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## You Cannot Lose If You Choose Not to Play: Toward A More Modest Establishment Clause

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## Articles

# You Cannot Lose If You Choose Not to Play: Toward a More Modest Establishment Clause

Richard M. Esenberg\*

### I. INTRODUCTION

Several years ago, Professor Rick Duncan, in a collection of essays by Christian legal scholars, wrote that “Christians wander today in an America that has rejected our God-indeed, in an America that often seems to be waging war against [Him].”<sup>1</sup> Professor Duncan suggests that the government “let our children go – without penalty.”<sup>2</sup>

While this may not be the dominant, or even a frequently encountered view among our cultural elites, the observation that public life is hostile or indifferent to religion, albeit generally expressed in milder form, is hardly unique to Professor Duncan.<sup>3</sup>

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1. Richard F. Duncan, *On Liberty and Life in Babylon: A Pilgrim's Pragmatic Proposal*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 354, 355 (Michael W. McConnell, Robert F. Cochran, Jr. & Angela C. Carmella eds., 2001).

2. *Id.* at 362.

3. See, e.g., STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993); REV. RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE* (1984). In a now famous (or, depending on your point of view, infamous) symposium, a collection of eminent scholars argued, among other things, that “morality – especially traditional morality, and most especially morality associated with religion – has been declared legally suspect.” Symposium, *The End of Democracy? The*

In the same collection, Michael McConnell wrote about the tendency of modern liberals to see religion as something that ought to be “relegate[d] . . . to the sidelines of public life.”<sup>4</sup> He urged Christians not to give up on liberal democracy.<sup>5</sup> Others have made the same point regarding the supposed hostility of the law to religious perspectives in the public square.<sup>6</sup>

Some feel differently. Some commentators say that the claim that faith has been driven from the public square is overstated.<sup>7</sup> We have erred, they argue, in permitting too much religion in the public square and risk, not the sterility of secularism, but the oppression of theocracy. For example, one scholar has suggested that “[t]he American political scene has therefore now degenerated to the point that a Christian who takes seriously” Jesus’ admonition in Mark’s Gospel that one ought to pray in private “would have a difficult time getting elected to political office.”<sup>8</sup> One prominent commentator observed that “[t]he wall that separates church and state is under assault.”<sup>9</sup>

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*Judicial Usurpation of Politics*, FIRST THINGS, Nov. 1996, at 18, 19. See also George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 863, 868-69 (1988) (summarizing a study showing secular bias in public school textbooks).

4. Michael W. McConnell, *Old Liberalism, New Liberalism, and People of Faith*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 1, at 5, 6.

5. *Id.* at 6-7.

6. See, e.g., Lisa Shaw Roy, *The Establishment Clause and the Concept of Inclusion*, 83 OR. L. REV. 1, 7 (2004) (“[T]he Court has produced a doctrine that is poised to displace all public religious manifestations.”). Bookstore shelves are replete with more popular (and, perhaps, less nuanced) explications of the same theme. See, e.g., ANN COULTER, *GODLESS: THE CHURCH OF LIBERALISM* (2006); JOHN GIBSON, *THE WAR ON CHRISTMAS* (2005); DAVID LIMBAUGH, *PERSECUTION: HOW LIBERALS ARE WAGING WAR AGAINST CHRISTIANITY* (2003). A recent poll conducted by the Anti-Defamation League found that 64% of the American public believes that “religion is under attack.” AMERICAN ATTITUDES TOWARD RELIGION IN THE PUBLIC SQUARE (2005), [http://www.adl.org/religious\\_freedom/poll\\_files/frame.htm](http://www.adl.org/religious_freedom/poll_files/frame.htm).

7. Certainly we see a certain kind of religion in public places. Politicians frequently invoke a nonspecific deity making no clear demands. Some scholars have argued that this is precisely as it should be. See Robert N. Bellah, *Civil Religion in America*, 96 DAEDALUS 1, 2 (1967).

8. Steven G. Gey, *The No Religion Zone: Constitutional Limitations on Religious Association in the Public Sphere*, 85 MINN. L. REV. 1885, 1914 (2001).

9. Erwin Chemerinsky, *Why the Rehnquist Court Is Wrong About the Establishment Clause*, 33 LOY. U. CHI. L.J. 221, 221 (2001). There are popular tomes on this side as well. See, e.g., KEVIN PHILLIPS, *AMERICAN THEOCRACY*:

Whether one sees America in the early twenty-first century as “Godless” or “God-haunted” may well depend on what one believes the role of religious discourse ought to be. Philosopher Jeffrey Stout has defined “secularization” as “the fact that participants in a given discursive practice are not in a position to take for granted that their interlocutors are making the same religious assumptions they are.”<sup>10</sup> We undoubtedly live in a secularized society,<sup>11</sup> in which religious perspectives are pluriform<sup>12</sup> and in which religion itself may be less widely adhered to.<sup>13</sup>

“Secularism” (at least as I will use the term here) is the view that the absence of religious assumptions is normative.<sup>14</sup> As framed by theologian Harvey Cox, it is “the name for an ideology, a new closed world view which functions very much like a new religion. . . . It is a closed ism. It menaces the openness and freedom secularization has produced.”<sup>15</sup> Having thrown off establishment of a particular sectarian outlook, Cox warned, we ought not embrace a new form of establishment.<sup>16</sup>

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THE PERIL AND POLITICS OF RADICAL RELIGION, OIL, AND BORROWED MONEY IN THE 21ST CENTURY (2006).

10. JEFFREY STOUT, *DEMOCRACY AND TRADITION* 97 (2004).

11. On the other hand, it is far from clear that American society is as deeply divided over all things religious as is typically assumed. The overwhelming majority is religious and either Jewish or Christian. While we disagree wildly about many things, it is far from clear that there are not “core” religious principles about which an overwhelming majority would agree. For examples of this claim from very different perspectives, compare ALAN WOLFE, *THE TRANSFORMATION OF AMERICAN RELIGION: HOW WE ACTUALLY LIVE OUR FAITH* (2003), with PETER KREEFT, *ECUMENICAL JIHAD: ECUMENISM AND THE CULTURE WAR* (1996).

12. See, e.g., DIANA L. ECK, *A NEW RELIGIOUS AMERICA: HOW A “CHRISTIAN COUNTRY” HAS NOW BECOME THE WORLD’S MOST RELIGIOUSLY DIVERSE NATION* (2001).

13. See, e.g., PIPPA NORRIS & RONALD INGLEHART, *SACRED AND SECULAR: RELIGION AND POLITICS WORLDWIDE* (2004) (arguing that material security is correlated with low religiosity.). But see *THE DESECULARIZATION OF THE WORLD: RESURGENT RELIGION AND WORLD POLITICS* (Peter L. Berger ed., 1999) (arguing that religion is resurgent).

14. See STOUT, *supra* note 10, at 93.

15. HARVEY COX, *THE SECULAR CITY: SECULARIZATION AND URBANIZATION IN THEOLOGICAL PERSPECTIVE* 18 (1965).

16. Professor Cox predicted the inevitable triumph of secularism and a decline in the influence of traditional religion. At least outside of Western Europe, the notion of a coming world without God now seems dated. See, e.g., ALISTER MCGRATH, *THE TWILIGHT OF ATHEISM: THE RISE AND FALL OF DISBELIEF IN THE MODERN WORLD* (2004). The idea has been abandoned even

Not everyone agrees. For some, secularism should be not only a contending orthodoxy, but the norm of public discourse and of life in the public square. We should, as far as the government is concerned, establish a certain kind of irreligion. While the state ought not forbid – or expressly criticize – religious practices, the public realm (understood here as what the government funds or that with which it is closely associated) ought to be rigorously secular.<sup>17</sup>

This view often turns on the notion that democracy in a pluralistic society is best served by “rational,” “temporary,” and relativistic modes of thought that are claimed to be present in secular, as opposed to religious, world views.<sup>18</sup> Others emphasize the need for “public reason” based upon secular premises that are asserted to be an “overlapping consensus” shared by diverse groups within the community.<sup>19</sup>

But, however much an established secularism be the preferred path for some, it has never been formally sanctioned by the Supreme Court. Although certain Justices have, at least, flirted with weaker<sup>20</sup> and stronger,<sup>21</sup> notions of a constitutionally

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by Professor Cox. HARVEY COX, *RELIGION IN THE SECULAR CITY: TOWARD A POSTMODERN THEOLOGY* (1984). Nevertheless, the distinction between secularization and secularism is still useful and still in common use. See generally MARTIN H. BELSKY & JOSEPH BESSLER-NORTHCUTT, *LAW AND THEOLOGY* (2005).

17. See, e.g., Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations and Liberal Public Values*, 75 CHI.-KENT L. REV. 417, 418 (2000); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 199-201 (1992).

18. See, e.g., Steven Gey, *When is Religious Speech Not “Free Speech,”* 2000 U. ILL. L. REV. 379, 451 (2000).

19. See JOHN RAWLS, *POLITICAL LIBERALISM* (1993). See also RICHARD RORTY, *PHILOSOPHY AND SOCIAL HOPE* 168-74 (1999); Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and An Uncertain Future*, 75 IND. L.J. 1, 8 (2000) (proposing that “legal indifference” to religious differences has contributed to the view that religion “should play little role in the political or public life of contemporary America”).

20. *County of Allegheny v. ACLU*, Greater Pittsburgh Chapter, 492 U.S. 573, 610 (1989) (Blackmun, J., plurality opinion) (“[T]he Constitution mandates that the government remain secular, rather than affiliate itself with religious beliefs or institutions.”).

21. *Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71*, Champagne County, Ill., 333 U.S. 203, 216-17 (1948) (Frankfurter, J., concurring) (“Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public

mandated secular ethos, the Supreme Court has made clear that neither sectarian nor secularist establishments are permitted. It has quite consistently held that the state may not “prefe[r] those who believe in no religion over those who do believe.”<sup>22</sup>

But this commitment to a judicially enforced neutrality is impossible. In modern life, government involves itself in a variety of activities that implicate its citizens’ religious beliefs. If it, for example, not only educates their children but undertakes the formation of their character, it becomes difficult, if not impossible, to avoid religious questions. While courts have been, for the most part, quite sensitive to the imposition (or state sponsored display) of the majority’s religious beliefs upon – or to – nonadherents, they have rarely had an answer for those believers who claim to be harmed by the imposition or endorsement of irreligion.

So, on the ground, this neutrality can look suspiciously like a judicial mandate of public secularism. In the past year alone, the Supreme Court has held that a public display acknowledging the Ten Commandments as a foundational document in the development of the law constituted a violation of the Establishment Clause.<sup>23</sup> A district judge, following an earlier decision of the Ninth Circuit Court of Appeals, held that students who are “forced” to hear other students recite the words “under God” in the Pledge of Allegiance have been subjected to establishment.<sup>24</sup> After a well publicized trial, a district judge in Pennsylvania held that requiring teachers to inform students that evolutionary theory is not believed by some people and identifying an alternative or, perhaps more accurately, supplementary theory called “intelligent design” breached the wall of separation.<sup>25</sup>

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school must keep scrupulously free from entanglement in the strife of sects.”).

22. *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963) (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)); *see also* *McCreary County, Ky. v. ACLU of Ky.*, 125 S.Ct. 2722, 2733 (2005).

23. *McCreary*, 125 S. Ct. at 2745. *But see* *Van Orden v. Perry*, 125 S. Ct. 2854, 2864 (2005) (upholding similar display).

