereign interests to pursue their theocratic goals would be deemed unconstitutional. *City of Boerne v. Flores*\(^\text{141}\) already limits the federal government’s power to protect religious liberty in some respects; this new state right to establish religion would expand these limits exponentially.

The very fact that one or two\(^\text{142}\) members of the Supreme Court could seriously propose that the Court should consider adopting the radical theory of Establishment Clause nonincorporation indicates how far the Court has come in recent years. These members of the Court argue vociferously that we should abandon our traditional Madisonian nervousness about the possibility of sectarian political fratricide. Their position conveys the certainty and absolute confidence of the righteous. In contrast, whatever criticism can be leveled at the confusion of the other members of the Court, at least it can be said on their behalf that they have hesitated before stepping off the precipice.

### I. The Divisiveness Analysis

The latest addition to the list of Establishment Clause standards proposed by one or more current Supreme Court Justices can be labeled the divisiveness analysis. This analysis was used by Justice Breyer in the recent Ten Commandments cases to justify his vote to uphold the constitutionality of one display while striking down the other.\(^\text{143}\) This was a mildly surprising result. In what would turn out to be her Establishment Clause swan song, Justice O’Connor chose to apply her endorsement analysis more rigorously than usual, leaving Justice Breyer in the unaccustomed role as the critical fifth vote who determined the different outcomes of two related cases.

It is difficult to say exactly what significance Justice Breyer intends to ascribe to the divisiveness analysis. Certainly nothing in his opinions in the Ten Commandments cases gives this analysis any systematic content, and he specifically disavows the notion that this (or any other analysis) should be regarded as the determinative factor in Establishment Clause decisions. Justice Breyer first expressed his concern with religious divisiveness in *Zelman*, in which he used divisive-

\(^{141}\) 521 U.S. 507 (1997) (holding the Religious Freedom Restoration Act unconstitutional because the remedy provided under the statute was not congruent and proportional to evidence of state violations of free exercise rights).

\(^{142}\) Justice Scalia is the other. *See* Lee v. Weisman, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) ("The Establishment Clause was adopted to prohibit such an establishment of religion at the federal level (and to protect state establishments of religion from federal interference")).

\(^{143}\) Van Orden v. Perry, 125 S. Ct. 2854, 2868 (2005) (Breyer, J., concurring).
ness primarily as an explanation for and unifying focus of the Establishment Clause. According to Justice Breyer:

In a society as religiously diverse as ours, the Court has recognized that we must rely on the Religion Clauses of the First Amendment to protect against religious strife, particularly when what is at issue is an area as central to religious belief as the shaping, through primary education, of the next generation's minds and spirits. A few years later, Justice Breyer seems to have elevated the concern with divisiveness to the status of an actual constitutional standard. As noted, he relied heavily on the element of divisiveness to distinguish two Ten Commandments displays. After voting to strike down a Ten Commandments display that had engendered a great deal of social conflict in a small Kentucky town,4 Justice Breyer then provided the fifth vote to uphold a similar Ten Commandments display outside the Texas State Capitol.16 Justice Breyer justified his vote in the latter case on the ground that "as a practical matter of degree [the Texas] display is unlikely to prove divisive."

At one level, the concern with divisiveness is understandable and even laudable. Division along religious lines is poisonous in a democracy as diverse as this one, in which members of virtually every imaginable religious faction must coexist peacefully alongside those whom they consider sinners and infidels. But even though Justice Breyer's general concern with divisiveness is unobjectionable, translating that general concern into an easily applicable legal standard is another matter. It is unclear, for example, how much religious divisiveness Justice Breyer believes is enough to tip the constitutional balance. Even if Breyer could identify a trigger point for an impermissibly divisive government action, moreover, his standard would introduce into the Establishment Clause mix an odd set of incentives. Under Breyer's standard, religious groups would actually be encouraged to fight openly about sectarian matters relating to government, because demonstrating religious division would be the only way to trigger the application of the Establishment Clause and enlist the courts' assistance in forestalling the government action. A standard that encourages religious divisiveness is hardly the sort of standard that could be relied upon to prevent religious divisiveness.

It also seems that Justice Breyer's divisiveness analysis would be least useful in situations in which it is most necessary. The Establishment Clause is most necessary in places where the community is the most religiously homogeneous. In such communities, religious dis-

145 McCreary County v. ACLU, 125 S. Ct. 2722, 2727 (2005).
146 Van Orden, 125 S. Ct. at 2868 (Breyer, J., concurring).
147 Id. at 2871.
senters are most likely to be coerced and harassed on religious grounds, but by virtue of being few in number and overshadowed and outshouted by the religious majority, such dissenters are unlikely to muster the magnitude of vociferous opposition to the government's religious activity that would trigger the concern with religious divisiveness. The fact that most people in Texas were perfectly happy to have their government erect a monument reminding them (among other things) that "I AM the LORD thy God" and that "Thou shalt have no other gods before me," is hardly an answer to Thomas Van Orden's argument that the religious exercise violated the Establishment Clause. The fact that few dissenters joined Van Orden in objecting may not, as Justice Breyer argued, indicate that there is no problem; rather, it may indicate just how large the problem is.

J. The Ad Hoc Analysis

Perhaps it was inevitable that some Justice would survey the situation outlined above and conclude that it is impossible to reconcile the conflicting strains of Establishment Clause analysis. Given her tendency to advance several different Establishment Clause theories at once, it was perhaps also inevitable that Justice O'Connor would be the first Justice to acknowledge publicly that she has given up the effort to find "a Grand Unified Theory that would resolve all the cases that may arise under [the Establishment] Clause." It is not possible to find a unifying theory, Justice O'Connor argued, because "the same constitutional principle may operate very differently in different contexts." Thus, she proposed that the Court should resort to an ad hoc analysis of Establishment Clause cases, under which different categories of cases would be analyzed under different tests:

If each test covers a narrower and more homogeneous area, the tests may be more precise and therefore easier to apply. There may be more opportunity to pay attention to the specific nuances of each area. There might also be, I hope, more consensus on each of the narrow tests than there has been on a broad test.

Justice O'Connor focused special attention—and criticism—on the Lemon test. According to Justice O'Connor, by 1994 the Lemon test had become "so vague as to be useless." In order to make Lemon work, she argued, the Court had tried to "patch up" Lemon,

148 Id. at 2873 (Stevens, J., dissenting).
150 Id.
151 Id. at 721.
152 Id. at 718.
making it "more amorphous and distorted."\textsuperscript{153} It would be far better, O'Connor concluded, to identify narrower and more precise tests to fit every area, to avoid the inevitable conflicts that arise when one test is used for all purposes.\textsuperscript{154}

There are two problems with this analysis. The first is that the factual predicate for Justice O'Connor's analysis may not be true. The second is that the solution Justice O'Connor proposed may be worse than the malady she identified. As for the first problem, it is by no means clear that the inconsistency in the Court's decisions is attributable to the vagueness and/or inherent inapplicability of \textit{Lemon} to some circumstances. Frankly, the terms of \textit{Lemon} are not especially vague. As for the first part of \textit{Lemon}, identifying a nonsecular purpose simply requires a factual investigation into why the government undertook a particular action. Obviously, the government actors involved may sometimes lie or cloak their real reasons behind sham rationales, but the difficulty of enforcing a clear standard in the face of official willingness to act illegally and then lie about it does not constitute proof that the standard itself is flawed. Likewise, applying the second part of \textit{Lemon} is in most situations equally easy. Identifying a secular effect simply requires a clear description of how a challenged government action actually operates. Certain government actions produce obvious nonsecular effects, such as government-sponsored messages that advocate religious principles or government programs that finance a religious enterprise. Finally, the third part of \textit{Lemon—the no entanglement requirement—simply prohibits extensive government intrusion into the affairs of a religious enterprise. This concept is neither unclear, nor particularly difficult to enforce. If a statute or regulation requires government employees to spend many hours coordinating their activities with religious personnel, then it is a good bet that the government is impermissibly entangled with religion.

The problems Justice O'Connor identified with the enforcement of \textit{Lemon} have nothing to do with the vagueness of the standard. The problems she identified have more to do with the fact that some of the Justices (including Justice O'Connor) dislike the results that would be produced by a consistent application of that standard. A consistent application of the three-part \textit{Lemon} test would require the Court to strike down all government programs that fund or otherwise contribute to the operation of religious institutions such as parochial schools. Financing a religious enterprise with government funds—even indirectly—constitutes a clear-cut religious effect under \textit{Lemon}, and (unless the church group is simply provided government funds

\textsuperscript{153} Id. at 720.

\textsuperscript{154} Id. at 721.
with no regulatory supervision) will probably involve such extensive oversight that the financing scheme will also constitute impermissible entanglement.

The problem this posed for Justice O'Connor is that this is not the result she wanted to reach. In the very same opinion in which she complained about Lemon, she also complained that in previous cases the Court enforced the Establishment Clause too rigorously in school aid cases: "The Court should, in a proper case, be prepared to reconsider [these previous cases] in order to bring our Establishment Clause jurisprudence back to what I think is the proper track—government impartiality, not animosity, toward religion."155 Three years after she wrote this opinion, Justice O'Connor would provide the fifth vote to overturn those earlier decisions.156 In subsequent years, she would again provide the deciding vote in cases that have paved the way for broad-scale government financing of religious education, as well as other religiously based social services. The results Justice O'Connor reached in those cases are impossible to reconcile with Lemon, so to Justice O'Connor (at least in the financing area) Lemon had to go. But the problem with Lemon is not that it is too vague; the problem with Lemon is that it is all too clear.

By adopting the ad hoc approach to the Establishment Clause, Justice O'Connor did not merely allow herself to enjoy the use of various different constitutional standards; she has actually allowed herself to create several different Establishment Clauses. Justice O'Connor assisted a shifting majority of the Court to develop one Establishment Clause for government symbolic endorsements of religion, another for government programs financing religion, yet another for state policies that avoid benefiting religious operations, and so on. The vagueness Justice O'Connor perceived in the Lemon standard was really a reflection of her own confusion about the proper purposes of the Establishment Clause. Unfortunately, she was not alone in this confusion. Indeed, just as Justice O'Connor leaves the Court, Justice Breyer has decided to pick up the cudgel for a standardless, ad hoc Establishment Clause jurisprudence. In Van Orden, Justice Breyer joined Justice O'Connor's expressed aversion to a unified Establishment Clause standard: "While the Court's prior tests provide useful guideposts... no exact formula can dictate a resolution to such fact-intensive cases."157 This willingness to abandon the effort to define a consistent Establishment Clause standard can be viewed in one of two ways. On one hand, it can be viewed as its pro-

155 Id. at 717–18.
156 See Agostini v. Felton, 521 U.S. 203, 235–40 (overruling previous decisions that had prohibited the government from providing remedial education services to religious schools).
ponents suggest: as an effort to introduce flexibility and adaptability into the Court’s Establishment Clause jurisprudence. On the other hand, it can be viewed through the lens suggested below: as an intellectually lazy avoidance of the difficult task of defining the basic reasons we are talking about the Establishment Clause in the first place.