24. *Newdow v. Cong. of the United States*, 383 F. Supp. 2d 1229, 1235, 1236, 1244 (E.D. Cal. 2005).

25. *Kitzmiller v. Dover Sch. Dist.*, 400 F. Supp. 2d 707, 766 (M.D. Pa. 2005). Although the District Court also found that “intelligent design” is not science or, to the extent that it makes scientific claims, is false, the holding rested upon the notion that suggesting an alternative that has, for many, profound religious implications, constitutes establishment. *Id.* at 735, 766.

In a nation that turns as often as we do to judicially endorsed norms, it is hard to dismiss the cultural, as well as juridical implications, of our courts' decisions about church and state. Perhaps what Professor Duncan and others are reacting against is the idea, either legally or culturally enforced, that the price of their participation in public life is often the demand that they put aside their most deeply held convictions. Their sense of injury may remind us that the notion that religion is private and, as Canon Theologian Bishop N. T. Wright put it, should be dismissed to the "upstairs room" and kept "out of sight,"<sup>26</sup> is itself not religiously neutral.

The sense of injury experienced by religious persons is exacerbated by the rather ambitious objectives that this neutrality is claimed to serve. No one, it says, should be made to feel like an outsider.<sup>27</sup> No one should have to sit quietly in the face of communications that breach this neutrality.<sup>28</sup> It is the Court itself that has raised this feeling of exclusion to the level of an establishment and has suggested that government endorsement of religious (or irreligious) ideas other than one's own constitutes constitutional injury.

In a nation in which the divide on religious questions is as often between the religious and irreligious as among religions,<sup>29</sup> a jurisprudence that defines government neutrality on religion as acting as if it did not exist will cause its religious citizens to feel excluded. To people for whom duty to God is paramount and pervasive, the ceremonial deism of politicians may be God-Talk,

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26. Dr. N. T. Wright, *Lecture at Jubilee Reflections at Westminster Abbey: God and Caesar, Then and Now*, [http://www.westminster-abbey.org/event/lecture/archives/020428\\_tom\\_wright.htm](http://www.westminster-abbey.org/event/lecture/archives/020428_tom_wright.htm).

27. See *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring); see also *McCreary*, 125 S. Ct. at 2733 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000)); *Santa Fe*, 530 U.S. at 309-10 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)).

28. See, e.g., *Santa Fe*, 530 U.S. at 294, 317 (holding that a school policy authorizing student-led and student-initiated prayers at high school football games was an unconstitutional endorsement of religion); *Lee v. Weisman*, 505 U.S. 577, 580, 599 (1992) (disallowing a public school system's provision of clergy-led, nonsectarian prayer at school graduation ceremonies); *Wallace v. Jaffree*, 472 U.S. 38, 41-42, 61 (1985) (holding unconstitutional an Alabama statute authorizing a daily period of silence in public schools for meditation or voluntary prayer).

29. Steven G. Gey, *Unity of the Graveyard and the Attack on Constitutional Secularism*, 2004 BYU L. REV. 1005, 1017 (2004).

but it is not serious God-Talk. The secularism of those significant parts of public life associated with the government effectively tells them to take their religion upstairs.

It is the thesis of this Article that, if the Court means what it says about non-establishment of secularism, its current notion of neutrality, an idea frequently expressed in retired Justice O'Connor's notion of nonendorsement, must be abandoned or at least significantly modified. Complete neutrality, at least with respect to that which government "endorses," is not possible and aiming for an unattainable goal clothes the public square in secularist garb. The Court's Establishment Clause goals should be more modest. You cannot lose if you do not play.

First this Article considers the different approaches to Establishment Clause jurisprudence, arguing that the multiple formulations seen in the literature and cases are really efforts at finding a stance on a continuum running between accommodationist and separationist orientations. Next this Article attempts to describe the stance upon which the Court has settled, characterizing it as a somewhat aggressive form of substantive – or "endorsement" – neutrality. This Article goes on to argue that this approach fails on its own terms. It is not religiously neutral and does not achieve its stated objective, i.e., to keep the government from preferring any particular religious perspective or religion over irreligion. It does not prevent dissenters from being made to feel like "outsiders." Finally, this Article proposes a new approach, rooted in avoiding historic establishments, coercion and substantial threats to religious pluralism. It too is a form of substantive neutrality, but a decidedly less ambitious one.

## II. THE AMBIGUOUS ESTABLISHMENT CLAUSE

It has been a staple of the literature to note the confused state of Establishment Clause jurisprudence.<sup>30</sup> As Justice Breyer

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30. See, e.g., Robert P. George, *Protecting Religious Liberty in the Next Millennium: Should We Amend the Religion Clauses of the Constitution?*, 32 LOY. L.A. L. REV. 27, 39 (1998); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 120 (1992) ("It's a mess."). Recently, a district judge suggested that Establishment Clause jurisprudence has reached that stage from which salvation is no longer possible. See *Green v. Bd. of County Comm'rs*, 450 F. Supp. 2d 1273 (D. Okla. 2006) ("Yes, we are



recently observed in a classic understatement, “[t]he First Amendment contains no textual definition of ‘Establishment,’ and the term is certainly not self-defining.”<sup>31</sup>

A consensus approach to this definitional problem has never taken hold, resulting in jurisprudence that has been described as “incoheren[t]” and “impenetrable and incapable of consistent application”<sup>32</sup> but which, on the bright side, is a playground for law professors. One is tempted to suggest that there are as many theories regarding proper interpretation of the religion clauses as there are scholars working in the field.<sup>33</sup>

The Court has often applied the test announced in *Lemon v. Kurtzman*, requiring that a statute must: (1) “have a secular legislative purpose,” (2) have “a principal or primary effect . . . that neither advances nor inhibits religion,” and (3) “not foster ‘an excessive government entanglement with religion.’”<sup>34</sup> But it has also said that the *Lemon* criteria are “no more than helpful signposts,” and do not represent a comprehensive test.<sup>35</sup> The Court has, at times, refused to apply *Lemon*, preferring instead to ask whether a government action impermissibly “compelled” conformity with an “explicit religious exercise,”<sup>36</sup> whether it has impermissibly “endorse[d]” religion,<sup>37</sup> whether it provided a

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definitely in Limbo.”).

31. *McCreary*, 125 S. Ct. at 2742.

32. *Van Orden v. Perry*, 125 S. Ct. 2854, 2866 (2005) (Thomas, J. concurring). See also *Twombly v. City of Fargo*, 388 F. Supp. 2d 983, 986 (D. N.D. 2005) (“The body of law as developed is convoluted, obscure, and incapable of succinct and compelling direct analysis.”).

33. See, e.g., Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles Formalism, and the Establishment Clause*, 38 GA. L. REV. 489, 496-97 (2004) (identifying approaches emphasizing “separationism,” “accommodation,” “equality,” “liberty,” nonpreferentialism,” and various forms of “neutrality”). Neutrality, itself, apparently comes in many forms. See, e.g., Paul E. Salamanca, *Quo Vadis: The Continuing Metamorphosis of the Establishment Clause Toward Realistic Substantive Neutrality*, 41 BRANDEIS L.J. 575, 575 (2003) (“formal” and “substantive”); Keith Werhan, *Navigating the New Neutrality: School Vouchers, the Pledge and the Limits of a Purposive Establishment Clause*, 41 BRANDEIS L.J. 603 (2003) (“purposive”).

34. 403 U.S. 602, 612-13 (1971) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).

35. *Hunt v. McNair*, 413 U.S. 734, 741 (1973).

36. *Lee v. Weisman*, 505 U.S. 577, 596, 598 (1992).

37. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (referring, however, to the purpose prong of the *Lemon* test).

neutral benefit available to all without regard to religion,<sup>38</sup> or whether whatever religious practice or message under challenge was sufficiently grounded in our historical practice.<sup>39</sup> The Court has made clear that it does not regard itself as confined to any one test of establishment.<sup>40</sup> *Lemon* itself has proven sufficiently flexible to support a wide range of results.<sup>41</sup>

Justices have at times delivered ringing affirmations of the need to maintain a “wall of separation” between church and state,<sup>42</sup> while, at other times, they have minimized the usefulness of the metaphor<sup>43</sup> or argued that it is a barrier that cannot always be maintained.<sup>44</sup>

June 27, 2005 may have been a paradigmatic day for Establishment Clause jurisprudence. As noted earlier, the Court in *McCreary County v. American Civil Liberties Union* held that the display of the Ten Commandments in a Kentucky courthouse, along with other secular documents thought to be among the “foundations” of American law, was unconstitutional.<sup>45</sup> Influenced by the county’s earlier attempts to display the Commandments alone, a bare majority of five justices concluded that the county lacked a primary secular purpose, failed the *Lemon* test, and, consequently, would be perceived by a rational observer to have endorsed religion.<sup>46</sup> Justices Scalia, Kennedy, Thomas and Chief

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38. See *Zelman v. Simmons-Harris*, 536 U.S. 638, 652 (2002).

39. See *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

40. *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984).

41. Compare *Everson v. Bd. of Educ. of the Twp. of Ewing*, 330 U.S. 1, 16-17 (1947) (state may provide transportation to and from religious schools), with *Wolmar v. Walter*, 433 U.S. 229, 254-55 (1977) (state may not fund field trips taken at religious schools); compare *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 248 (1968) (state may pay for text books in parochial schools), with *Meek v. Pittenger*, 421 U.S. 349, 362 (1975) (state may not pay for maps and other “instructional materials”). As applied, however, *Lemon* often leads to separationist outcomes.

42. *Engel v. Vitale*, 370 U.S. 421, 425 (1962).

43. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting) (“The ‘wall of separation between church and State’ is a metaphor based on bad history, a metaphor which has proved useless as a guide in judging.”); *Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71, Champaign County, Ill.*, 333 U.S. 203, 247 (1948) (Reed, J., dissenting) (“A rule of law should not be drawn from a figure of speech.”).

44. See *Van Orden v. Perry*, 125 S. Ct. 2854 (2005).

45. *McCreary County, Ky. v. ACLU of Ky.*, 125 S. Ct. 2722, 2730, 2731, 2745 (2005).

46. *Id.* at 2732-39.

Justice Rehnquist dissented.<sup>47</sup> Justice Scalia, in that portion of his dissent joined by the Chief Justice and Justice Thomas, rejected both the *Lemon* test and, at least in part, the notion of “nonendorsement” arguing that government is free to endorse, without coercion, monotheistic religion.<sup>48</sup>

On the same day, in *Van Orden v. Perry*, the *McCreary* dissenters, picking up a concurrence from Justice Breyer, upheld a Ten Commandments display outside the Texas capitol.<sup>49</sup> While eight Justices, although disagreeing as to the constitutionality of such displays, found no material difference between the Commandments in Texas and those in Kentucky, Justice Breyer did. This made all the difference. For Justice Breyer, the Texas display, being much older than that in Kentucky and having evaded challenge for most of those years, must not have been perceived by reasonable observers as an endorsement of religion.<sup>50</sup>

It seems likely that Justice Breyer’s opinion was a prudential move against the political furor that would be caused by taking down decades-old displays.<sup>51</sup> Needless to say, the law governing displays of civil religion remains in need of clarification.<sup>52</sup>

The late Chief Justice Rehnquist recently suggested that the Establishment Clause jurisprudence is “Januslike,” looking both “toward the strong role played by religion and religious traditions throughout our Nation’s history,” and also “toward the principle

47. *Id.* at 2753, 2757.

48. *Id.*

49. 125 S. Ct. at 2858.

50. *Id.* at 2870. (Breyer, J., concurring). In *Van Orden*, the plurality opinion advanced an accommodationist rationale irreconcilable with the majority in *McCreary*. *Id.* at 2867. Although *McCreary* relied on *Lemon*, the *Van Orden* plurality differed, asserting that “[w]hatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it is not useful in dealing with the sort of passive monument that Texas has erected in its Capitol grounds.” *Id.*

51. See Jay A. Sekulow & Francis J. Marion, *The Supreme Court and the Ten Commandments: Compounding the Establishment Clause Confusion*, 14 WM. & MARY BILL RTS. J. 33, 44-45 (2005).

52. On the other hand, every decision since the date of *Van Orden* has upheld public displays of the Ten Commandments. See *ACLU of Ky. v. Mercer County, Ky.*, 432 F.3d 624, 640 (6th Cir. 2005); *ACLU of Ohio Found., Inc. v. Bd. of Comm’rs of Lucas County, Ohio*, 444 F. Supp. 2d 805, 815-16 (N.D. Ohio 2006); *Twombly v. City of Fargo*, 388 F. Supp. 2d 983, 993 (D. N.D. 2005); *Card v. City of Everett*, 386 F. Supp. 2d 1171, 1178 (W.D. Wash. 2005). The display of a Bible in a neon-lit case, however, remains problematic. See *Staley v. Harris County*, 461 F.3d 504 (5th Cir. 2006).

that governmental intervention in religious matters can itself endanger religious freedom.”<sup>53</sup> While this does not exhaust the potential range of Establishment Clause concerns, it does suggest a repeated tension between “too much” and “not enough” public religion. Put another way, the Court has struggled to reconcile the notion that religion has been part of our public life and, if it is not to be disadvantaged in the market place of ideas, must continue to be part of our public life, with the recognition that government involvement with religion presents dangers for dissenting faiths, nonbelievers and even that faith which government seeks to promote or accommodate.

“Accommodationist” and “separationist” approaches to the Establishment Clause can be seen as competing assessments of, and responses to, these concerns. Although they may be seen as two separate schools, they are more accurately viewed as opposing ends of a continuum with one’s place on that continuum determined by one’s assessment of the proper role of faith in public life.

Although “neutrality” is often seen as a distinct category of Establishment Clause analysis,<sup>54</sup> I prefer to see neutrality as an approach informed by, and designed to achieve, a particular substantive view of disestablishment. In and of itself, neutrality makes sense only in light of ground rules, i.e., some sense of that state of affairs with respect to which we must be neutral.<sup>55</sup> Where you think that baseline should be is likely to be determined by what you think disestablishment is supposed to be. Some scholars, retired Justice O’Connor, and, occasionally, the Court, have sometimes tried to root neutrality in the absence of impact on religious choices. As we will see, this does not work.

### III. THE SEPARATIONIST ESTABLISHMENT CLAUSE

Separationism calls for some substantial isolation of religion from government<sup>56</sup> and, at least in its stronger forms,

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53. *Van Orden*, 125 S. Ct. at 2859.

54. See, e.g., Arnold H. Loewy, *The Positive Reality and Normative Virtues of a “Neutral” Establishment Clause*, 41 *BRANDEIS L.J.* 533, 533 (2003) (claiming theories of Establishment Clause jurisprudence are characterized by “separationist,” “accommodationist,” and “neutrality”).

55. See Ravitch, *supra* note 33, at 492.

56. In referring to “separationists,” I mean those jurists and scholars who

affirmatively argues that separation of church and state does – and should – result in a secular public square.<sup>57</sup> Proponents of this view are likely to be favorably disposed to Thomas Jefferson’s metaphor of a “wall of separation” between church and state.<sup>58</sup>

The Supreme Court has, from time to time, called for such strong degrees of separation. Most famously, in *Everson v. Board of Education*,<sup>59</sup> Justice Black wrote that “[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.”<sup>60</sup>

Separationism necessarily involves a set of beliefs about the role of religion in public life and the impact (or lack thereof) of the exclusion of religion from the public square. There is a tradition of supporting separationist approaches to establishment on the grounds that it is beneficial to religion.<sup>61</sup> Professor Gey, for example, emphasizes that secularism allows religion to flourish in a “vibrant private sector.”<sup>62</sup> Separationists more frequently emphasize the supposedly divisive nature of religion<sup>63</sup> and the impact of state support for majority religions – or religion

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argue for a relatively thoroughgoing divide between the state and religion. Of course, virtually any norm of nonestablishment will require some degree of separation.

57. See, e.g., Gey, *supra* note 8; Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 473 (1996); Sullivan, *supra* note 17, at 195. However, not all separationists insist that isolation be extreme or complete. See Douglas Laycock, *The Many Meanings of Separation*, 70 U. CHI. L. REV. 1667, 1687-88 (2003).

58. However, its contemporary use may be quite different than the sense in which Jefferson used the term. DANIEL L. DREISBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* (2002) (arguing that Jefferson was concerned with institutional separation at the federal level, while contemporary usage calls for complete separation of religious and civil government at all levels).

59. 330 U.S. 1 (1947).

60. *Id.* at 18.

61. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 711-12 (2002) (Souter, J., dissenting).

62. See Gey, *supra* note 29, at 1025. However, the notion that religion may flourish “in private” is one on which not all theologians or sociologists of religion agree.

63. See Gey, *supra* note 29, at 1013 (religion “offers unity only for those who convert”); see also *Zelman*, 536 U.S. at 715-16 (Souter, J., dissenting), 724-27 (Breyer, J., dissenting).

generally – on dissenters.<sup>64</sup> Separationists are more likely to see religion as uniquely contentious and secularism as religiously neutral.

Even in its heyday, the wall of separation was never as high and impregnable as might be imagined. Nevertheless, the metaphor of separation has occupied a significant place in the public imagination and, in the past, the Court often seemed concerned with the need to quarantine the state against religious activities and sentiments, seeking, for example, to prevent government funding from finding its way to uses too closely associated with religious practices.<sup>65</sup>

Of course, separationists often couch their arguments in terms of neutrality. In so doing, the baseline is most often the absence of any government involvement with religion. Any attempt to accommodate or facilitate religion, no matter how secular the status quo may be, is a deviation from neutrality. Secularism, on this view, is the thing.

Although remarkably malleable, the *Lemon* test, in its use of a disaggregated effects clause, arguably leads to separationist results. If one begins with the status quo and then asks if a governmental action advances or inhibits religion, then it is easy to conclude that any introduction (or tolerance) of religion in the public square impermissibly “advances” religion.<sup>66</sup> Similarly, if a state action must have a “secular” purpose, any attempt to level the field by restoring religion where it has been excluded can be

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64. See, e.g., *Van Orden v. Perry*, 125 S. Ct. 2854, 2881 (2005) (Stevens, J., dissenting); Frank S. Ravitch, *Locke v. Davey and the Lose-Lose Scenario: What Davey Could Have Said But Didn't*, 39 TULSA L. REV. 255, 260 (2004); Steven H. Shiffrin, *Liberalism and the Establishment Clause*, 78 CHI. KENT. L. REV. 714, 727 (2003).

65. For example, Justice Souter has characterized the period from 1947 to 1968 as one in which “the basic principle of no aid to religion through school benefits was unquestioned.” *Zelman*, 536 U.S. at 688 (2002) (Souter, J., concurring). Even after 1968 until sometime in the late 90s, Justice Souter believed the Court took the case to ensure that government aid to religious institutions was not diverted to religious uses or, at least, remained insubstantial. See *id.* at 688-89.

66. See Douglas Laycock, *Formal, Substantive and Disaggregated Neutrality*, 39 DEPAUL L. REV. 993, 993 (1993). The Court has never clearly declared a state law or regulation unconstitutional because it inhibited religion. See James R. Beattie, Jr., *Taking Liberalism and Religious Liberty Seriously: Shifting Our Notion of Toleration From Locke to Mill*, 43 CATH. LAW., 367, 397 n.130 (2004).

seen as impermissible.<sup>67</sup>

Although there are arguably four Justices on the Court who are strongly separationist, we will see that there are significant areas of Establishment Clause jurisprudence in which a majority has abandoned, or substantially discounted, the separationist approach.

#### IV. THE ACCOMMODATIONIST ESTABLISHMENT CLAUSE

At the opposite pole is a view often termed “accommodationist.” This approach suggests that there are areas in which government may affirmatively facilitate or even encourage religion.

There are certain “weak” forms of accommodation. For example, even persons with a largely separationist orientation might permit a certain degree of accommodation – most often for activities they characterize as “ceremonial deism.” Justice Black, for example, thought it acceptable to encourage school children and others to recite historical documents notwithstanding some religious content or to sing officially espoused anthems “which include the composer’s professions of faith in a Supreme Being . . . .”<sup>68</sup> In his view, such “patriotic or ceremonial occasions” did not amount to a religious exercise.<sup>69</sup>

More than one commentator has pointed out that there is more ceremony than deism in these proclamations.<sup>70</sup> A rule that permits religious expression only when it is sufficiently diluted to be nearly unrecognizable or, as Justice Thomas has noted, is sufficiently ritualized and commonplace as to no longer be taken

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67. However, the Court, and various justices have, from time to time, seen the flaw in applying *Lemon* in this way. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring) (“It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden.”).

68. *Engel v. Vitale*, 370 U.S. 421, 435 n.21 (1962).

69. *Id.* A bit more expansively, Justice O'Connor proposed a four-prong test for governmental references to accommodation of religion, arguing that such expressions would be most likely to pass constitutional muster if the practice is 1) historic and ubiquitous, 2) does not involve worship or prayer, 3) does not refer to a particular religion, and 4) has minimal religious context. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 33-45 (2004) (O'Connor, J., concurring).

70. Gabrië A. Moens, *The Menace of Neutrality In Religion*, 2004 BYU L. REV. 535, 568 (2004).

seriously,<sup>71</sup> may wind up accommodating only that which no one really wants. If “ceremonial deism” exhausted the accommodationist landscape, there would be little worth arguing about.

One stronger form of accommodationism would not require evenhandedness between “religion” and “irreligion.” Often referred to as non-preferentialism, this view of government may promote religion generally as long as it does not prefer one sect over another.

One of the clearest expressions of this view was most recently advanced by Justice Scalia in his *McCreary* dissent, joined by Chief Justice Rehnquist and Justice Thomas.<sup>72</sup> For Justice Scalia, not only is religion not to be excluded from the public square, but it is to be encouraged.<sup>73</sup> He flatly rejects the Court’s frequent recital that the First Amendment mandates neutrality between “religion and non-religion.”<sup>74</sup> He sees no problem with acknowledging the God of monotheism even if this means the “disregard of polytheists . . . believers in unconcerned deities . . . [and] devout atheists.”<sup>75</sup> Although such acknowledgment cannot be entirely nondenominational, neutrality requires only that government may not favor one monotheistic religion over another. This view has never clearly commanded a majority of the Court in any case.<sup>76</sup>

But even if one does not identify nonpreferentialism among sects as the *sine qua non* of disestablishment, accommodationist approaches to the Establishment Clause will strive to find room

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71. *Van Orden v. Perry*, 125 S. Ct. 2854, 2866 (2005) (Thomas, J., concurring) (“[I]n a seeming attempt to balance out its willingness to consider almost any acknowledgment of religion an establishment, in other cases Members of this Court have concluded that the term or symbol at issue has no religious meaning by virtue of its ubiquity or rote ceremonial invocation.”).