K. The Roots of the Establishment Clause Morass

However one feels about any of the standards discussed above, it should be easy to get consensus on the general proposition that the Court’s effort to define a clear and consistent standard for Establishment Clause cases has been a complete failure. Some combination of these standards (such as the Lemon, endorsement, broad coercion, and formal neutrality analyses) can attract the votes of a majority of the current Justices, at least in some circumstances. Others (such as the nonpreferentialist and nonincorporation theories) are idiosyncratic and can garner no more than one or two votes (although this assessment may change as the two new Justices more fully articulate their views on church/state matters). Even if these idiosyncratic approaches remain anomalous, however, they cannot be ignored; given the divisions on the current Court, it may be possible to cobble together a majority in some cases from groups of Justices taking two or three different idiosyncratic approaches.

To complicate things even further, some of the Justices change not just their votes, but their entire constitutional perspective, depending on what type of government action is being challenged. In many respects, therefore, the factual category into which a particular Establishment Clause challenge fits is a better predictor of the Court’s response to that challenge than are any of the constitutional standards used to frame that response. If one views Establishment Clause cases from the bottom-line perspective of Holmes’ “bad man,”\(^\text{158}\) then the best way to assess the current status of any Establishment Clause issue on the Supreme Court is to focus on how the Justices respond to particular factual contexts, rather than on how they explain their behavior. The frustrating thing about modern Establishment Clause jurisprudence is that the Justices’ responses to some factual contexts in which church/state issues arise are deeply inconsistent with how they respond to other church/state disputes. The real problem with the modern Court’s Establishment Clause jurisprudence is not that the Court has ten different constitutional standards; rather, the problem is that the Court seems to be applying four

\(^{158}\) See Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 459 (1897) (“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences . . . .”).
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different Establishment Clauses. The next section describes these
four clauses.

II. THE COURT'S FOUR ESTABLISHMENT CLAUSES

This Section describes the modern Supreme Court's four Estab-
lishment Clauses. Within these four categories of cases, the modern
Court can generally produce consistent and predictable majorities.
The consistency and predictability ends, however, when one crosses
the boundary from one Establishment Clause category to another.
Justices switch sides, the majority alters its analysis, and the focal
point and sensitivity to infringements of religious liberty will differ
markedly depending on the category into which a case falls. Some
Justices have a more pronounced problem than others in arriving at a
consistent approach to the Establishment Clause, but this is not a
phenomenon that is limited to Justices Kennedy and O'Connor, who
have been the perennial swing votes for over a decade. Even the
most separationist Justices are, in the end, willing to countenance
government actions that contradict their generally separationist atti-
dudes, and even the most accommodationist Justices will often recoil
from the religiously divisive consequences entailed by their embrace
of a sectarian state. And so we are left with a fractured doctrine that
has no central focus and is vulnerable to the most basic kinds of logi-
cal critique. There are four Establishment Clauses because different
majorities within the Court want the government to have a different
relationship with organized religion in different contexts. The ques-
tion is whether it makes sense to have religion play such different
roles in areas that are often quite closely related and theoretically in-
distinguishable. That question will be addressed in the next Section,
after a description of the Court's four Establishment Clauses.

A. The Separationist Establishment Clause

Jefferson's and Madison's Establishment Clause lives on in at least
one area of active First Amendment litigation. This is the first of the
modern Court's Establishment Clauses. This category of Establish-
ment Clause cases involves challenges to the government's symbolic
or verbal endorsement of religion. The category includes cases chal-
genring public school prayer,\(^\text{159}\) public school Bible-reading,\(^\text{160}\) gov-

student prayer at a public high school football game); Lee v. Weisman, 505 U.S. 577, 599 (1992)
(holding unconstitutional student prayer at a public high school graduation ceremony); Wal-
lace v. Jaffree, 472 U.S. 38, 61 (1985) (holding unconstitutional an Alabama statute requiring a
moment of silent meditation in public school classrooms); Engel v. Vitale, 370 U.S. 421, 436

\(^{160}\)
ernment erection of religious holiday displays, and government insignias containing religious symbols such as a cross. In this category of cases, six members of the Supreme Court have adhered fairly rigorously to the principle of separation of church and state during the last two decades. This majority has been weakened, but not entirely undermined, by Justice O'Connor's departure from the Court. In the cases defining this area of Establishment Clause jurisprudence, the Court has struck down school prayer in a range of different contexts, from state-drafted prayers in classrooms to prayers given by individual students at high school football games. The Supreme Court has also struck down a Ten Commandments display in a public school classroom. Finally, on two occasions, the Court has struck down statutes prohibiting or "balancing" the teaching of evolution in public school classrooms.

The Court has been remarkably strict in cases involving overt government endorsement of religion, especially in the school context. The Court's earliest rendition of the principle governing these cases was summarized in the fairly narrow proposition that "in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." In its more recent opinions, however, this proposition has been broadened to a Jeffersonian-style barrier against the infusion of the majority's religious views into gov-

(1962) (holding unconstitutional a state statute mandating the recitation of prayer in public school classrooms).


See Murray v. City of Austin, 947 F.2d 147, 158 (5th Cir. 1991), cert. denied, 505 U.S. 1219 (1992) (upholding a city seal containing a Christian cross); Harris v. City of Zion, 927 F.2d 1401, 1415 (7th Cir. 1991), cert. denied, 505 U.S. 1229 (1992) (holding unconstitutional a city logo containing a Christian cross); Friedman v. Bd. of County Comm'rs, 781 F.2d 777, 782 (10th Cir. 1985) (en banc), cert. denied, 476 U.S. 1169 (1986) (holding unconstitutional a city seal containing a Christian cross); Webb v. City of Republic, 55 F. Supp. 2d 994, 1000-01 (W.D. Mo. 1999) (holding unconstitutional a city seal containing a Christian fish symbol).

See Engel, 370 U.S. at 436 (holding unconstitutional the New York Regents' Prayer).

See Santa Fe, 530 U.S. at 316-17 (holding unconstitutional the student-initiated prayer at public school football games).


Engel, 370 U.S. at 425.
ernmental policy. In this regard, it is significant that many of the cases involving symbolic governmental favoritism toward religion are decided on the basis of the secular purpose component of the Lemon test. Thus, even facially neutral policies, which may be subject to explanation on secular grounds when read literally or viewed in the abstract, have been deemed unconstitutional in light of the political majority's impermissible intent of using the government to advance its religious views.

The Court has even reached out to strike down a statute that had no practical effect—such as the Alabama silent meditation statute struck down in Wallace v. Jaffree—because of the obvious (and admitted) religious motives of an influential legislator who supported the adoption of the statute. In that case, the Court deemed the separation principle important enough to require a symbolic cleansing of any religious impetus for the classroom moment of silence, even though (as Justice O'Connor noted), "[i]t is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren." The religious background of the legislation alone was sufficient to attract the Court's attention, even though the symbolism had little measurable effect on the religious practices or beliefs of the students in the classroom.

The importance of symbolism in these cases has led the Justices to issue some of their sternest lectures on the countermajoritarian function of the Establishment Clause. Ironically, Justice Kennedy authored one of the strongest examples of this sort of statement in his majority opinion for the Court in Lee v. Weisman. Among other things, Justice Kennedy specifically distinguished the First Amendment's mechanism for protecting religious liberty from the Amendment's mechanism for protecting expressive liberty, thus rejecting an analog between governmental religious expression and the right of free speech, which opponents of church/state separation repeat-

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168 The Court struck down one statute that provided a one-minute period "for meditation or voluntary prayer," while leaving intact a second statute that set aside a one-minute period "for meditation." 472 U.S. 38, 40 (1985).

169 The state senator who sponsored the challenged statute testified that he had "no other purpose in mind" than to "return voluntary prayer to public school." Id. at 43.

170 Id. at 73 (O'Connor, J., concurring).

171 505 U.S. 577 (1992). Justice Kennedy's expression of these sentiments is ironic in light of the very different views he expressed only a few years earlier in County of Allegheny v. ACLU. See 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in part and dissenting in part) (arguing that the Establishment Clause gives government actors some latitude in accommodating religious expression).

172 See, e.g., Lee, 505 U.S. at 591 (stating that speech and religion are protected by different mechanisms).
In response to this attempt to draw a direct analogy between the religion and speech provisions of the First Amendment, Justice Kennedy noted, "[t]he Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions." Justice Kennedy directly linked the very different First Amendment approaches to religious and expressive liberty to the history of religious division and conflict. This history led him to conclude, "in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce." The remarkable thing about these passages is not the sentiments themselves—which do little more than reiterate Madison's much stronger phrasing of the same points in the *Memorial and Remonstrance*—but rather Justice Kennedy's application of them in a case in which (as Justice Scalia's dissent repeatedly emphasized) the religious exercise was innocuous, ecumenical, brief, and uttered by a religious figure who belonged to the same faith as the plaintiff. As in *Wallace*, the plaintiff's injury in *Lee v. Weisman* largely was symbolic, but the depth of the sentiments expressed in the majority opinion's civics lesson communicates volumes about the importance of that symbolic injury.

The Court often does a poor job of explaining why the religious symbolism is so important in the endorsement cases. In *Lee v. Weisman*, Justice Kennedy attempted to link the religious symbolism to his favored theme of religious coercion, but that explanation is implausible for two reasons. First, the coercion explanation is implausible as an empirical matter because the prayer uttered at the graduation ceremony had no discernible effect on the religious practices or beliefs of anyone in the audience. At most, as Justice Scalia snidely pointed out, Deborah Weisman was "subtly coerced... to stand!" Moreover, it is highly unlikely that the school's endorsement of a

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175 The emphasis on religious free speech as a means of avoiding Establishment Clause problems raised by the injection of religion into public school classrooms was a key component of one of then-Judge Alito's major church/state decisions when he served on the court of appeals. *See C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198, 210 (3d Cir. 2000) (en banc) (Alito, J., dissenting) (arguing that "public school students have the right to express religious views in class discussion or in assigned work, provided that their expression falls within the scope of the discussion or the assignment and provided that the school's restriction on expression does not satisfy strict scrutiny").

176 *Lee*, 505 U.S. at 591.

177 Id. at 591-92.

178 *See id.* at 637-44 (Scalia, J., dissenting) (dismissing scathingly the majority's contention that benedictions at high school graduations are coercive and violative of students' First Amendment rights based on United States traditions and history).

179 Id. at 638.
brief religious exercise would in any way sway the religious leanings of a student such as Ms. Weisman, who was resourceful and self-confident enough to put her name on a lawsuit against her school board to defend her religious liberty.

No matter how much Justice Kennedy would like to shoehorn the symbolic endorsement cases into a coercion model, the fear of religious coercion is not the Court's primary concern in those cases. There must be a reason why the Court has insisted since the earliest school prayer decision that proof of coercion is not required to state an Establishment Clause claim. The reason that the Court so vigorously discourages the government from endorsing religion has much more to do with what such endorsements communicate about the structure of government and the nature of citizenship than whether such endorsements directly compel individuals to engage in particular religious practices. Justice O'Connor recognizes this in opinions explaining her endorsement theory, in which she emphasizes that governmental endorsements of religion are problematic because such endorsements "make religion relevant, in reality or public perception, to status in the political community." By neutralizing religion as an aspect of citizenship and political participation, the Establishment Clause ensures that one or a few dominant religious factions will not capture the government, either overtly or subtly. By insulating the government from religious dominance, the Establishment Clause bolsters the democratic mechanisms that allow the government to respond to changing policy needs and social demographics over long periods of time. In its symbolic endorsement cases, the Court acknowledges that the only way to accomplish the goal of protecting diverse democratic governance over time in a country characterized by shifting religious demographics is to build (in Justice Black's terms) a "high and impregnable" wall between church and state.

As noted above, the Court has been remarkably consistent in protecting that wall in cases falling into this first category. There are a few counterexamples, of course. The Court's politically skittish reluctance to enter the controversy over the Pledge of Allegiance in an

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178 See Engel v. Vitale, 370 U.S. 421, 430 (1962) ("Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonob-serving individuals or not.").


election year is one counterexample. The Court’s willingness to permit legislative prayer and payment of official chaplains is another. A third example is Justice Breyer’s odd fifth vote to permit one official endorsement of the religious values represented by the Ten Commandments, while voting to invalidate another. Part of the explanation for these deviations from the Court’s general attitude toward symbolic endorsement may be that the Court has not yet been willing to take the short logical step in extrapolating from the concept of church/state separation the mandate of a totally secular government. The argument for taking this step is set forth in Section III.

Before making that argument, however, the more interesting question is why the modern Court’s hypersensitivity to religious exclusionism in the symbolic endorsement cases does not carry over into other areas of Establishment Clause litigation in which the government’s educational and social service programs communicate the same message of religious endorsement and exclusion in a much more pronounced fashion. In reviewing government action in these areas, the Court not only suppresses its inclination to control the government’s religious message; the Court actually permits the government to employ religious agencies to carry out government policies and uses its taxing and spending authority to finance explicitly religious activities. In cases involving the government financing of religious education, for example, the Court encourages the linkage of government and religion with the same consistency as it discourages such a linkage in the symbolic endorsement context. These financing cases are the subject of the Court’s second Establishment Clause, which is described in the next subsection.

B. The Neutral Establishment Clause

The modern Court’s second Establishment Clause applies to the category of cases in which the government chooses to finance or subsidize religious activity or institutions. The school voucher, school

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182 See Marsh v. Chambers, 463 U.S. 783 (1983) (upholding the Nebraska legislature’s practice of hiring an official chaplain and beginning each legislative session with a prayer).

183 See Van Orden v. Perry, 125 S. Ct. 2854, 2872 (2005) (Breyer, J., concurring) (voting to uphold the display of the Ten Commandments at the Texas State Capitol); McCreary Cty. v. ACLU, 125 S. Ct. 2722, 2727 (2005) (striking down a display of the Ten Commandments at a Kentucky county courthouse).

184 See Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding the Cleveland school voucher program, which funnels millions of dollars of government funds to private religious schools).
financing,\textsuperscript{185} and charitable choice cases\textsuperscript{186} are the primary examples of this category. In this category, Justices Kennedy and O'Connor invariably have voted with the Court's newly ascendant church/state accommodationists instead of the Court's four remaining church/state separationists, and this voting pattern has produced a narrow but solid 5–4 majority supporting substantial government financial support for religious institutions. There is little reason to doubt that this alignment will continue with the addition of Chief Justice Roberts and Justice Alito.\textsuperscript{187} The only real limitation that this new majority places on government financial support of religious social service and educational programs is that the program must be "neutral" in the sense that it may not favor religious recipients of government aid over nonreligious recipients.

As noted in Section I, while Justice O'Connor remained on the Court, there were a few slight differences among members of the five-member majority about the meaning of "neutrality" when it came to articulating the remaining limits on direct government financial aid to religious institutions.\textsuperscript{188} In the Court's recent school-funding decisions, four Justices would reduce the Establishment Clause to the essentially meaningless requirement of formal neutrality. Under this requirement, the mere formal availability of aid to secular organizations in a particular government program would be sufficient to satisfy the Constitution, even if the program actually operated in a way that funneled almost all of the available government funds to religious groups.\textsuperscript{189} This faction of the Court would apply the formal neutrality requirement to both indirect and direct government aid programs. As noted in Section I, the opinions issued on this subject all have involved government financing of private religious educa-

\begin{itemize}
  \item \textsuperscript{185} See Mitchell v. Helms, 530 U.S. 793 (2000) (upholding a government program through which federal funds are used to purchase educational materials for private religious schools).
  \item \textsuperscript{186} The most recent charitable choice proposals have not yet been reviewed by the Court, but in \textit{Bowen v. Kendrick}, 487 U.S. 589 (1988), the Court rejected a facial constitutional challenge to an early version of a program that specifically encouraged the use of religious groups to carry out government social policies. For one statement of the general policy behind charitable choice programs, see Exec. Order No. 13,199, 66 Fed. Reg. 8,499 (Jan. 29, 2001) (creating the White House Office of Faith-Based and Community Initiatives).
  \item \textsuperscript{187} For a discussion of the Court's take on formal neutrality with the addition of Justices Roberts and Alito, see supra note 106.
  \item \textsuperscript{188} For an overview of neutrality, see supra notes 89–115 and accompanying text.
  \item \textsuperscript{189} See \textit{Zelman}, 536 U.S. at 658 ("The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school. As we said in \textit{Mueller}, '[s]uch an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated.'" (citing \textit{Mueller v. Allen}, 463 U.S. 388, 401 (1983))).
\end{itemize}
In the indirect financial aid programs, such as the Cleveland school voucher scheme upheld in *Zelman*, the government funnels funds to religious schools through the parents of children at the schools, who are the ostensible recipients of the aid. In the direct aid programs, the government provides funds that are used to finance the purchase of educational materials such as computers and blackboards, which are then provided to religious schools. In an indirect aid program, formal neutrality is satisfied if secular schools are permitted to participate in the aid program on the same terms as religious schools, even if the terms of the program tend to favor the religious schools, and even if an overwhelming number of the schools that participate in the program are religious in nature. In a direct aid program, formal neutrality is satisfied if both secular and religious schools are allowed to participate in the program, even if the religious schools use the materials purchased with the government aid for overtly religious purposes.

As the fifth vote in these cases, Justice O’Connor was reluctant to go quite as far as her four colleagues in approving unfettered state funding of religious education. But as noted above, her reservations were more hypothetical than real. The limits she suggested provided very little protection from the potentially massive infusion of government funds into religious education. In the indirect financial aid cases, for example, she suggested that she would be willing to hold unconstitutional any program in which parents were not offered the option of sending their children to secular private schools. But in making the assessment of whether religious schools dominated the Cleveland voucher system reviewed by the Court in *Zelman*, she refused to address the voucher system on its own terms and insisted on counting public schools, magnet schools, and charter schools as part

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190 For an extensive history of Court rulings on direct and indirect financial aid programs, see *supra* notes 89–105.
191 *Zelman*, 536 U.S. at 646 (“Where tuition aid is spent depends solely upon where parents who receive tuition aid choose to enroll their child. If parents choose a private school, checks are made payable to the parents who then endorse the checks over to the chosen school.”).
192 See *Mitchell v. Helms*, 530 U.S. 793, 802–03 (2000) (describing the process by which materials are provided to private schools).
193 See *Zelman*, 536 U.S. at 657 (noting with approval that eighty-two percent of the schools that participated in the Cleveland voucher program were religious).
194 See *Mitchell*, 530 U.S. at 824 (noting that the religious use of state-provided educational materials could not be attributed to the state, and therefore would not violate the Establishment Clause).
195 For a discussion of Justice O’Connor’s position, see *supra* notes 106–15 and accompanying text.
196 See *Zelman*, 536 U.S. at 676 (O’Connor, J., concurring) (noting that she is “persuaded that the Cleveland voucher program affords parents of eligible children genuine nonreligious options”).
of the funding mix. Because the schools in these latter categories were by definition secular (because they were public schools), this assessment made it possible for Justice O'Connor to dismiss the fact that ninety-six percent of the schools receiving voucher funds were religious in nature.

In the direct funding context, Justice O'Connor's reservations potentially could have restricted public funding of religious education because (unlike the other four Justices in the majority) she would have held unconstitutional any diversion of government funds for overtly religious purposes.

Unfortunately, the impediments to enforcing this restriction severely limited its effectiveness. Justice O'Connor rejected a facial constitutional challenge to an aid program that provided millions of dollars worth of equipment to religious schools, based on her presumption that most religious schools who receive government aid would act in good faith and refrain from converting the aid to religious purposes. Overcoming this presumption would require detailed private oversight of the internal operations of religious schools. This would be a difficult task, given the fact that the schools are populated by students and teachers who have a vested interest in not revealing any impermissible diversion of government aid to religious purposes. Any government body that seeks to increase public funding of religious education by enacting an aid program also is unlikely to aggressively oversee the impermissible diversion of the funds. The expense and complications of litigating every instance of diversion would compound these problems. In the absence of aggressive governmental oversight, an O'Connor-style limit on the diversion of funds would be difficult to police because public interest groups would have to bring a separate lawsuit against every recipient of aid that impermissibly diverts funds. It is plausible to expect that many institutions converting their government aid to religious purposes will go undetected or unchallenged.

Thus, even before the departure of Chief Justice Rehnquist and Justice O'Connor, five members of the Court were willing to permit large infusions of taxpayer funds into the system of private religious education. If anything, the five-member majority in favor of such transfers of government funds to religious institutions is likely to so-

197 Id. at 663–64 (discussing other types of schools receiving state assistance).
198 Id. at 664 (noting that if all different types of schools are considered, instead of just schools financed by the private school voucher plan, then the total percentage of state-assisted students attending religious schools drops from 96% to 16.5%).
199 See Mitchell, 530 U.S. at 857 (O'Connor, J., concurring) (discussing the divertibility of secular aid for religious use).
200 Id. at 858 ("[P]resumptions of religious indoctrination are normally inappropriate when evaluating neutral school aid programs under the Establishment Clause.").
lidify in the absence of Justice O'Connor's muted skepticism. Presumably the Court's new majority will take a similar attitude to the participation of religious groups in charitable choice programs. The Court's doctrine in the financing cases—which I have termed the Court's second Establishment Clause—thus essentially eliminates the barriers to church/state symbiosis that the Court routinely prohibits in the cases involving symbolic governmental endorsement of religion—which are governed by what I have termed the Court's first Establishment Clause.