72. *McCreary County, Ky. v. ACLU of Ky.*, 125 S. Ct. 2722, 2757-64 (2005) (Scalia, J., dissenting).

73. *Id.*

74. *Id.*

75. *Id.* at 2753.

76. Nor has it been championed in the academy although a few scholars have advocated something like an accommodationist approach. See, e.g., Michael W. McConnell, *Accommodation of Religion*, 1985 S. CT. REV. 1, 5-9 (1986); Rodney K. Smith, *Nonpreferentialism In Establishment Clause Analysis: A Response to Professor Laycock*, 65 ST. JOHN’S L. REV. 245, 247-63 (1991).



for religion in the public square. These approaches will also be described as a form of “neutrality,” with the concern no longer being deviation from a secular baseline, but with the need to give religion an “even shake” in the public arena.

Those trending toward accommodation, and away from separation, are more likely to see religion as no less contentious than other strongly held views and less likely to see secularism as religiously neutral. This may be rooted in a belief that religion is a good thing and ought to be encouraged.<sup>77</sup> Alternatively, or in addition, it may be predicated upon the recognition that to keep religion out of public life is to place it at a disadvantage.

For example, in *Zelman v. Simmons-Harris*, the Court upheld a school voucher plan that permitted the vouchers to be used at sectarian schools.<sup>78</sup> Although both Chief Justice Rehnquist and Justice Souter claimed to be concerned with government neutrality toward the religious views of its citizens, they disagreed wildly over what evenhandedness entailed.

The Chief Justice was unconcerned that 96% of voucher recipients had enrolled in religious schools, observing that there were alternatives to the Cleveland public schools (other than the vouchers) that were not religious in nature.<sup>79</sup> He found it constitutionally irrelevant that a vast majority of program benefits went to religious schools. For Chief Justice Rehnquist, the baseline was neither the existing state of affairs prior to adoption of the program (i.e., government aid only to secular public schools) nor some presumed allocation of benefits among secular and sectarian options or between differing sects. Convinced as he was that individuals were free to choose among secular and sectarian options, he concluded that the program was neutral.<sup>80</sup> For the Chief Justice, in *Zelman*, the baseline was something approximating the absence of government influence on

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77. See, e.g., John H. Garvey, *An Anti-Liberal Argument For Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 275 (1996).

78. 536 U.S. 639 (2002).

79. *Id.* at 658.

80. *Id.* at 703 (Souter, J., dissenting). Justice Souter expressed concern that students who wish to use the scholarships might have no alternative but to use them at “established” religious schools not of their own denomination. *Id.* But, for the Chief Justice and the majority, the key point appears to have been that the state did nothing to affect the denominational distribution of religious schools.

private choices.

Justice Souter, in dissent, on the other hand, argued that, in assessing neutrality, it was proper to consider only the choices made by voucher recipients because only in that way could one conclude whether there was a true secular alternative regarding the use of *those* funds.<sup>81</sup> The existence of pre-existing secular alternatives or the extent to which government, as opposed to the nature and extent of private religious affiliations, brought about the distribution of scholarship use presumably did not matter. For Justice Souter, the baseline was the status quo – which was presumed to be neutral.

Justice Souter accused the majority of formalism,<sup>82</sup> certainly a cardinal sin for the legally sophisticated. But the *Zelman* majority was engaged not in formalism (whatever that may be), but in the identification of a different form of baseline reflecting different assumptions about the proper relationship between state and religion. The Chief Justice was relatively unconcerned about what the choices regarding use of the scholarship turned out to be or the extent to which they might be influenced by an existing array of religious choices that were presumably uninfluenced by government policy.

He was also unconcerned with the promotion of a common (and secular) public discourse or with the supposedly uniquely divisive nature of religion. The fact that opportunities for religious education may not be available to students of minority faiths was not problematic,<sup>83</sup> as long as it was not the product of government action.

Justice Souter was more concerned that government policy not “reinforce” the minority status of certain of its beneficiaries. He emphasized what he saw as the divisive and disuniting properties of religion.<sup>84</sup> The choice of baseline and prioritization of concerns can be seen as reflecting accommodationist and separationist views of the Establishment Clause.

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81. *Id.* at 694 (Souter, J., dissenting).

82. *Id.*

83. *Id.* 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.”).

84. *Id.* at 715-16 (Souter, J., dissenting).

The same concern can be seen with respect to public funding of what the Court regards as private speech. In *Rosenberger v. Rectors and Visitors of the University of Virginia*,<sup>85</sup> the Court held that a public university could not exclude a religious group from services generally available to student organizations. For example, Justice Kennedy, writing for the majority, observed that the Court had (or at least had now) “rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design.”<sup>86</sup> To do otherwise would be to exercise censorship “to ensure that all student writings and publications meet some baseline standard of secular orthodoxy.”<sup>87</sup>

Justice Souter and the dissenters argued for a baseline centered upon “the destructive consequences of mixing government and religion . . . [and to] protect religion from a corrupting dependence on support from government.”<sup>88</sup> In other words, the baseline is separation.

## V. THE AMBITIOUS ESTABLISHMENT CLAUSE

### A. *The “Death” of Separation*

While Justice Black would have built a wall of separation between church and state that was “high and impregnable,” the past twenty years or so have seen, if not its demolition, at least a significant aeration of that wall. Although reports of the death of separation<sup>89</sup> may have been greatly exaggerated, the notion that religion must be quarantined from public spaces has been considerably weakened.

### B. *Public Funding Cases*

As noted earlier, for a number of years, the Court generally sought to prevent the use of government funds for, at least, the

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85. 51 U.S. 819 (1995).

86. *Id.* at 839.

87. *Id.* at 844.

88. *Id.* at 891 (Souter, J., dissenting).

89. Ira Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230 (1992).

religious activities of sectarian institutions.<sup>90</sup> More recently, the Court has shown a broad willingness to permit government funding of faith based services as long as the choice of those alternatives was made by an individual and there remains a private secular alternative. It has upheld tax deductions for expenses connected with sending children to private schools, including religious ones,<sup>91</sup> educational grants to be used at sectarian colleges,<sup>92</sup> sign language interpreters to be used by a student at a sectarian school,<sup>93</sup> grants to religiously affiliated organizations for sexuality and pregnancy counseling,<sup>94</sup> funding for remedial education in religious schools,<sup>95</sup> and direct aid for instructional materials to pervasively sectarian schools.<sup>96</sup>

This line of cases arguably culminated in *Zelman v. Simmons-Harris*<sup>97</sup> in which, as noted earlier, the Court upheld Ohio's school voucher plan permitting families in Cleveland to receive tuition aid for both secular and sectarian private schools. Because the program had the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system, and provided assistance directly to citizens who directed the aid to religious schools wholly as a result of their own independent and private choice, the Court held that government aid to religious schools did not violate the Establishment Clause.<sup>98</sup>

While *Zelman* may not itself have constituted a sharp departure from the Court's then recent decrees, it faced and rather conclusively rejected much of what was still thought to restrict aid to religious institutions. Government aid was permitted to flow to these schools regardless of the fact that they engaged in religious instruction. No steps were taken to segregate government funded secular activity from religious instructions. Although the Court emphasized the need for a secular alternative, it was untroubled by the fact that an overwhelming percentage of

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90. See Part IV and accompanying notes.

91. *Mueller v. Allen*, 463 U.S. 388 (1983).

92. *Witters v. Washington Dept. of Serv. for the Blind*, 474 U.S. 481 (1986).

93. *Zobrest v. Catalina Foothills*, 509 U.S. 1 (1993).

94. *Bowen v. Kendrick*, 487 U.S. 589 (1987).

95. *Agostini v. Felton*, 521 U.S. 203 (1997).

96. *Mitchell v. Helms*, 530 U.S. 793 (2000).

97. 536 U.S. 639 (2002).

98. *Id.* at 662-63.

families using program vouchers employed them at religious schools.<sup>99</sup>

There remains a significant minority on the Court who would read the Establishment Clause to permit, as the *Everson* Court said, even “[n]o tax in any amount, large or small” to support overtly religious activity.<sup>100</sup> But, for now, nonestablishment does not seem to prevent the mere use of public money for religious purposes as long as that money is available to all religious and secular alternatives and is directed to its ultimate recipient by private choice. As one commentator has noted, “the Establishment Clause part of this fight is over.”<sup>101</sup> “Equal-treatment” accommodation has prevailed over separation. This reflects an increased willingness to conclude that the secular is not religiously neutral and, however divisive religion might be, to see individual choice to commit funds to religious purposes as consistent with government neutrality.

### C. “Private” Speech in Public Places

The Court has also permitted substantial religious expression in proximity to government or, more specifically, in places or fora that government funds or controls. Although these cases have generally been doctrinal hybrids, in which Establishment Clause concerns were potentially in conflict with free speech rights, once again the trend has been away from separation and toward accommodation.

For example, the Court has held that student religious groups were entitled to equal access to university facilities, generally available to other student groups.<sup>102</sup> The Court has also upheld the Federal Equal Access Act, which guarantees student religious groups access to school facilities made generally available to other extracurricular groups during noninstructional time.<sup>103</sup>

It has held that public school facilities that were available to

99. *Id.* at 657-59.

100. *Id.* at 686-87 (Souter, J., dissenting) (quoting *Everson v. Bd. of Educ. of the Twp. of Ewing*, 330 U.S. 1, 16 (1947)).

101. Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 167 (2004).

102. *Widmar v. Vincent*, 454 U.S. 263 (1981).

103. *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990).

the public during nonschool hours must be made available to a church that wished to show a film on child rearing, and to a Christian children's club.<sup>104</sup> It held that the state must permit a cross on a state owned plaza that was a traditional public fora, open generally to private speech.<sup>105</sup>

As we have seen, in *Rosenberger v. Rector and Visitors of the University of Virginia*, the Court held that the University of Virginia could not deny funding to a religious group seeking to publish a Christian magazine where funding for this purpose was made available to other student groups.<sup>106</sup> Once again, the Court declined to regard the secular as religiously neutral and refused to see permitting private religious choices in public spaces as impermissibly divisive.

Finally, in *Good News Club v. Milford Central School*,<sup>107</sup> the Court held that a school that allowed after-school use of its building by any group promoting the moral and character development of children could not deny use to a Christian club. The Court found that the program planned by the religious group fit within the purpose for which the building was made available, notwithstanding that it would involve Bible memorization, Christian teaching and the singing of hymns. Justice Thomas was untroubled by Justice Souter's suggestion that the program involved worship, observing that it still constituted moral instruction and rejecting the suggestion that "reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not."<sup>108</sup>

#### D. Persistence of the Secular State

Some scholars have either celebrated, or lamented, these developments as the death of separationism<sup>109</sup> and the triumph of formal neutrality.<sup>110</sup> The Court seems to have moved to a baseline

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104. *Lamb's Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384 (1993).

105. *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995).

106. 515 U.S. 819 (1995).

107. 533 U.S. 98 (2001).

108. *Id.* at 111.

109. *Lupu*, *supra* note 89, at 230.

110. *Ravitch*, *supra* note 33, at 489-90; *Loewy*, *supra* note 54, at 533-34; *Salamanca*, *supra* note 33, at 575.

built upon something more akin to a notion of substantive neutrality, i.e., a concern that government not take sides; that it not place its weight behind the religious choices of its citizens.<sup>111</sup> Thus the baseline becomes the treatment of analogous secular activities.<sup>112</sup> In the era of a less porous wall of separation and in the heyday of *Lemon*, the Court was more likely to see the naked public square as the pertinent baseline.

It is clear that there is no longer, if there ever was, a “wall of separation” dividing religion and government into two worlds that may not meet. But theocracy is not yet upon us. When the government speaks, the Court has remained adamant regarding the exclusion of religious points of view.

### E. *The Government Has But One Voice*

Although the Court has allowed significant interaction between religion and government in the areas of public aid and private speech in certain public fora, government speech must remain relatively religion-free.<sup>113</sup> For example, in *Stone v. Graham*<sup>114</sup> the Court invalidated a state requirement that the Ten Commandments be posted in public classrooms. In *Edwards v. Aguillard*,<sup>115</sup> it struck down a law requiring schools to teach “Creation Science” as well as evolutionary theory.

More recently, in *McCreary County v. American Civil*

111. Professor Laycock has described this as the “no aid” non-discrimination principle. Laycock, *supra* note 101, at 165.

112. The trend may or may not have stalled with the Court’s decision in *Locke v. Davey*, in which the Court held that the state of Washington could refuse to permit the use of a generally available scholarship program to fund preparation for the ministry without violating a student’s free exercise rights. See 540 U.S. 712 (2004). While some scholars have argued that *Locke* permits, but does not require, state discrimination in favor of a secular state, see, e.g., Laura S. Underkuffler, *Davey and the Limits of Equality*, 40 TULSA L. REV. 267, 268, 272 (2004), *Locke* may also be seen as a simple permitting of a state to fund core religious functions closely associated with the running of a church, i.e., the training of its ministers. See 540 U.S. at 719-20. *Locke* may also represent the Court’s aversion to the argument that the government might be required to fund religious activities. See Frederick Mark Gedicks, *The Establishment Clause Gag Reflex*, 2004 BYU L. REV. 995, 1001 (2004).

113. Government may, under certain circumstances, communicate “objectively” about religion, although the legal rigor required to do so may often operate as a disincentive to even try.

114. 449 U.S. 39 (1980).

115. 482 U.S. 578 (1987).

*Liberties Union*, the posting of the Ten Commandments, even when accompanied by materials designed to emphasize their historic role in the development of law and, even when displayed in conjunction with secular materials, was held to violate the Establishment Clause.<sup>116</sup>

Religious discourse is excluded from the public square not only when the government is the speaker, but when it sponsors – or a reasonable observer might conclude that it has sponsored – religious speech. If government permits religious speech in a context where it exercises control over the message, or otherwise facilitates “religious expression” in a way that may be characterized as not neutral, courts may conclude that it is government sponsored, and therefore prohibited.

For example, in *Wallace v. Jaffree*,<sup>117</sup> the Court struck down an Alabama statute authorizing a daily period of silence in public schools for meditation or voluntary prayer because, in its view of the law’s history and context, the law’s purpose was to endorse religion.<sup>118</sup> In *Lee v. Weisman*,<sup>119</sup> the Court held that a school could not provide for nonsectarian prayer by a clergyperson at a graduation ceremony because the prayer in question would bear “the imprint of the state” and be viewed as a prescription or endorsement of theistic, albeit rather generic, religious belief.<sup>120</sup> In *Santa Fe Independent School District v. Doe*,<sup>121</sup> the Court held that even student-led and student initiated prayers at high school football games, at least where conducted pursuant to a school policy authorizing an invocation of some sort, amounted to an unconstitutional endorsement of religion.

The idea of equality between religious and secular speech, ascendant when it comes to funding and private speech not too

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116. 125 S. Ct. 2722. Although, as noted earlier, on the same day that *McCreary* was decided, the Court upheld a different, and somewhat older, display of the Ten Commandments in *Van Orden v. Perry*, 125 S. Ct. 2854 (2005). Justice Breyer’s concurrence describing his swing vote, explained that his vote was based, not on a view that the government may engage in religious expression, but that no such expression had taken place. *Id.* at 2861.

117. 472 U.S. 38 (1985).

118. *Id.* at 59.

119. 505 U.S. 577 (1992).

120. *Id.* at 590.

121. 530 U.S. 290, 308 (2000).



closely associated with the government, does not apply when the government is speaking or to private speech that might be attributed to the government by a hypothetical "reasonable observer."<sup>122</sup> Although the Court has moved toward equal treatment in cases of public funding and private speech on public property that is sufficiently "removed" from the state,<sup>123</sup> it has continued to apply different First Amendment standards to religious and nonreligious expression too closely associated with the state.

#### F. Endorsement Neutrality

The idea of substantive neutrality, most prominently advanced in the academy by Professor Douglas Laycock,<sup>124</sup> is that the government should refrain from doing things that influence citizens' religious choices.<sup>125</sup> Choosing this form of neutrality reflects a determination that the Establishment Clause is about protecting religious choice. Extending this form of neutrality to choices between religion and "irreligion" reflects a further judgment about the scope of the liberty that is to be protected.

On this view, it may sometimes be necessary to separate and sometimes be necessary to accommodate, depending on which serves the goal of even-handedness. For example, Professor Laycock has argued that separation is required in addressing questions like recitation of the Pledge of Allegiance, with its claim that our nation is "under God." To sponsor recitation of the

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122. Gey, *supra* note 8, at 1888; see also Ira C. Lupu, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 802-04 (2001) (noting separationist approach in government speech).

123. See Part V.B and V.C and accompanying notes.

124. Douglas Laycock, *Religious Liberty as Liberty*, 197 J. CONTEMP. LEGAL ISSUES, 313, 320 (1996). Others have formulated similar ideas in different terms. See, e.g., Keith Werthan, *Navigating the New Neutrality: School Vouchers, the Pledge and Limits of Purposive Establishment Clause*, 41 BRANDEIS L.J. 603 (2003); David Cole, *Faith and Funding: Toward an Expressivist Model of the Establishment Clause*, 75 S. CAL. L. REV. 559 (2002).

125. Laycock, *supra* note 66, at 1001-02 ("[T]he religion clauses require government to minimize the extent to which it either encourages or discourages belief or disbelief, practice or nonpractice, observance or nonobservance." Religion "is to be left as wholly to private choice as anything can be.").

existence of God would be to take sides.<sup>126</sup> Accommodation is required with respect to the government scholarships that permit students to choose their own course of study.<sup>127</sup> Because the decision to use those is made by the student, the state has not taken sides.

On the Court, substantive neutrality is, perhaps, most clearly expressed by recently retired Justice O'Connor's "nonendorsement principle."<sup>128</sup> As framed by Justice O'Connor, religious expression by the state is forbidden when its purpose *or* effect<sup>129</sup> is to endorse religion or nonreligion, or one religion over another. Endorsement, in her view, "sends a message to non-adherents that they are outsiders, not full members of the political community."<sup>130</sup>

Government must not make a person's religious beliefs "relevant in any way to a person's standing in the political community" by conveying a message "that religion or a particular religious belief is favored or preferred."<sup>131</sup> Whether or not endorsement has occurred is to be determined by a reasonable observer, familiar with the text and background of both the First

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126. Laycock, *supra* note 101, at 160-66.

127. Professor Laycock filed amici briefs supporting the view that the state may not exclude majors in devotional theology from an otherwise unrestricted scholarship program and the view that public schools may not lead students in the Pledge. See *Locke v. Davey*, 540 U.S. 712 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); Laycock, *supra* note 101, at 160.

128. *Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring) (citing *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203 (1963)).

129. In *McCreary*, the Court came close to suggesting that impermissible endorsement will almost always have a "purpose" to advance religion or, more accurately, the "reasonable observer" would perceive a purpose to take sides on religious questions. 125 S. Ct. at 2735 ("If someone in the government hides religious motive so well that the 'objective observer' ... cannot see it, then without something more the government does not make a divisive announcement that in itself amounts to taking sides."). But see *Zelman v. Simmons-Harris*, 536 U.S. 639, 707 (2002) (Stevens, J., dissenting) ("And it is entirely irrelevant that the State did not deliberately design the network of private schools for the sale of channeling money into religious institutions").

130. *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 625 (1989) (quoting *Lynch*, 465 U.S. at 688).

131. *Id.* at 593, 625 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor J., concurring)).

Amendment and of the challenged practice.<sup>132</sup>

This notion of nonestablishment is rather demanding. Justice Breyer, without apparent irony, summed up its ambitious scope in his *Van Orden* concurrence. The religion clauses, he says, are to promote "the fullest scope of religious liberty" and "tolerance for all."<sup>133</sup> They seek to avoid "divisiveness" by maintaining "separation of church and state."<sup>134</sup> But interpretation of the clauses must manage not to "purge from the public sphere all that in any way partakes of the religious" because that, too, would "promote the kind of social conflict the Establishment Clause seeks to avoid."<sup>135</sup> The government must neither "engage in [ ] or compel," nor do anything resulting in excessive "interference with, or promotion of" religion.<sup>136</sup> It must, moreover, maintain this Solomonic neutrality not only among "sects" but between "religion and nonreligion."<sup>137</sup> Not surprisingly, Justice Breyer can conceive of no test that might tell us whether government has strayed from the narrow path to which it must keep.<sup>138</sup> One tires just reading his description of the requisite rigor.

Thus, government is not to endorse, or to be reasonably perceived as endorsing not only any particular religion or religion in general, but nonbelief as well.<sup>139</sup> While certain governmental expressions may be excused as ceremonial deism<sup>140</sup> or even as *de minimis*,<sup>141</sup> unconstitutional endorsement need not involve any

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132. Some courts have seen the endorsement test as a refinement of the first two prongs in *Lemon* (i.e., "purpose" and "effect"). See *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 770 (7th Cir. 2000). Other courts have considered it to be a refinement of the effects prong. See *ACLU v. Ashbrook*, 35 F.3d 484, 503 (6th Cir. 2004). Again, in *McCreary*, the Court came close to eliding the two, suggesting that there is unlikely to be an "effect" without a "purpose."

133. *Van Orden v. Perry*, 125 S. Ct. 2854, 2868 (2005) (Breyer, J., concurring).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *McCreary County, Ky. v. ACLU of Ky.*, 125 S. Ct. 2722, 2733 (2005); *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963).

140. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) ("[T]he practice of opening legislative sessions with prayer has become part of the fabric of our society.").

141. *Lynch v. Donnelly*, 465 U.S. 668, 683 (1983) ("[W]hatever benefit [from municipal display of crèche] there is to one faith or religion or to all

but the blandest and most brief theistic sentiment.<sup>142</sup> It can be entirely symbolic in the sense of having no consequence other than mere exposure.<sup>143</sup> Thus, in *Lee v. Weisman*, Justice Kennedy and the majority concluded that having to sit in respectful silence during a nondenominational prayer was an unacceptable burden.<sup>144</sup>

This prohibition against the government taking sides applies almost without regard to the degree of burden that is placed on dissenters<sup>145</sup> or the likelihood that it will have any real impact on religious choices.<sup>146</sup> It can even consist of an “endorsement” that expressly denies that it is any such thing, merely acknowledging religious sentiment or belief as a source of our democracy or as something which “just happens” to be or to have been believed by a majority or significant portion of us at all or some times in our

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religions, is indirect, remote, and incidental.”).