The problem is that the bodies of doctrine that underlie these two Establishment Clauses—the separationist clause governing endorsement and the neutrality clause governing financing—are intrinsically and comprehensively inconsistent. Under the theory of neutrality that governs the second Establishment Clause, a government program that permits both secular and sectarian entities to compete for government favoritism (in the form of money) is constitutional, even if the practical result is that religious organizations receive virtually 100% of the government's assistance. (Recall that, in the Cleveland voucher case, the Court upheld a program in which students attending religious schools received ninety-six percent of the government funds.

Yet the Court specifically and repeatedly has rejected the application of this theory of neutrality in the endorsement context. Schools attempting to defend their prayer or Bible-reading programs frequently have argued that these programs are "neutral" in the sense that all religious groups can compete to participate in the program. In School District v. Schempp, for example, the government attempted to defend its policy permitting Bible-reading over a public school intercom on the ground that the students chose the Bible passages and could read from their own personal Bibles. Thus, like the later voucher cases, the program involved individual (rather than governmental) religious choice and the beneficiaries under the program were not limited to members of one faith. Nevertheless, the Court struck down the program. Indeed, the Court used the state's nod toward ecumenism as proof that the state recognized "the place of the Bible as an instrument of religion... and [its] recognition of the pervading religious character of the ceremony."

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201 As noted, the Court already has rejected a facial challenge to an earlier version of these programs. See supra note 187.
202 See Zelman, 536 U.S. at 647 (noting that, of the 3,700 students who participated in the voucher program, 96% were enrolled in religious schools).
204 See id. at 207 (recounting the nature of the public school policy).
205 Id. at 224.
In a much more recent variation on this same theme, the school board in *Santa Fe Independent School District v. Doe* attempted to defend its policy of permitting students to pray before public school football games on the ground that the students, rather than the school system itself, would vote on whether the pre-game ceremony would include a prayer and what that prayer would contain. The Court rejected this argument on the ground that this majoritarian system would effectively guarantee that the religious majority would always dominate the forum, explaining that "the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced." What was true in Santa Fe, Texas, however, was also true in Cleveland, Ohio: in a country where the system of private education is dominated by the religious majority, a formally "neutral" system will effectively ensure that most of the benefits will go to that majority.

The majority's contradictory attitude toward the constitutional significance of formal neutrality is not the only difference between the Court's first and second Establishment Clauses. There are also deeper theoretical differences between the Court's approaches to the two types of cases. The Court's first and second Establishment Clauses rest on theoretical assumptions about the relationship between church and state that are completely incompatible. Three of these assumptions are especially telling. First, in the financing cases the Court approves the government's authority to make the political judgment that religion serves a positive social function. In rejecting an Establishment Clause challenge to a federal family planning statute, for example, the Court stated that "it seems quite sensible for Congress to recognize that religious organizations can influence values and can have some influence on family life, including parents' relations with their adolescent children." In the endorsement cases, on the other hand, the Court prohibits the government from taking any position on the relative benefits or advantages of religion in general or a specific religion in particular.

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207 Id. at 304.
209 See Lee v. Weisman, 505 U.S. 577, 589 (1992) ("The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission."); Engel v. Vitale, 370 U.S. 421, 435 (1962) ("It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.").
Second, in the financing cases, the Court has approved the principle that the government can provide financial assistance for religious education, which is one of the primary mechanisms by which churches cultivate their young members and attract new adherents. In the endorsement area, on the other hand, the Court has held that the government cannot sponsor messages by the religious majority celebrating, advancing, or reaffirming its faith, nor can the government undertake the task of defining a common religious ground on which "once conflicting faiths [may] express the shared conviction that there is an ethic and a morality which transcend human invention."  

Finally, the Court repeatedly expresses its concern with the coercive effects government action may have on religious dissenters in the endorsement context, while in the financing context it permits the government to collect taxes from religious dissenters and use those funds to finance religious activities, including education. Forcing one set of adherents to pay for the sectarian activities of their religious adversaries is quintessentially coercive. Thus, there is a stark contrast between the Court's approach to coercion under the first and second Establishment Clauses: the Court prohibits indirect, subtle, and psychological coercion in one context, while permitting direct, overt, and concrete coercion in the other.

It is not immediately evident why the same concerns that motivate the Court in one context seem negligible or nonexistent to the Court in others. But to make matters worse, the Court seems to have identified two other Establishment Clauses, which advance two other perspectives on church/state relations. The approaches taken under these other two Establishment Clauses are related and may portend a tendency toward giving up on the entire project of defining through constitutional litigation the proper limits of church and state.

C. The Nondiscrimination Establishment Clause

The Court's third Establishment Clause is actually discussed in cases brought under the Free Exercise Clause. Even though the Court addresses these cases in terms of identifying rights under the Free Exercise Clause, these decisions are relevant to defining the Establishment Clause limits on government because they deal with the extent to which the government can interfere with minority religious practices in order to advance the social mores of the political and religious majority. Examples of recent cases in this category involve the

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210 See, e.g., Santa Fe, 530 U.S. at 307 (discussing a pre-football game prayer over a public address system).
211 Lee, 505 U.S. at 589.
enforcement of drug abuse laws against members of Native American religious groups that use drugs in their religious ceremonies\textsuperscript{212} and the enforcement of animal abuse statutes against religious practitioners who sacrifice animals during their religious ceremonies.\textsuperscript{215}

In the first of these cases, Employment Division v. Smith, the Court held that under the Free Exercise Clause, "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest."\textsuperscript{214} In the second of these cases, Church of Lukumi Babalu Aye v. City of Hialeah, the Court elaborated on what it meant by the concept of "generally applicable." In Lukumi, the Court resorted once more to the concept of neutrality, although the Court gave the term a somewhat different scope than it gave the similar term in the Establishment Clause cases involving government financing of religious activities:

Although a law targeting religious beliefs as such is never permissible if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.\textsuperscript{215}

The Court emphasized that the legislature's intent was as crucial as the actual phrasing of the statute or policy in determining whether the government action was neutral, explaining: "Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause 'forbids subtle departures from neutrality,' and 'covert suppression of particular religious beliefs.'"\textsuperscript{216} In sum, the Lukumi version of neutrality produces a nondiscrimination rule that policies are unconstitutional only if they discriminate against an individual or group based on religious faith. Based on this theory, the Court held the City of Hialeah's prohibition of animal sacrifices unconstitutional because "Santeria worship service was the object of the ordinances."\textsuperscript{217}

This rendition of the Free Exercise Clause has several implications for the Court's Establishment Clause jurisprudence. At first glance, the nondiscrimination principle of Lukumi seems to complement the general thrust of the Court's first Establishment Clause requirement of no religious endorsement. "In our Establishment Clause cases we


\textsuperscript{214} 494 U.S. at 886 n.3.

\textsuperscript{215} 508 U.S. at 533 (citations omitted).

\textsuperscript{216} Id. at 534 (citations omitted).

\textsuperscript{217} Id.
have often stated the principle that the First Amendment forbids an
official purpose to disapprove of a particular religion or of religion in
general. As the Lukumi Court notes, its principle simply takes the
no-endorsement proposition that the government may not act in ways
that favor a religious faith (or religion in general) and adds to it the
seemingly unobjectionable principle that the government cannot act
in ways that disfavor the exercise of religious faith.

At second glance, however, the Court’s interpretation of the Free
Exercise Clause in Smith and Lukumi seems less like the Court’s first,
separationist Establishment Clause and more like its second, majori-
tarian Establishment Clause. What at first glance seems like a prohi-
bition of religious favoritism, at second glance seems to embody reli-
gious favoritism. Two consequences of the Court’s Smith and Lukumi
decisions support this conclusion. First, the Court’s holdings in Smith
and Lukumi actually prohibit only a very narrow range of government
conduct, and the prohibition does not exhaust the various ways in
which religious favoritism can infect government conduct. The non-
discrimination rule of Smith and Lukumi comes into effect only when
the government somehow communicates—either through the phras-
ing of a government dictate or the legislative history leading up to the
policy’s adoption—its disfavor of a specific religious faith and its
practitioners.

The nondiscrimination rule does not, however, in any way limit
the government’s ability to enact regulations based on assumptions
and moral frameworks that are heavily imbued with the majority’s
faith. The drug laws at issue in Smith have obvious secular purposes,
but the government’s unwillingness to carve out exemptions to those
laws for individuals participating in religious ceremonies exhibits an
insensitivity to religious dissenters that is informed by the majority’s
greater familiarity with their own religions’ ceremonial use of sacred
intoxicants other than peyote. It is unlikely, for example, that the
State of Oregon would similarly insist on rigidly applying its underage
drinking laws to the ingestion by minors of sacramental wine. The
disjunction between the rules applicable to familiar and common reli-
gious practices and those that apply to unfamiliar and strange reli-
gious practices amounts to a form of favoritism toward the sorts of
broad-based faiths that tend to be dominant among members of the
political majority. Not only is favoritism of the majority implicit in
the standard, it was explicitly embraced by the majority in Smith:

It may fairly be said that leaving accommodation to the political process
will place at a relative disadvantage those religious practices that are not
widely engaged in; but that unavoidable consequence of democratic gov-
ernment must be preferred to a system in which each conscience is a law

\[218\] Id. at 532.
 unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.\footnote{Smith, 494 U.S. at 890.}

There is another respect in which the *Smith/Lukumi* nondiscrimination rule favors the lifestyles, values, and practices of the religious majority. While the *Smith/Lukumi* rule protects religious groups from the overtly hostile actions of legislators and government officials, it does not protect members of the general population from governmental actions that have significant religious overtones to those running the government. Many current controversies fall into this category. The disputes over abortion and homosexual rights are two prominent examples. As both Justices and academic commentators have pointed out, the regulation of abortion has significant religious overtones and is probably inextricably bound up with inherently religious notions regarding the ensoulment of the fetus.\footnote{See Webster v. Reprod. Health Servs., 492 U.S. 490, 566 (1989) (Stevens, J., concurring in part and dissenting in part) ("[T]he absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause of the First Amendment to the Federal Constitution."); RONALD DWORKIN, LIFE'S DOMINION (1993) (arguing that any pre-viability regulation of abortion would be based on inherently religious determinations and therefore would violate the Establishment Clause); Ronald Dworkin, Unenumerated Rights: Whether and How Roe Should Be Overruled, 59 U. CHI. L. REV. 381, 418–25 (1992) (same).}

Criminal prohibitions of homosexual conduct are likewise deeply rooted in religious teachings. As Chief Justice Burger concurred in *Bowers v. Hardwick*, "Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards."\footnote{Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (Burger, J., concurring).} While *Lawrence v. Texas* provides immediate relief from moral regulations pertaining to intimate sexual conduct, the Court's majority opinion specifically leaves intact regulations of other aspects of homosexual relations whose regulation have equally deep religious roots.\footnote{See Lawrence v. Texas, 539 U.S. 558, 567 (2003) (implying that the government may retain the authority "to define the meaning of the relationship or . . . set its boundaries" in situations in which that relationship threatens "abuse of an institution the law protects"); id. at 578 (noting that the decision in Lawrence "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter").}

The problem with the Court's nondiscrimination principle is that it prohibits discrimination against religion, but it does nothing to prohibit discrimination in favor of religion.\footnote{For an example of arguable discrimination "in favor of" religion, see Cutter v. Wilkinson, 125 S. Ct. 2113 (2005). In Cutter, the Supreme Court upheld the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-1(a) (2000), which provides accommodations for prisoners who engage in religious activities, but provides no such accommodations for similar activities of nonreligious prisoners. The Court did not deny that such discrimination existed but only noted that if such discrimination were significant "all manner of religious accommodations would fall." Cutter, 125 S. Ct. at 2124.} When the constitutional companion to the Free Exercise Clause is viewed in light of this
principle, we can see a "third" possible Establishment Clause. Under this third Establishment Clause, religious dissenters are left to a political process that can surreptitiously advance religious values, hampered only by the restriction of nondiscrimination. Put another way, the third Establishment Clause does not prohibit the political majority from indiscriminately forcing everyone in society to conform to an ethos that is so permeated with the majority's most deeply felt religious values that the majority views the values as transcending religion.

D. The Deconstitutionalized Establishment Clause

The theme of religious majoritarianism is the defining feature of the Court's second and third Establishment Clauses. Under the Court's second Establishment Clause, an overtly religious political majority may fund religious activity from general tax revenue, provided that the legislature is careful to craft the appropriations measure in sufficiently "neutral" terms. Likewise, under the Court's third Establishment Clause, the political majority may craft draconian moral regulations that track the behavioral guidelines provided by the majority's religious leaders—provided that the legislation applies the moral regulation in a nondiscriminatory way. The Court's fourth Establishment Clause continues to emphasize the theme of majoritarianism, but it takes this theme to a new level and does so in a context that may discomfort even the religious groups that usually applaud the Court's recent Establishment Clause tendencies.224

The fourth Establishment Clause is a very recent creation. In Locke v. Davey, the Supreme Court upheld a Washington state university scholarship program that assists academically gifted students with post-secondary educational expenses, but denies funding to students seeking devotional theology degrees.225 The state's refusal to fund devotional theology degrees is necessary to comply with the Washington state constitution's version of the Establishment Clause, which is phrased more precisely than the federal version. According to Washington's version of the Establishment Clause, "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."226

The United States Supreme Court held that the Washington statute and constitution do not violate the federal Constitution's Establishment or Free Exercise Clauses. The Court rejected the plaintiff's

225 Id. (upholding WASH. ADMIN. CODE § 250-80-020(12)(f)–(g) (2003)).
226 WASH. CONST. art. I, § 11.
claim that the Washington policy violated the nondiscrimination principle of *Lukumi*, even though Washington essentially provided scholarships to all students except religious students seeking theology degrees. To uphold the *Lukumi* claim, the Court concluded, “would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning.” In defense of its conclusion, the Court recognized that from the earliest days of the country’s history, many states have refused to expend tax money on religious enterprises. Washington’s scholarship program follows in this tradition, and the Court held that nothing in the Establishment Clause requires states to fund training for religious occupations against the state’s will. The State of Washington did not discriminate against religion or religious persons, the Court held, because it “ha[d] merely chosen not to fund a distinct category of instruction.”

This decision creates yet another variation on the theme of neutrality in the Court’s jurisprudence. Whereas the Court’s *Zelman*-style version of neutrality permits states to aid religion if they so desire on an ecumenical basis, the Court’s *Locke*-style version of neutrality harkens back to the Court’s earliest Establishment Clause cases, in which the term “neutrality” referred to what the Court used to call “strict neutrality.” Under this version of neutrality, the government must obey the command to remain strictly neutral on matters of religion, “neither aiding nor opposing religion.” Under the new version of this theory described in *Locke*, however, strict neutrality is no longer required by the federal Constitution; rather, it is one approach among many that the federal Constitution allows each state to choose on its own. Under *Locke*, the separation of church and state has been demoted from a federal constitutional command to a state policy option.

This approach has the effect of deconstitutionalizing questions relating to government financing of religion. Religious and secular groups are being told to fight these matters out in the political arena; and under either *Zelman* or *Locke*, the Court is likely to uphold whatever policy the participants in each state’s political process decide to adopt. This approach may actually be the most dangerous of all the Court’s four current Establishment Clauses, when viewed from the perspective of all religious faiths. What this approach portends is a Hobbesian war of all against all for dominance of the civic culture and government purse. Since the core religious dictates that are the basis for the conflict will be absolutist and non-negotiable, all sides

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227 *Locke*, 540 U.S. at 720.
228 *Id.* at 721–23.
229 *Id.* at 721.
will seek total victory in order to pursue their version of sacred truth. Even if some religious groups do not wish to enter the culture war or have no desire to foist their views upon others, they will be forced to enter the fray and seek victory as a necessary act of self-defense. If everything turns on the outcome of the political battle, after all, then both sides would be well advised to fight to the death to ensure that their view of eternal salvation dominates. Millions of dollars (and the souls those dollars may entice) are at stake. The country has witnessed this ugly scenario before, and if Locke is any indication, we may be about to do so again.

None of this is intended to convey the impression that the actual result in Locke is wrong. The result in Locke is correct: The Constitution does not require the State of Washington to finance Joshua Davey's religious education. But the rationale for this result is not that the Jeffersonian separationists happen to have captured control of the Washington State Legislature and imposed their will on the state. That rationale sends a message to proponents of state-financed religious education that they should redouble their efforts to bring religious disputes into the public sphere and fight to grab control of the public "fisc" back from their religious opponents. It is not possible to conceive of a more potentially poisonous message to send in an increasingly divided and religiously factionalized society. The reason the Court's result was correct in Locke is not that the Court properly respected the results of a religiously inflamed political process, but rather that in our system, the question should never have been a matter of state political authority at all. The reason that the result in Locke is correct is that the Establishment Clause provides the framework for a secular society in which the financing of religious education is relegated entirely to the private sector.

The Court's decision in Locke is unsatisfactory, because in that decision, the majority defines a new, "fourth" Establishment Clause in which the Court no longer even bothers to address the central issues that have always been at the heart of Establishment Clause jurisprudence, such as: What is the proper relationship between church and state? What are the proper parameters of religious governance in a pluralistic democracy? Can the government legitimately coerce members of one faith to pay for the training of another faith's clergy? In Locke, the Court throws up its hands and gives up even participating in the discussion. "Fight it out among yourselves," the Court seems to sigh; and if you don't like the result reached by the State of Washington, then move to Alabama. In this sense, the Court's fourth Establishment Clause may ultimately absorb the other three. If the

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231 See supra notes 80–84 and accompanying text.
Court is willing to let a religiously charged political process sort out the issues that got the Establishment Clause ball rolling to begin with, then there is no reason why the Court shouldn’t be willing to let the same process sort out all the other issues as well. This, of course, is just another way of saying, “Let the religious wars begin.”

III. THE ORGANIZING PRINCIPLES OF SECULARISM AND THEOCRACY

The only conclusion that can be drawn from the material discussed in the preceding Sections is that the Court’s current Establishment Clause jurisprudence is inconsistent to the point of incoherence. The problem cannot be attributed simply to the ineptly drafted standards discussed in Section I. Despite the inherent difficulties in deciphering constitutional standards that are phrased in vague terms such as “coercion,” “endorsement,” or “neutrality,” the problem with the Court’s current Establishment Clause regime is not primarily linguistic nor definitional. After all, the Court even has problems consistently applying the most unambiguous of its standards (such as the “secular purpose,” “secular effect,” and “no-entanglement” requirements of *Lemon*). The problem is much deeper: The problem lies in the Court’s unwillingness to settle on a comprehensive (and comprehensible) theory of the Establishment Clause. No set of standards will make sense unless those standards are informed by some notion of what they are supposed to accomplish. As the material described in Section II illustrates, several of the Court’s current Justices cannot decide what function the Establishment Clause should serve. Their indecision has fractured the Court’s church/state jurisprudence to the point that the Court is now applying multiple Establishment Clauses, each of which is conceptually distinct from the others.

The Court’s inability to define one set of goals and purposes for the Establishment Clause is reflected in the debate within the academic literature over the larger meaning of the Clause. Because of the two new appointments to the Court and the possibility of one or more additional appointments to the Court in the near future, the country has now arrived at a crucial juncture in the debates over the constitutional law of church and state. It is no longer true—as it probably was as recently as a decade ago—that the basic value of separationism defines the field for most of the mainstream players in this area of constitutional law. As Chip Lupu and Robert Tuttle recently noted, “only the most ostrich-like Separationist could have denied the flux in the law of the Establishment Clause.” The debate

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today is not over how aggressively to pursue the central value represented by the separation of church and state. Rather, the debate today is over whether we should abandon the goal of separation altogether. This increasingly vociferous debate over basic values threatens to reorient Establishment Clause jurisprudence in unexpected and imprudent ways. Abandoning the separation principle will entail changing many of our present assumptions about the powers of government, the nature of citizenship, the influence of religion, and the very meaning of religious liberty.

The remainder of this Article is a series of caveats about this newly invigorated effort to renounce the Jeffersonian objective of church/state separation as the defining principle of the Establishment Clause. These caveats are based on the blunt premise that abandoning separation inevitably leads to the adoption of a sectarian vision of government and the evisceration of the Establishment Clause. This premise follows from the simple logic of the separation principle and its theocratic opposite. In sum, the logic of separationism can be reduced to four propositions: first, a meaningful principle of separationism requires a wholly secular government; second, any theory that abandons separation necessarily will permit government to be nonsecular; third, if the nature of government is nonsecular, then it must be theocratic; and fourth, a theocratic government will never be nonsectarian.

A more detailed defense of these propositions and the theory of secular government that they support will be set forth below. Before turning to that defense of separationism, however, brief attention will be given to some of the common arguments against a rigorous theory of church/state separation.