142. See *Lee v. Weisman*, 505 U.S. 577, 581-82 (1992) (considering a prayer, offered by a Rabbi, that did no more than thank and call upon a “God” and “Lord” about whom no further details were offered, to be an endorsement); *Engel v. Vitale*, 370 U.S. 421, 422 (1962) (finding unconstitutional a prayer that said “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country”).

143. One separationist scholar has observed: Many of the state actions the Supreme Court has deemed to violate the Constitution over the years have involved intangible establishments. That is, constitutional violations have often come in the form of state actions that do not actually force anyone to do anything against their personal faith, but rather simply communicate that the government favors some form of religion in the abstract.

Gey, *supra* note 8, at 1910.

144. Justice Kennedy, writing for the majority, acknowledged that “students may consider it an odd measure of justice to be subjected during the course of their educations to ideas deemed offensive and irreligious, but to be denied a brief, formal prayer service ceremony that the school offers in return.” *Lee*, 505 U.S. at 591. He conceded that “to endure social isolation or even anger may be the price of conscience or nonconformity,” *id.* at 597-98, but that exposure to this brief formal and nondenominational prayer was “too high an exactment” to be permitted.

145. As Justice Thomas has observed, students exposed to what was taken as a state-sponsored prayer at a graduation ceremony are not “coerced to pray” but “[a]t most, . . . are ‘coerced’ into possibly appearing to assent to the prayer.” *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 47 (2004) (Thomas, J., concurring).

146. See, e.g., *Engel*, 370 U.S. at 442 (Douglas, J., concurring) (acknowledging that nondenominational prayer does not establish religion).

history.<sup>147</sup> It need not include an argument that the point of view expressed constitutes exclusive truth or an express claim that any other point of view is wrong.<sup>148</sup> We require government to not refrain, notably from coercion, but from a rather exaggerated notion of insensitivity.<sup>149</sup> Endorsement, it turns out, can be very slight.<sup>150</sup>

The scope of “nonendorsement” theory can be illustrated by consideration of the different senses of the term embraced by it. Shortly following Justice O’Connor’s promulgation of the endorsement list, Stephen Smith identified at least four forms of endorsement, roughly labeled exclusive preferment of a belief, endorsement of the truthfulness of a belief, endorsement of the

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147. *McCreary County, Ky. v. ACLU of Ky.*, 125 S. Ct. 2722, 2739 (2005) (“Foundation of American Law and Government” exhibit included Ten Commandments in display with other documents thought significant in historical foundation of American government).

148. Arguably no modern Establishment Clause case considered by the Court involves such a claim, other than in the sense that facilitating invocations of God implies that there is one and that those who say there is not must be wrong. For example, *Edwards v. Aguillard* and its progeny largely consist of cases invalidating government communication that evolution is a “theory” and that some persons have different beliefs regarding the origin of life. See 482 U.S. 578, 581 (1987).

149. For example, in *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462 (5th Cir. 2001), the court held that an issue of fact existed as to whether a volunteer “Clergy In the Schools” counseling program was an establishment, notwithstanding that the clergy were required to speak from a secular perspective and wore no religious garb. Apparently their mere identity was problematic. Upon remand, the district court found that the program constituted an establishment. *Id.* at 464.

150. See *Van Orden v. Perry*, 125 S. Ct. 2854, 2866 (2005) (Thomas, J., concurring) (“[T]his Court’s precedent permits even the slightest public recognition of religion to constitute establishment of religion.”); *Lee v. Weisman*, 505 U.S. 577, 637 (1992) (Scalia, J., dissenting) (“[S]urely our social conventions . . . have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence.”). Some have argued that the extent to which a perception of a government message is context dependent renders the whole concept of endorsement incomprehensible. See, e.g., B. Jessie Hill, *Putting Religious Symbolism In Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491 (2005). Others have critiqued the notion that government action should be understood in terms of the “message” that it sends. See, e.g., Steven D. Smith, *Expressivist Jurisprudence and the Depletion of Meaning*, 60 MD. L. REV. 506 (2001); Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000).

value of a belief, and recognition that many have believed.<sup>151</sup> Following the Court's decisions in *McCreary* and *Van Orden*, it seems that a slim majority of the Court believes that the first three are all forbidden by the Establishment Clause.

There seems to be no doubt that if the government claimed (explicitly) that all believers are irrational (exclusive preferment) or that "Jesus saves" (endorsement of truthfulness), the Establishment Clause would be violated. It is hard to see how communication of the value of a particular belief would steer clear of Establishment Clause difficulty, given, for example, invalidation of laws providing for moments of silence,<sup>152</sup> informing students of alternative views of the origins of life<sup>153</sup> or acknowledging the importance of the Ten Commandments<sup>154</sup> in the development of the western legal tradition. It may be that only where, as in *Van Orden*, a court (or at least the decisive vote on a court) can conclude no claim is made regarding the value of a belief, that a government statement concerning that belief – at least if it is religious – can stand. Because, as we saw in *McCreary* and *Kitzmiller*, endorsement may be implicit<sup>155</sup> – may, in fact, be found even where it has been disclaimed – one wonders how often endorsement in the fourth sense (a recognition that many have believed) can be permitted.

## VI. THE FAILURE OF ENDORSEMENT NEUTRALITY

### A. *Nonendorsement's Frustrated Ambitions*

This is a sensitivity at war with itself. If vague and noncoercive references to God are problematic because an objective observer might perceive the government to be endorsing a perspective about religion that she does not share and will, therefore, feel "disfavored," then the presentation of a systematic

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151. Stephen D. Smith, *Symbols, Perceptions and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 276-77 (1987).

152. *Wallace v. Jaffree*, 472 U.S. 38, 40-41 (1985).

153. *Edwards*, 482 U.S. at 581.

154. *McCreary County, Ky. v. ACLU of Ky.*, 125 S. Ct. 2722, 2728-29 (2005).

155. *Id.* at 2731; *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 708-09 (M.D. Pa. 2005).

worldview that rigorously excludes any mention of God should also raise Establishment Clause concerns. When we seek to exclude no one, neutral ground may turn out to be a fairly small patch.

Neither the Supreme Court nor lower courts have been eager to fully explore the implications of this broader form of anti-establishment. Particularly when government is the speaker, it has generally been assumed, mostly without explanation, that Establishment Clause mandates of "neutrality" or "nonendorsement" are perfectly consistent with government policies that either explicitly or implicitly adopt secular approaches to questions and problems where many seek religious answers.

But whether recognized or not, the failure to see how activities undertaken with a secular purpose may violate the "norm" of governmental neutrality toward religion undermines "nonendorsement" or "substantive neutrality." They fail – and they fail on their own terms.

#### *B. Government Policies And Practices Implicate Religious Concerns*

The notion that there is a secular realm with which the state is involved and in which religious concerns are not implicated may have been accurate when the state was relatively uninvolved with education and social services. But as soon as the government begins to care for its citizens and to care about what they should think, implication of religion is unavoidable.

In *Engel*, the majority argued that disestablishment "leave[s] that purely religious function to the people themselves and to those the people look to for religious guidance."<sup>156</sup> But the efficacy of private religious expression is only as strong as the scope of wholly private spaces will permit.

To the extent that modes of expression become "public" in the sense that they are financed or perceived to be endorsed by the government, limiting those modes to "secular" discourse becomes increasingly problematic. Thus, as Professor Donald Gianelli has pointed out, in a state where all property was public, the

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156. 370 U.S. at 435.

government may have to build churches.<sup>157</sup>

While twenty-first century America is far from a socialist state, the state is an active participant in public discourse, far more active than it has been for much of the period in which the Religion Clauses have been in existence.<sup>158</sup> To the extent that the state's voice (or, as current jurisprudence would have it, any voice too closely associated with the state) is a large one, what it chooses to say (or not say) has a disproportionate influence on its citizen's religious choices.

Schools do much more than teach the "three Rs." There are few schools which do not, in one way or another, engage students in discussions about how and what to think about issues such as sexuality, tolerance for the choices and lifestyles of others, diversity of races and cultures, the environment, etc.<sup>159</sup> One appellate court recently observed that "education is not merely about teaching the basics of reading, writing, and arithmetic. Education serves higher civic and social functions, including the rearing of children into healthy, productive, and responsible adults and the cultivation of talented and qualified leaders of diverse backgrounds."<sup>160</sup>

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157. Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principal*, 81 HARV. L. REV. 513, 522-23 (1968); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 49 (1997).

158. See, e.g., Thomas C. Berg, *Religious Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 714 (1997); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 137, 161, 183-94 (1992).

159. This "clarification" of values may be mandatory as well as merely suggestive. More than one teacher certification program requires successful teaching candidates to exhibit a "commitment to social justice" and the National Council for Accreditation of Teacher Education has expressly recognized this as a "disposition" that may be required for accreditation. See, e.g., Robert "K.C." Johnson, *Disposition For Bias*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, May 23, 2005, <http://www.thefire.org/index.php/article/6250.html>. At Washington State University, a student received negative values on "dispositions" requiring him to be "sensitive to community and cultural norms" and to "appreciat[e] and valu[e] human diversity" allegedly because he was a self described "conservative Christian" who did not believe that male and white privilege exist. Press Release, Foundation for Individual Rights in Education, *Education Programs May Have a 'Disposition' for Censorship* (Sept. 21, 2005), <http://www.thefire.org/index.php/article/6280.html>.

160. *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1209 (9th Cir. 2005), *aff'd*, 447 F.3d 1187 (9th Cir. 2006).



Even where a public school advocates no particular facts or values contrary to its student's religious beliefs, it will almost certainly engage in, and at least implicitly promote, a way of thinking and living in which religion is excluded. If, for example, a curriculum offers students a set of "tools" by which to facilitate moral decision-making or choices about sexual activity<sup>161</sup> that may exclude, or minimize,<sup>162</sup> religious considerations, it is hardly a stretch to say that such instruction communicates a message that these perspectives are less important – and are certainly never to be urged upon others.

Even in the more traditionally "academic" realm, what schools say – or, again, do not say – about the role of religion in the nation's history and current affairs have implications for students' religious life. Throughout most of the twentieth and now into the twenty-first century, bitter controversy surrounds the fact and manner of teaching evolution and whether to include alternatives ranging from "creation science" to "intelligent design."<sup>163</sup>

Although public education is the paradigmatic example of government speech, it is not the only one. As the government has taken on greater responsibility for the delivery of social services, what it communicates about, for example, how one escapes poverty or recovers from addiction, assumes a larger role in the public's assumptions and beliefs and about how such problems are to be addressed and what is to be said about them. Religious social services agencies, such as Catholic Charities and Lutheran Social Services, have long been accused of becoming increasingly

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161. See *Gheta v. Nassau County Cmty. Coll.*, 33 F. Supp. 2d 179, 180 (E.D.N.Y. 1999) (challenging a sexuality course); *Grove v. Mead Sch. Dist.* No. 354, 753 F.2d 1528 (9th Cir. 1985) (objecting to a book in an English literature curriculum).

162. In fact, if what is constitutionally significant is the requirement that no one be made to feel like an outsider or to believe that the state disapproves of his or her faith, "establishment" may arise. Even if the publicly expressed view is that religion is one of many more or less equivalent considerations or portrayed as something that "some people" believe which may be further explored outside the formal educational process. Those who believe that duty to God is paramount will feel that duty has been slighted.

163. See, e.g., *Edwards v. Aguillar*, 482 U.S. 578, 581 (1987); *Epperson v. Arkansas*, 393 U.S. 97, 98 (1968) (evolution); *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 708 (M.D. Pa. 2005) (intelligent design); *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 341 (5th Cir. 1999) (creation science); *Scopes v. State*, 289 S.W. 363, 363 (Tenn. 1927) (evolution).

secular as they grow more dependent on government funds.<sup>164</sup>

Public spaces, moreover, have always been places in which the state expresses the values of the community. Plaques, public art and memorials purport to express and reinforce the values of the community. While this is not new, the notion that such public displays not contain any hint of religiosity is, as the ubiquity of the Ten Commandment memorials such as that at issue in *Van Orden* attests.<sup>165</sup>

### C. Religious Perspectives Are Not Private

One scholar has noted that “[s]eparationism thrived best when white Anglo-Saxon Protestants of low-level religious intensity constituted the bulk of our cultural elite.”<sup>166</sup> As we have seen in the work of Rawls, Rorty, Macedo, and Gey, these elites might argue that individuals are allowed to practice religion freely, in private, but are expected “to put aside their sectarian loyalties and convictions when acting in their capacities as citizens.”<sup>167</sup>

This presupposition not only fails to describe how many regard their faith, it is not religiously neutral. It “takes sides.” As Professor Kathleen Brady has explained,<sup>168</sup> the notion that religion is a private and individual matter, while informing much of our Establishment Clause jurisprudence,<sup>169</sup> is most recently

164. See, e.g., Rev. Robert A. Sirico, *Taking the “Catholic” out of Catholic Charities: He Who Pays the Piper Calls the Tune*, PHILANTHROPY, Jan. 1, 1998.

165. The display of the Ten Commandments went unchallenged for forty years. *Van Orden v. Perry*, 125 S. Ct. 2854, 2870 (2005).

166. Lupu, *supra* note 89, at 231.

167. Michael W. McConnell, *Believers as Equal Citizens*, in OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF FAITH: RELIGIOUS ACCOMMODATION IN PLURALIST DEMOCRACIES 90, 101 (Nancy L. Rosenblum ed., 2000).

168. Kathleen A. Brady, *Fostering Harmony Among the Justices: How Contemporary Debates in Theology Can Help to Reconcile the Divisions on the Court Regarding Religious Expression by the State*, 75 NOTRE DAME L. REV. 433 (1999).

169. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985) (concluding that religion is a “product of free and voluntary choice”); *Wisconsin v. Yoder*, 406 U.S. 205, 243 (1972) (Douglas, J., dissenting in part) (arguing that religion is “an individual experience”); *Everson v. Bd. of Educ. of the Twp. of Ewing*, 330 U.S. 1, 39 (1947) (Rutledge, J., dissenting) (discussing that religion is “wholly private”).

associated with "modern" or "liberal" theology.<sup>170</sup> In accordance with Kant's "turn to the subject" in modern philosophy and the corresponding notion that one cannot know the "noumena" or thing-in-itself, modern theology, following the lead of F.D.E. Schleiermacher,<sup>171</sup> argued that the source of religion was an individual, but universal, human experience of feeling an utter dependence.<sup>172</sup> If religion is rooted in individual and universal experiences, then it is ultimately a matter between God and the individual, with religious communities flowing organically and naturally from that experience. On this view, the argument continues, while religion may be expressed in community, there is little threat to faith by excluding it from the public square because religious experience is innate. It may be reinforced or developed in community, but it need not be formed by a community.<sup>173</sup>

On the other hand, post-modern theology tends to see religion as rooted in the particular traditions, history and interaction within particular communities.<sup>174</sup> These communities are, moreover, permeable and influenced by the larger culture in which they exist.<sup>175</sup> Professor Brady writes that "[i]n the postliberal view, the survival of religion depends on healthy religious communities whose symbols, rituals, and values can function as an integral part of the individual's conduct and thought. If religious belief systems no longer function as the central interpretative schemes within which individuals understand their lives, then religion will wither and die."<sup>176</sup> On this view, "if religion is excluded from a significant portion of the individual's life, its continuing relevance will be threatened."<sup>177</sup>

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170. See generally IMMANUEL KANT, *CRITIQUE OF PURE REASON* (Norman K. Smith, trans., Random House, Inc. 1958) (1781).

171. FRIEDRICH SCHLEIERMACHER, *THE CHRISTIAN FAITH*, 16-17 (H. R. Mackintosh & J.S. Stewart eds., T&T Clark Ltd. 1999) (1830).

172. Brady, *supra* note 168, at 485.

173. See, e.g., GEORGE A. LINDBECK, *THE NATURE OF DOCTRINE: RELIGION AND THEOLOGY IN A POSTLIBERAL AGE*, 33-41 (1984).

174. See, e.g., KATHRYN TANNER, *THEORIES OF CULTURE: A NEW AGENDA FOR THEOLOGY* 152 (1997).

175. Brady, *supra* note 168, at 485.

176. *Id.* at 498.

177. *Id.* at 499. See *Lee v. Weisman*, 505 U.S. 577, 638 (1991) (Scalia, J., dissenting). ("Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the

Not all theological post liberals believe that this requires a more significant place for religion in the public square or those portions of communal life associated with government. Most famously, Stanley Hauerwas has argued that the church's distinct nature can be preserved only by a certain separation from society at large.<sup>178</sup> But for others, faith cannot be excluded from those areas of life upon which the government increasingly wishes to pronounce and instruct them. If faith is formed in community and influenced by the secular world, then its systematic exclusion from significant aspects of life will affect it.

Such exclusion is not neutral. As one separationist commentator has noted, "the main battle today is not between Catholicism and Protestantism, but between religion and cultural secularism."<sup>179</sup> It is not between differing religious perspectives but between religious and secular world views. If this is indeed a challenge to communities of faith, then a naked public square is anything but even-handed.

*D. Secular Messages On Matters of Religious Import Violate the Principle of Nonendorsement.*

If a public school goes to great lengths to exclude expressions of religious sentiment from public occasions, particularly when they would otherwise be natural for a majority of students, it does more than protect the sensibilities of minorities. It also teaches those students that religion is not a public value, but something most appropriately held – and discussed – in private. Similar messages are sent when even historic expressions of religiosity are ordered removed from the public square<sup>180</sup> or providers of social services are required to eliminate or temper their religious perspectives.<sup>181</sup>

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privacy of one's room. For most believers it is *not* that, and never has been.").

178. STANLEY HAUERWAS, A COMMUNITY OF CHARACTER: TOWARD A CONSTRUCTIVE CHRISTIAN SOCIAL ETHIC 86 (1981).

179. Gey, *supra* note 29, at 1017.

180. McCreary County, Ky. v. ACLU of Ky., 125 S. Ct. 2722, 2739 (2005) (Ten Commandments); Van Orden v. Perry, 125 S. Ct. 2854, 2858 (2005) (Ten Commandments); Newdow v. Cong. of the United States, 383 F. Supp. 2d 1229, 1231 (E.D. Cal. 2005) (Pledge of Allegiance).

181. See, e.g., DeStefano v. Emgcy. Hous. Group, Inc., 247 F.3d 397, 408 (2d Cir. 2001) (arguing that Alcoholics Anonymous constitutes religion in which publicly funded staff should not participate); Am. United for Sep. of

Recall the ambitious nature of our Establishment Clause jurisprudence. If we are to recoil at exposure to a brief nondenominational prayer, how can we remain unconcerned about what seems to be a much more significant intrusion on the conscience of dissenters? How can we conclude that a government that tells a citizen that her religious views are wrong or irrelevant does not “harm” her in the same way that it harms her atheist neighbor by confronting him with the endorsement of theism.<sup>182</sup>

As Michael McConnell has written:

If the public school day and all its teaching are strictly secular, the child is likely to learn the lesson that religion is irrelevant to the significant things of this world, or at least the spiritual realm is radically separate and distinct from the temporal. However unintended, these are lessons about religion. They are not “neutral.” Studious silence on a subject that parents may say touches all of life is an eloquent refutation.<sup>183</sup>

This is so whether or not public communication directly addresses religion. Consider two hypothetical students. Dick is an atheist. He may be exposed to such things as voluntary prayer or a sticker on his textbook that identifies random evolution as a theory and informs him that some people argue in favor of an alternative theory called intelligent design. He is not coerced to

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Church and State v. Prison Fellowship Min., 432 F. Supp. 2d 862, 865 (S.D. Iowa 2006) (challenging a faith based prison ministry); Lown v. Salvation Army, Inc., 393 F. Supp. 2d 223, 226 (S.D.N.Y. 2005) (challenging government funding of social services provided by Salvation Army); Teen Ranch v. Udow, 389 F. Supp. 2d 827, 842 (W.D. Mich. 2005) (upholding exclusion of state funds for program in which faith was incorporated into residential treatment for juveniles).

182. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (noting “[f]amilies entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious beliefs that may conflict with the private beliefs of the student and his or her family”). It is difficult to see how, if a family who is harmed by having their child exposed to “Creation Science” as an alternative to evolution, their evangelical neighbors are not harmed by having their child told that she must reject what she regards to be the scriptural account of the origin of life. If there is a principle that justifies treating the two families differently, it is not “nonendorsement” or neutrality.

183. Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 Nw. U. L. Rev. 146, 162 (1986).

believe or proclaim anything. He is not told that his ideas are wrong or untrue. He may feel left out. He may feel pressure to go along and affirm what many of his classmates affirm.

Jane is an evangelical Christian. She believes that God created the world and all living things in it, but is taught that life arose as a result of random chemical processes. She believes that pre-marital sex and homosexuality are sins, prohibited by God. She is taught that gays and lesbians are exercising their individual rights and are to be, if not celebrated, accepted. She is taught that the decision to engage in premarital sex is hers alone and, while (perhaps) inadvisable, is a decision that can be made on the basis of considerations other than her religion, each of which she is invited to explore. She is consistently reminded that she is different. She feels strong pressure to conform.

The harm, if that is what it is, suffered by Dick and Jane is similar. Both may feel excluded on the basis of their religious views. Both are reminded that a majority of their classmates – and the school which each attends – embrace a different set of beliefs. Both are subject to school and peer pressure to alter their own beliefs. But it is a generally accepted view that only Dick has an Establishment Clause remedy.<sup>184</sup>

If it is an establishment to require students to sit respectfully at a graduation that they need not attend while someone who is not a state employee briefly recites a prayer to a God in which they do not believe, it is not immediately apparent why it is any less an Establishment Clause concern to require students to listen to a state employee teach – and require them, in some sense, to affirm – a view of the origins of life<sup>185</sup> or a way to approach critical

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184. Courts have repeatedly held that parents have no right to object to the provision of secular information that is inconsistent with their religious beliefs. *See, e.g.,* *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1200 (9th Cir. 2005) (challenging school survey containing sexual matter); *Leebaert v. Harrington*, 332 F.3d 134, 135 (2d Cir. 2003) (objecting to mandatory health education course); *Parents United for Better Schools, Inc. v. Sch. Dist. of Philadelphia Bd. of Educ.*, 148 F.3d 260, 262 (3d Cir. 1998); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 529 (1st Cir. 1995) (objecting to attendance at AIDS awareness assembly).

185. L. Scott Smith, *On Teaching Neo-Darwinism in Public Schools: Avoiding the Pall of Orthodoxy and the Threat of Establishment*, 11 ROGER WILLIAMS U. L. REV., 143, 148-49 (2005) (“[E]volution, interpreted as a algorithmic expansion of life following its fortuitous appearance, violates the Establishment Clause whenever taught as “factual” or orthodox doctrine in

moral questions that is contrary to their religious beliefs.