A. The Critique of Separation

The principle of separation of church and state has had a hard time recently in the United States. For many years, the principle has been attacked by those on the Supreme Court who would permit government to engage directly in "nonpreferential" religious activity.233 Until recently, those Justices have been on the fringe of the Court's Establishment Clause discussions. The vigor of these attacks

233 See, e.g., Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45, 54 (2004) (Thomas, J., concurring) (arguing that the First Amendment was not intended to interfere with state establishments of religion and asserting that although the First Amendment was written by James Madison, it did not reflect his "extreme" views on separation of church and state); Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) (noting Jefferson's advocacy of a "wall of separation between church and State," asserting that Establishment Clause doctrine "has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years," and arguing that the First Amendment should permit nonpreferential establishments of religion).
has been heightened lately, however, by salvos from some prominent jurists and academics who argue that the entire separationist ideal is nothing but a cover for Protestant attempts to dominate Catholicism and/or secularist attempts to undermine organized religion, generally.\footnote{See, e.g., Mitchell v. Helms, 530 U.S. 793, 829 (2000) (arguing that the separationist prohibition on government aid to pervasively sectarian institutions was targeted “almost exclusively [at] Catholic parochial schools” and was therefore “born of bigotry[ ] [and] should be buried now”); Allegheny v. ACLU, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in part and dissenting in part) (arguing that “the Establishment Clause ... [should be interpreted to] permit[ ] government some latitude in recognizing and accommodating the central role religion plays in our society” and that the rigorous enforcement of the separation of church and state would require government to recognize only the secular “to the exclusion and so to the detriment of the religious”); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 193 (2002) (calling the separation of church and state a “Theologically Liberal, Anti-Catholic and American Principle”).}

Even some former friends of separationism have abandoned the ideal. Chip Lupu has argued that separationism is essentially already dead, and that part of the reason for this death is separationism’s unfortunate favoritism toward “[the] ideology of secular rationality.”\footnote{Ira C. Lupu, The Lingering Death of Separationism, 62 GEO. WASH. L. REV. 230, 279 (1994).} According to Lupu, the secular rationality favored by separationism is nonobjective (because it favors science and markets) and is not “particularly conducive to the life of the spirit, without which it may not be possible for a nation to thrive.”\footnote{Id.} Likewise, Michael Perry has recently abandoned his earlier resistance to religiously based legislation\footnote{See MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 30–38 (1997).} and now argues that the Establishment Clause should permit the legislature to embody religious morality in law.\footnote{See MICHAEL J. PERRY, UNDER GOD?: RELIGIOUS FAITH AND LIBERAL DEMOCRACY 20–34 (2003).} A separationist Establishment Clause rule that prohibits the legal embodiment of religious morality “deprivilege[s] religious faith, relative to secular belief, as a ground of moral judgment.”\footnote{Id. at 30.} Douglas Laycock has even forsaken the use of the term “separation of church and state,” because “the phrase has no sufficiently agreed meaning to be of any use.”\footnote{Douglas Laycock, The Many Meanings of Separation, 70 U. CHI. L. REV. 1667, 1700 (2003) (reviewing PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002)).} He would prefer to treat separation as essentially coextensive with a theory of substantive neutrality under which the government would be required to “minimize government incentives to change religious behavior in either direction.”\footnote{Douglas Laycock, The Underlying Unity of Separation and Neutrality, 46 EMORY L.J. 43, 71 (1997).}
It is easy to understand the perspective of some of the opponents of separationism. When Jay Sekulow and his fellow lawyers for Pat Robertson’s American Center for Law and Justice argue that the theory of separationism is “destructive” when viewed from the “political perspective of Jefferson,” because it is “wrought with the anticlerical biases of the enlightenment,” it is not hard to determine the overall objective of the critique. If someone wants the government to advance the specific tenets of his or her particular faith or to expand the influence of the concept of religion in general, then the separation of church and state is a principle that must be extinguished once and for all. Religious hegemony through force of law is impossible if religion must stand apart from the government.

But this point of view does not describe that of other recent opponents of separationism such as Professors Lupu, Tuttle, Perry, and Laycock. They are sensitive and thoughtful critics who are deeply committed to the cause of religious liberty. For this reason, their abandonment of separationism is more puzzling, as is their characterization of the debate. To return to an example cited above, Professor Laycock recently despaired that the very term “separation of church and state” no longer has a sufficiently definitive meaning to justify its prominent placement at the center of church/state discussions. He notes that “to some people separation means protection of religious activity from government, and to other people it means suppression or subordination of religious activity by government.”

The odd thing about this quote is that Professor Laycock leaves out a third possible meaning, which probably comes closer to describing how a majority of the Court actually has used the term “separation” since the modern era of church/state jurisprudence began in *Everson v. Board of Education*.244


Laycock, *supra* note 240, at 1700.

330 U.S. 1 (1947). The *Everson* Court was both specific and comprehensive in setting forth what it meant by “separation of church and state” in the most famous passage from that case:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbelief, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between church and State.”

*Id.* at 15-16 (citations omitted).
The third possible meaning of separation interprets the term as referring to the need to protect secular government from religious domination and the political distortions that such domination entails. This meaning is consistent with the first meaning of separation noted by Laycock, but it does not at all encompass the second of Laycock's possible meanings. When Laycock writes that a strong theory of separation leads to the "suppression or subordination of religious activity by government," the clear implication is that a secular government in a separationist regime would take as its central objective the "suppression or subordination" of religious activity in society at large. This is a common argument against separationism, even though it requires a significant logical leap that cannot be found in any separationist literature. Separationist limits on the religious influence over government in the public sphere have little or nothing to do with what that government may do to suppress or subordinate religious activity in the private sphere. Moreover, no prominent separationist on the Court or in academia has ever made the case that a separationist regime permits—much less requires—the suppression of religion in civil society.

In truth, opposition to separation does not turn on the purported fear of governmental suppression of religion in the private sector, but rather the more controversial fear that in a separationist regime the religious majority in society will not be able to use the government to advance its deeply felt values. The third meaning of separation—i.e., viewing separation as primarily concerned with the protection of a secular government from religious domination—is resisted by those who argue that government should be more accommodating to religion, because like Professor Laycock, they resist putting limits on how the religious majority can exercise its political clout. Laycock is forthright about this point in his criticism of versions of separationism that link the theory to the requirement of a purely secular government:

Professor Lupu accurately describes a certain faction in recent controversies, and that faction may call itself separationist; but its defining com-

For what it is worth, this third meaning also comes much closer to describing the attitudes of James Madison and Thomas Jefferson. In his fight to convince the Virginia legislature to pass Jefferson's Bill for Religious Freedom, Madison repeatedly returned to the argument that the structure of government would be undermined by the intrusion of religion into politics. See Madison, Memorial and Remonstrance Against Religious Assessments, supra note 7, at ¶ 8, reprinted in Everson, 330 U.S. at app. 68 ("What influence in fact have ecclesiastical establishments had on Civil Society? In some instances they have been seen to erect a spiritual tyranny on the ruins of Civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been seen the guardians of the liberties of the people.").

Laycock, supra note 240, at 1700.

See, e.g., Perry, supra note 239.
mitment seems to be to secular supremacy and religious subordination, or at least to religious marginalization.

As I have argued elsewhere, there is little basis for that version of separation in constitutional text, history, or structure. So-called separationism that would privilege secular beliefs and bar religious arguments from public debates mistakes freedom of speech and the working of democracy for establishment. It distorts constitutional provisions that protect the people from the government into provisions that protect the government from the people.\(^{247}\)

This quote is telling, because it indicates that even the liberal opponents of separation are much more concerned with the influence of religion over government policy than they are with the possibility that religion will be suppressed in civil society. But once again, this criticism caricatures the separationist argument: Contrary to the assertions of Professor Laycock and others, no judicial opinion or mainstream academic treatment advocating the separation of church and state argues that a secular government should subordinate religion or enshrine atheism as the national anti-religion. Under a separationist regime, religions are “marginalized” only in the sense that they cannot use the law to finance their sectarian activities through tax revenue or foist their views on nonadherents in public schools and elsewhere. If this is marginalism, then members of minority religious groups may be forgiven for thinking that marginalism may not be such a bad thing.

Laycock’s tendentious phrasing of the problem is not unusual. It is very common for proponents of the anti-separationist position to use the rhetoric of government oppression of private faith to justify an argument in favor of using government power to advance sectarian ends. Michael McConnell once made a point similar to Laycock’s that employed much the same rhetorical shift: “the idea of ‘separation between church and state’ is either meaningless, or (worse) is a prescription for secularization of areas of life that are properly pluralistic.”\(^{248}\) This statement cannot withstand close scrutiny. Why would a constitutional rule that prohibits the government from advancing a religious agenda inevitably have the effect of secularizing “areas of life that are properly pluralistic?” If anything, the logic seems to work in the other direction. A government that is required to stand apart from controversies over the existence of God and the nature of His moral mandates seems much more likely to foster a vibrant and pluralistic private life than a government that is permitted to incorporate one particular set of ultimate beliefs into law. Laycock makes a simi-

\(^{247}\) Laycock, supra note 241, at 47 (citations omitted).

lar mistake when he argues that "[s]o-called separationism that would privilege secular beliefs and bar religious arguments from public debates mistakes freedom of speech and the working of democracy for establishment." But nothing in a separationist political regime would bar religious arguments from public discussion, nor would such a regime privilege secular beliefs over religious beliefs. A separationist regime simply requires that some issues be taken off the government's table and left to the private sector, where individuals and private associations such as churches can join together and decide these issues among themselves, free of majoritarian coercion through law.

In the end, the arguments of liberal opponents of separationism sound remarkably similar to the arguments used by conservative critics such as the American Center for Law and Justice, Michael McConnell, and Richard Neuhaus. Both sets of anti-separationists would empower religious groups to influence the government and incorporate their views into law. Both groups base their conclusions on three dubious assertions: first, that prohibiting government from adopting religiously-based policies marginalizes and discriminates against religious practitioners; second, that the separation of church and state effectively enshrines secularism as the national faith; and third, that religion is necessary to provide the deeper values that a democracy needs to operate and thrive.

These are debatable propositions, which will be addressed further in the next Section; but for now, it is noteworthy that the liberal and conservative critics are basically in agreement about the perceived problems with the separation principle. The two different groups would undoubtedly impose different limits on how far the government could go to enforce the religious majority's views. The ques-

249 Laycock, supra note 241, at 47.
250 See supra note 38 and accompanying text.
251 For example, Professor Laycock submitted one of the most compelling briefs supporting Michael Newdow's challenge to the inclusion of the words "under God" in the Pledge of Allegiance. See Brief for Rev. Dr. Betty Jane Bailey et al. as Amici Curiae Supporting Respondent, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (No. 02-1624). The first half of this brief provides abundant and eloquent support for Newdow's argument that the religious language in the Pledge abridges the religious liberty of those not adhering to the majority faith. See id. at 4-20. On the other hand, the second half of the brief also provides the framework and detailed arguments eventually adopted by Justice O'Connor to support her conclusion that the government's endorsement of the majority's religion in the Pledge does not violate the Establishment Clause. Compare id. at 20-29 (urging the Court to emphasize that the religious language in the Pledge is not a prayer, does not refer to Christianity alone, is very short, was in the Pledge for fifty years before being challenged, and cannot be imposed on anyone as part of a mandatory recitation requirement), with Newdow, 542 U.S. at 37-44 (O'Connor, J., concurring) (adopting and discussing these justifications for upholding the religious endorsement in the Pledge). The second half of Professor Laycock's brief can be explained as an understandable exercise in controlling the damage to religious liberty inflicted by a Court unwilling to buck an
tion, however, is whether the liberal critics can logically impose these limits while simultaneously abandoning the separation of church and state. In the next Section, I argue that they cannot.

B. The Defense of Separation

The outline of the case for separation of church and state is implicit in the preceding responses to some of the critics of the separation principle. This Section will flesh out this argument by discussing three propositions that are at the heart of the affirmative case for separationism: (1) separationism is the only theory of church and state that is compatible with the concept of limited constitutional democracy; (2) a secular government is the only political mechanism that can adequately implement the separation principle; and (3) there is no alternative to separation except some form of theocracy, which inevitably will devolve into either a mild or strong form of sectarianism.

1. Democracy and Political Agnosticism

The arguments for the separation principle track many of the arguments for pluralistic democracy in general. The separation principle is intricately connected to notions of limited government, which are themselves tied to the concept of democracy as a long-term project of popular governance. The separation principle is premised on the theory that a proper democratic government must be defined by more than mere procedural mechanisms to determine the composition of immediate electoral majorities. Under this theory, a proper democracy must also be constrained by substantive limits on the objectives that government may pursue in exercising its authority. Specifically, a democratic government should avoid all exercise of power that imposes through law a particular view of ultimate goods or any totalizing view of morality and virtue. Government must be philosophically, as well as religiously agnostic. This is not to say that the government cannot pursue particular social goals; nor is it to say that the government cannot package and justify these goals as value choices. The key is that the government cannot present its policies as ultimate value choices, which are by their nature permanent, imposed from outside the political system (e.g., dictated by God), and

incensed political majority. But it also highlights the central problem of attempting to protect the liberty of religious dissenters while compromising on the separationist mandate. Once the separation principle is abandoned, the ultimate battle for religious liberty is lost and all remaining efforts amount to little more than damage control.
therefore immunized from critique and revision by subsequent political majorities.

As I have explained elsewhere, this view of democracy is a simple extrapolation from the basic attributes of every democratic regime.\textsuperscript{292} Under this view, a democratic political structure is defined by three characteristics. A democratic government: (1) is subject to popular control by properly enfranchised citizens; (2) ascribes legitimacy to policies enacted by current majorities only if those policies are recognized as temporary and are subject to being revisited (and possibly rejected) by subsequent majorities; and (3) is organized around a process that emphasizes a common political discourse based on empirical analysis and rational critique of government action. The first characteristic is the \textit{sine qua non} of democracy and is presumably uncontroversial. It would be difficult to define democracy without popular control; after all, the Greek root of the word means "the people."\textsuperscript{255} If the first characteristic of popular control is a given for any democratic system, then the other two characteristics follow inevitably.

The second characteristic requires all policies to be temporary and contingent, because otherwise the democratic process of alternating majorities within a context of popular control could not continue to operate. Democratic governance (again defined as "popular control") would be destroyed if a particular group or coalition could capture the government at one point in time and enact policies that were immunized from the contrary decisions of future majorities. Democracy is not a one-time snapshot of one day's majority. Rather, it is a process that (if the system is designed correctly) should operate in perpetuity, since it is infinitely adaptable to new power structures and political alliances. Thus, all policies enacted by a political majority that currently controls a democratic government must be treated as temporary and subject to revision or rejection by a future majority. In a proper democracy, the law cannot embody any set of eternal truths.

The third characteristic of democratic government flows from a recognition that in a diverse civic culture, democratic conversations about self-governance must occur among citizens who have radically different views of the moral universe. The moral absolutes that one person derives from his or her religious faith will often be incomprehensible to others who do not share that person's particular theological orientation. In Richard Rorty's terms, religious rationales for


\textsuperscript{255} \textit{IV Oxford English Dictionary} 442 (2d ed. 1989) (defining "democracy": Greek \textit{demokratia}, from \textit{demos} "the people" plus \textit{-kratia} "power, rule").
public policy become "conversation stoppers," and therefore cannot advance the cause of democratic self-governance. Effective political conversations between citizens of a democracy must take place on religiously neutral turf and be conducted in terms that are generally accessible to all. The pragmatic and earth-bound language of empiricism and rationality provides a mutually accessible structure for discourse about the common collective concerns of groups and individuals who possess wildly varied ultimate values. Using this language necessarily limits the scope of the discussion to exclude those ultimate values, but this limitation is a necessary characteristic of a functioning democracy. A diverse democratic culture cannot survive over the long term if political discussions become hermetically sealed monologues that are cast by each party in the terms of mutually exclusive religious "Can't Helps."

One of the paradoxes implicit in democratic theory is that the rules of democratic dialogue within the government cannot be enforced directly against individual citizens in their discourse conducted outside the government. The democratic requisites of free speech and open discussion could not operate effectively if the constitutional regime allowed private citizens to participate in public discourse about political policies only if they agreed in advance to speak in terms that were universally accessible to everyone else in society. In the general society's public debate, speakers may use any terms that they see fit, no matter how incomprehensible or exclusionary the speakers' perspectives may be to those who do not share the speakers' biases. Although the rule of universal accessibility cannot be enforced against private participants in political discussion, the rule can be applied to citizens who join the government and employ the apparatus of democratic legitimacy to make and enforce the law. Private citizens cannot be forced to converse in particular ways, but the government can. This limitation on the government operates to hold the government to its democratic obligation to render policies that are acceptable (or at least understandable) even to citizens who have radically different worldviews and fundamental values than those who comprise the political majority.

If this conception of democracy is correct, then the government may not base policy on religious grounds. If the government bases policy on religious grounds, it renounces the central democratic requisite of popular control (because it grants legal status to the dictates of a supernatural entity, viz. God); and it effectively forecloses any dialogue about the wisdom of particular policies. There is no point


255 See Oliver Wendell Holmes, Natural Law, 32 HARV. L. REV. 40, 40 (1918).
in debating the proposition that "God said so." Thus, the rule of universal political accessibility prohibits the government from basing its policies on religious grounds—and hence, the *Lemon* secular purpose requirement. As a practical matter, this requirement will not prevent some legislators from surreptitiously slipping their religious views into law, but it will prevent them from doing so if they cannot satisfy the courts that there is some plausible nonreligious rationale for each policy. The mandate to explain policies in secular terms will not only prevent the government from enacting legislation that is exclusively theological, but will also force legislators to internalize the essential democratic lesson that they must respect the viewpoints of political opponents, instead of only seeing opponents as apostates, heretics, or sinners.

Professor Lupu complains that the separation principle privileges the "the ideology of secular rationality," but in reality it is democracy itself that requires such an ideology. In a democracy, secular rationality is the neutral territory on which people of competing faiths can make decisions about practical issues of mutual importance, while leaving aside ethereal matters having to do with irreconcilable notions of the ultimate good. This does not diminish the importance of the pursuit of an ultimate good, nor does it devalue the religious faith that directs individuals in that search. A democracy simply shifts these matters from the public sphere into a strong, vibrant, and vigorously protected private sector, in which discussions are outside the control of the government and free from political sanction. The fundamental right to retreat into the private sector when one loses the political battle is no small consolation for renouncing the ability to participate in a winner-takes-all war to control the government.

2. Separation as Secularism

If the depiction of democracy set forth above is correct, then it follows that the separation of church and state is essential to ensure that the government answers to the people rather than to the celestial dictates of God's representatives. It also follows that separation requires democratic governments to be exclusively secular in nature. Once again, this trait follows from the central democratic characteristic of popular governance. A democratic government must be free of any pretense that it is carrying out the commands of an entity that purports to be supreme to the people, themselves. In a democracy, *vox populi, vox Dei*; the voice of the people is the voice of God (albeit only within a set of constitutional parameters that limit the scope of the popular government's concerns to the mundane postindustrial

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256 Lupu, *supra* note 235, at 279.
equivalents of making the trains run on time). Any attempt to move beyond these mundane matters risks allowing the populi to think of itself as the real Dei, at which point ordinary human hubris takes over, the entire democratic project fails, and religious liberty is extinguished. As usual, the cynical Holmes had it right; he accepted that everyone in society believed essential and unprovable truths that would guide their choices and dictate their values, but he then defined "truth" as "the system of [his] (intellectual) limitations."257 The political humility that produces rules limiting the scope of democratic policymaking derives from the recognition that intellectual limitations can be collective as well as individual. Sometimes the voice we hear is not really God at all, but the distorted sounds of our own selfish interests and personal fears.

Enforcing the Establishment Clause through the lens of the democratic mandate of limited secular government would provide both substance and clarity to the fractured and incoherent area of jurisprudence described in the first two sections of this article. The standards used to enforce the nonestablishment constitutional mandate would not have to change under such a system. The Lemon test would work quite effectively—if only the Court would free itself from the self-defeating burden of accommodating a political culture "whose institutions presuppose a Supreme Being."258 It is little wonder that a Court attempting to reconcile this proposition with the Lemon secular purpose requirement produces incoherent jurisprudence. The central problem with the Court's modern Establishment Clause doctrine is that the Court's majority understands that it cannot follow the logic of Justice Douglas's unfortunate phrase to anywhere near its logical endpoint without weakening the basic protections of religious minorities and undercutting democratic government itself.

Just as Lemon could be an effective tool for enforcing the democratic mandate of secular government, Justice O'Connor's endorsement analysis could provide a succinct explanation for the connection between the secular mandate and democratic citizenship.259 Justice O'Connor notes that governmental endorsements of religion "make religion relevant, in reality or public perception, to status in the political community,"260 which has the effect of disenfranchising nonadherents of the majority's faith. When the government "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political commu-

257 Holmes, supra note 255, at 40.
259 See supra notes 61–62 and accompanying text.
nity, the government violates the basic terms of a pluralistic democracy's social contract. A system that defines itself by popular control of the government robs itself of legitimacy if it ostracizes any group of citizens who refuse to accept the government's ideological and religious preconditions before exercising their franchise.

Viewing the Establishment Clause as mandating a secular government corrects the misconception that the Establishment Clause is merely another variation on the theme of the Free Exercise and Free Speech Clauses. It is not. Unlike those clauses, which function to protect individuals from the exercise of power by the government, the Establishment Clause is intended to protect the structure of government itself. The Establishment Clause is primarily about politics, not religion. The function of the Establishment Clause is to preserve the fluid political culture that is one of the essential characteristics of a constitutional democracy. This culture recognizes the temporal and transitory nature of all power and policies. Such a system is fundamentally incompatible with religious ideals that have their basis in eternal verities that neither can be questioned nor changed. To borrow a point Michael McConnell once made for other purposes, if there is a God and God has already identified Truth and communicated it to God's disciples, then that truth is superior to the policies of government. But from this perspective the disciples of God would behave irresponsibly and even sinfully to concede power once they obtain it. It would be their religious duty to defend eternal truth against the infidels who happen to win the next election. But this attitude is obviously incompatible with the way democracies operate. A political system that permits any politically powerful faction to use the force of law to impose permanent truths on everyone in society denies the transitory nature of policy and thereby also abandons democracy. Secular government may not protect against all threats to democracy, but it would at least prevent that one.

3. The Impossibility of an "Established" Religious Heterodoxy

The previous two subsections set forth the affirmative case for secular government as an essential structural component of a democratic political system. As noted, this would clarify the confusion currently plaguing Establishment Clause jurisprudence by providing a conceptual baseline against which all government actions must be
measured. Having provided several affirmative arguments for secular governance, this subsection sets forth a complementary negative argument for secular governance. The negative argument is simply this: the only alternative to secular governance is a form of sectarian theocracy. When opponents of the secular government requirement inherent in separationism argue that this theory discriminates against religious practitioners, the implicit message is that a theocratic government would be both ecumenical and nondiscriminatory. There is good cause to believe that neither of these things is true. If this perception is correct, then the religious discrimination claim so often used against separationist theories is canceled out by the fact that the same problem would exist under a theocratic regime.

To be clear about the terminology used here: The term "theocracy" is being used to refer to a government whose officials view themselves as being subject to divine guidance, and whose lawmakers are permitted to base legislation (especially moral legislation) on explicitly religious grounds. The term "sectarian" refers to the subdivision of the group of theocracies whose officials and policies track the teachings of a particular sect or group of sects.

Many of the arguments against separationism assume that the alternative to secular government under a separationist regime is a benign nonsectarian government that will respect the views and practices of many different faiths without privileging any church or its followers. This is also the basis of the nonpreferential establishment approach advocated by Chief Justice Rehnquist in *Wallace v. Jaffree.* Separationist theory denies this possibility. The separationist claim is that there is a stark choice between sectarian and secular governance. There is no alternative to this choice. There is no middle ground between the two poles of political secularism and sectarianism, and no third category can divide the realms of the religious and the secular in a way that would satisfy the proponents of each. In other words, there is no such thing as a "nonpreferential" religious establishment. Any attempt to implement the objective of a nonsectarian theocracy will: (1) produce a series of disingenuous doctrinal distinctions to avoid the more oppressive implications of sectarian governance; (2) degenerate into another series of incoherent and internally inconsistent doctrines and standards; or (3) end up forthrightly embracing a form of mild (or worse) sectarian majoritarianism.

Justifications of a system of religious governance will inevitably end up adopting one of these three approaches, because the academic and judicial proponents of the anti-separationist cause will never be able to impose logical limits on their newly pious govern-

363 See 472 U.S. 38 (1985); *supra* notes 123–33 and accompanying text.
ment. The religious adherents who gain power under the new constitutional system of religious governance can issue repeated assurances that they will protect members of other faiths—or no faith at all—but the system will inevitably end up incorporating the majority’s sectarian beliefs and practices into law. This is inevitable because of the very nature of religion. There is no such thing as a generic God whose preeminence all believers and nonbelievers accept. Once members of the political majority are allowed to introduce some version of God into government and some version of God’s commandments into law, it will become impossible to limit those sacred decrees and divine endorsements to benevolent and universally acceptable truisms. Even a cursory review of religious doctrine reveals the absence of agreement about theological basics. Even bare references to “God” effectively exclude from the government’s religious tent Buddhists, Hindus, agnostics, atheists, and various proponents of other minor sects. Insisting in the government’s authority to embrace this divisive and disputable religious figure will require something on the order of Justice O’Connor’s dismissal of such religious outsiders in her opinion affirming the constitutionality of the religious reference in the Pledge of Allegiance:

The Pledge complies with [the Establishment Clause]. It does not refer to a nation “under Jesus” or “under Vishnu,” but instead acknowledges religion in a general way: a simple reference to a generic “God.” Of course, some religions—Buddhism, for instance—are not based upon a belief in a separate Supreme Being. But one would be hard pressed to imagine a brief solemnizing reference to religion that would adequately encompass every religious belief expressed by any citizen of this Nation. The phrase “under God,” conceived and added at a time when our national religious diversity was neither as robust nor as well recognized as it is now, represents a tolerable attempt to acknowledge religion and to invoke its solemnizing power without favoring any individual religious sect or belief system.264

Justice O’Connor identifies the central issue when she notes that “one would be hard pressed to imagine a brief solemnizing reference to religion that would adequately encompass every religious belief expressed by any citizen of this Nation.”265 Precisely. Once the government is allowed to endorse religion, some religions will be left out. The pesky Buddhists will just have to understand that the Establishment Clause no longer will require the government to do anything more than make a “tolerable attempt” to include them in the country’s religious inner-circle. Justice Scalia goes even further, bra-

265 Id.
zenly abandoning any pretense of respect for those outside the ma-
jority's religious fold: In the newly devout republic inaugurated by
Justice Scalia and the other conservatives, religious outsiders simply
can be “disregard[ed].”

Once one accepts the premise that the Establishment Clause per-
mits the infusion of religion into government and that a religious
government will inevitably be sectarian, then it is difficult to see
where the logical limits of the government sectarianism might be.
This is an old lesson, and Madison included it in his definitive de-
fense of separationism: “Who does not see that the same authority
which can establish Christianity, in exclusion of all other Religions,
may establish with the same ease any particular sect of Christians, in
exclusion of all other Sects?” If the separation principle is removed
from the Constitution’s nonestablishment mandate, and the Estab-
lishment Clause is interpreted to permit the government to endorse
God in general, then a logical extrapolation of this principle would
permit the government to endorse a specific God and all God’s
commands. This is not to say that the government could establish re-
ligious prisons and imprison nonbelievers and others who would re-
sist the majority’s religious mandates. The Free Exercise Clause, for
example, would presumably impose limits on the extent to which
apostates could be forced to worship a particular God in a particular
way. But in the end, provisions other than the Establishment Clause
would have to carry the full load in protecting the religious liberty of
dissenters, and those Clauses would have little effect on the many acts
of religious suasion that an increasingly pious government can be ex-
pected to advance.

Many of the attacks on separationism are based on a commend-
able concern with religious discrimination and disenfranchisement.
But if the critics of separationism have their way, they may find the
Court’s post-separationist Establishment Clause far more troubling
than the weakly separationist jurisprudence that the new majority on
the Court will soon begin to dismantle. As for those of us who still
adhere to the apparently anachronistic separationist ideals of Madi-
son and Jefferson, perhaps we have been too hard on the modern
Court that held sway until Justice O’Connor’s retirement. Maybe the
unsatisfactory current state of affairs is not as bad as some of us sup-
pose. We have an Establishment Clause jurisprudence that is vague,
theoretically unsound, and riddled with inconsistencies. We have ten
different standards and four different bodies of Establishment Clause

\[266\] See McCreary County v. ACLU, 125 S. Ct. 2722, 2753 (Scalia, J., dissenting).

\[267\] Madison, Memorial and Remonstrance Against Religious Assessments, supra note 7, at § 3, re-
jurisprudence. This situation is not good. But then again, four Establishment Clauses is better than no Establishment Clause at all.

CONCLUSION

The Court’s current Establishment Clause is incoherent and unpredictable, except by reference to the disparate personal responses of Justices that cannot be reconciled in any theoretically comprehensible way. The Court occasionally tries to paper over this unhappy situation by making a virtue of incoherence, as when the Court once claimed that its Establishment Clause doctrine “sacrifices clarity and predictability for flexibility.”268 The problem with this self-serving characterization of the Court’s doctrine is that it assumes what is self-evidently missing from the Supreme Court’s treatment of church/state issues; i.e., that the “flexibility” the Court has so carefully cultivated serves some overriding goal in coordinating the relationship between church and state. Flexibility in the pursuit of a consistent constitutional objective would be praiseworthy; aimless elasticity is evidence of an inexcusable failure of the Court to come to terms with the difficult issues at the heart of all Establishment Clause controversies.

Perhaps the Court has refused to grapple with the hard issues presented by church/state disputes because doing so would require the Court to reach logical conclusions that both sides of the church/state debate would find unsavory. On the one hand, if the Court were to decide these disputes by recognizing that the United States is a religious country whose theological essence should be reflected in its government, then the government should logically be allowed to engage the apparatus of government to advance the chosen religious ideals and should be allowed to require everyone—including nonadherents—to finance these theological activities through their taxes. As long as nonadherents are not put in jail for worshipping at the wrong church (or worshipping at no church at all), then they have no right to expect anything more from their government. These people are living in a religious (i.e., Christian) country, so they should get used to it.

On the other hand, if the Court were to decide Establishment Clause disputes consistently in the Jeffersonian/Madisonian “wall of separation” mode, then it would have to come to terms with the inevitable meaning of separationism. In simple terms, separationism means that the government should be comprehensively secular. This does not only mean that religious oaths cannot be required of public officials. It also means that government cannot incorporate the cur-

rent religious majority's beliefs in its official symbols or use the government's many branches to advance a particular religious view of the world. The government cannot announce that it rules a nation "under God." Under a secular regime, government cannot require its public school teachers to instruct students in the majority's faith, and it cannot allow powerful religious groups to use public school facilities to proselytize unwary youngsters. Students in a public school biology class cannot be taught that God created the world. Finally, and perhaps most importantly, government cannot take tax money—even the modern equivalent of three pence—269—from one group of believers (or nonbelievers) and finance the religious activities of others.

These conclusions are absolutist because the logic governing sectarian and secular governance dictates that the two categories are mutually exclusive. Those who oppose the secular approach should open the Pandora's box of sectarian governance at their peril. Optimistic proponents of weak sectarianism may hope that the strong sectarians with whom they are presently allied will restrain themselves from abusing the authority to impose their religious will—authority that may very soon be granted by a newly configured Supreme Court. But it is difficult to identify the historical or theological basis for this belief in the religious majority's inclination to exercise self-restraint. There is nothing in the logic of sectarian government that compels it, and if the long, bloody history of religious governance is any guide, there is no reason that the rest of us realistically should expect it.