*E. Endorsement of Secularism Implicates Establishment Clause Values*

*1. Protection of Minorities*

As noted by Justice O'Connor, those who dissent from the established view may come to see themselves as outsiders.<sup>186</sup> The government should refrain from taking sides<sup>187</sup> and should, as Professor Chemerinsky has put it, act in a way that "allows all in society, of every religion and of no religion, to feel that the government is theirs."<sup>188</sup> There is a notion that one's religious beliefs are so fundamental to a person's existence so as to be akin to a status; something that ought to be free of official disapproval and not be the basis upon which official decisions about her are made. If a student who is exposed to the word "God" in the Pledge of Allegiance or to a nondenominational prayer or a passer-by who happens upon a crèche unaccompanied by the appropriate secular or multi-cultural symbols is made to feel like a political outsider, on what basis can we say that a student who is told, at least implicitly, that her most deeply held beliefs about the manner in which she is to live her life are not pertinent to life's biggest questions is not also made to feel excluded? The extant evidence suggests that she is. If the purpose of our Establishment Clause jurisprudence is to assure citizens that the government is "their own," quite a few people are not getting the message.

*2. Promotion of Common Discourse and Unity*

If the point of the non-establishment principle is to reduce divisiveness around religious issues, there is little evidence that this purpose has been served. It is far from obvious that religious issues are uniquely divisive. Although it is common for scholars to assert, without evidence, that this is so for Establishment Clause

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public schools . . .").

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

187. *McCreary County, Ky. v. ACLU of Ky.*, 125 S. Ct. 2722, 2742 (2005) (emphasizing neutrality as an interpretive guide).

188. See Chemerinsky, *supra* note 9, at 227.

purposes, the same scholars will often argue that the nature of strongly held non-religious views require the same protection that the Constitution affords religious beliefs under the free exercise clause.<sup>189</sup> In a nation in which it is not uncommon for persons to argue that they no longer wish to live in a nation that has voted for a political party other than their own,<sup>190</sup> secular differences can be just as charged as religious ones.

In any event, it is unlikely that religious differences can be made to go away by siding with a secularist perspective. While one can imagine intense public debate over invocations at the opening of the school day, it is not necessary to imagine the controversies that do exist over such matters as sex education, diversity and the manner in which history should be taught. Religious folks are not going gently into the good night. The

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189. For example, Professor Laycock notes the peculiar sensitivity of persons to suggestions that the government disapproves of their religious beliefs or approves those of others in advancing the notion of substantive neutrality. Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 320 (1996). However, in the free exercise context, he argues that the law should protect nontheistic conscientious objections on the same basis as theistic ones. *Id.* at 331. In other words, nontheistic principles may be just as strongly held and equally integral to a person's identity. "Put another way, if the Establishment Clause really was meant to protect dissenters from being implicated in state action which violated deeply held religious principles, then what warrant have we for refusing to extend this principle beyond the bounds of religion, to nonreligious principles and nonreligious actions?" Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 425 (2002). Professor Feldman notes: "There are humanists and atheists, socialists and capitalists, Aristotelians, Freudians, Darwinians, Derrideans, Foucauldians and Randians who mold nonreligious principles into the foundational bases of their deeply-held views." Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673, 717 (2002). Professor Feldman, of course, is not an advocate of the endorsement test. NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM – AND WHAT WE SHOULD DO ABOUT IT* 204-05 (2005).

190. Although perhaps not so charged as to actually leave. Although celebrities as diverse as Pearl Jam frontman Eddie Vedder, Alec Baldwin, Pierre Salinger and Barbara Streisand all said they would go, apparently none have. See [snopes.com](http://www.snopes.com/inboxer/outrage/leave.htm), <http://www.snopes.com/inboxer/outrage/leave.htm> (last visited Oct. 17, 2006). Canadian immigration officials did report a surge in interest from the U.S. following President Bush's reelection. Whitney Boggs, *President Bush's Re-election Encourages Americans to Move to Canada, Well ... Not Exactly*, THE HILLTOP, Nov. 19, 2004, <http://www.thehilltoponline.com/home/archives/> (click on Nov. 19, 2004 edition, then select article under Nation & World heading).



exclusion of religion from the public square has itself become extraordinarily divisive.<sup>191</sup>

### 3. *Protection of Religious Liberty*

Government sponsorship of religion may threaten to subject religious liberty to secular control and sap its vitality. This view, most widely associated with Roger Williams, holds that “worldly corruptions . . . might consume the churches if sturdy fences against the wilderness were not maintained.”<sup>192</sup> But certainly the sponsorship of secularism can do the same thing. Indeed, separationist scholars defend their view by arguing that it will do precisely that.<sup>193</sup> In their view, inculcation of what they see as “rationalist” and “inclusive” values is to be applauded, notwithstanding (and perhaps because of) its adverse impact on at least some religious perspectives. That it does so without expressly mentioning God or theistic principles does not make it any more “neutral.”

If the point of non-establishment is to ensure that government is substantively neutral, i.e., does as little as possible to affect the religious choices of citizens,<sup>194</sup> this hardly seems served by the imposition of a thorough going secularism in public spaces. If public schools routinely teach that life’s most significant questions can – and, by implication, ought to – be answered without regard to one’s religious belief, isn’t the risk of influencing those beliefs exponentially higher than when it offers a voluntary non-

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191. Erwin Chemerinsky, *Why Justice Breyer Was Wrong in Van Orden v. Perry*, 14 WM. & MARY BILL OF RTS. J. 1, 3 (2005) (arguing that divisiveness makes no sense as a principle because “[a]ny enforcement of the Establishment Clause is inherently divisive”). But see Chemerinsky, *supra* note 9, at 227 (arguing that nonestablishment should allow “all in society . . . to feel that the government is theirs”).

192. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1158 (2d ed. 1988) (citing MARK D. HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 6 (1965); PERRY MILLER, *ROGER WILLIAMS, HIS CONTRIBUTIONS TO THE AMERICAN TRADITION* 89, 98 (1953)).

193. Macedo, *supra* note 17, at 422; Steven G. Gey, *Why Is Religion Special: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 185-86 (1990) (reasoning that a purpose of the Establishment Clause is to protect the state from religion).

194. Laycock, *supra* note 66, at 1001-02.

denominational prayer?

The notion that removing religious concerns from public discourse will have an impact on the public is hardly new. Jefferson famously saw a nation in which everyone would become a “Unitarian” which, in his view, was a tolerant form of Christianity making few distinct demands on its adherents.<sup>195</sup> Justice Frankfurter saw public schools in particular as inculcating a common public ethos or “religion” of democracy, serving “as a symbol of our secular unity.”<sup>196</sup> When it comes to God, the assumption of His absence may be as critical as the advocacy of His presence. If the battle is between faith and secularism, then pretending that the silence on religion is neutral has the effect of licensing “one side of the debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules.”<sup>197</sup> As Professor Feldman points out, the secularist project has never emphasized negative propositions about God, preferring instead to treat it as irrelevant.<sup>198</sup>

#### F. *The Courts Have Not Acknowledged This Failure*

Nevertheless, courts have generally rejected arguments that public secularism either “establish” irreligion or interfere with free exercise. The classic case is *Mozert v. Hawkins County Board of Education*.<sup>199</sup> In *Mozert*, plaintiffs argued that certain required readings in the Hawkins County, Tennessee school district were offensive to and contradictory of their religious beliefs and, for that reason, a violation of their free exercise rights.<sup>200</sup> The Court of Appeals found no free exercise violation because the students were required neither to affirm nor to deny any particular point of view.<sup>201</sup> In the court’s view, “[w]hat [was] . . . absent . . . [was] the critical element of compulsion to affirm or deny a religious belief

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195. Letter from Thomas Jefferson to Dr. Benjamin Waterhouse (June 26, 1822), in 12 WORKS OF THOMAS JEFFERSON 243 (Paul L. Ford ed., 1905).

196. *McCullom v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 217 (1948) (Frankfurter, J., concurring).

197. *R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992).

198. FELDMAN, *supra* note 189, at 113, 129.

199. 827 F.2d 1058 (6th Cir. 1987).

200. The *Mozert* plaintiffs chose not to advance an Establishment Clause claim. They sought to be exempted from the offending curriculum, not to change it. *Id.* at 1069.

201. *Id.* at 1076-77.

or to engage or refrain from engaging in a practice forbidden or required in the exercise of a plaintiff's religion."<sup>202</sup> Public schools have the right, the court noted, to teach fundamental values "essential to a democratic society" including "tolerance of divergent political and religious views."<sup>203</sup>

This (and other aspects) of the *Mozert* holding have been roundly criticized, not least of all for the court's failure to recognize that exposure to, and the admonition to tolerate, certain "divergent" views were precisely what the plaintiffs argued was inconsistent with the exercise of their religion.<sup>204</sup> Although the *Mozert* plaintiffs did not assert an Establishment Clause claim, the lack of symmetry is jarring. The absence of coercion has never, or at least not recently, been a required element of an Establishment Clause claim. In virtually no modern Establishment Clause case, certainly not in *Engel*, *Edwards*, *Abington*, *Wallace*, *Lee*, *Santa Fe*, or *McCreary*, was anyone compelled to affirm anything.

The Eleventh Circuit, in *Smith v. Board of School Commissioners*, considered and rejected a claim that pervasive secularism violates the Establishment Clause.<sup>205</sup> In that case, the trial court had held that certain textbooks used in elementary and secondary schools in the state of Alabama violated the Establishment Clause because they advanced the religion of secular humanism and inhibited theistic religion.<sup>206</sup> The Court of Appeals disagreed. In its view, the texts conveyed a message of "tolerance of diverse views, self-respect, maturity and logical decision-making"<sup>207</sup> and this was an "entirely appropriate secular

202. *Id.* at 1069.

203. *Id.* at 1068 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986)).

204. Nomi Maya Stolzenberg, *He Drew a Circle That Shut Me Out: Assimilation, Indoctrination and the Paradox of Liberal Education*, 106 HARV. L. REV. 582, 605-06 (1993) ("After all, requiring impressionable children to exhibit adherence to beliefs they do not (yet) hold is an effective way of cultivating adherence to those beliefs.").

205. 827 F.2d 684, 695 (11th Cir. 1987).

206. *Smith v. Bd. of Sch. Comm'rs*, 655 F. Supp. 939, 988 (S.D. Ala. 1987). For example, the district judge Brevard Hand found that home economics textbooks promoted an "individualistic," "relativist," and utilitarian form of moral decision-making. *Id.* at 986.

207. *Smith v. Bd. of Sch. Comm'rs*, 827 F.2d 684, 692 (11th Cir. 1987).

effect.”<sup>208</sup> The absence of a discussion of religion, it concluded, did not convey a message of approval of secular humanism.<sup>209</sup> Other cases considering allegations of an “establishment” of secularism have generally reached similar conclusions.<sup>210</sup>

G. *Nonendorsement Cannot Be Saved*

There are at least four ways in which one might attempt to save nonendorsement. None work.

1. *Embrace the Failure*

One response, as we have seen, is to argue that the apparent lack of neutrality between the endorsement of religion and secularism is not a bad thing. God talk, on this view, is dangerous for democracy and should be kept from the public square.

Professor Gey, for example, borrowing from Rawls and Rorty, argues that democracies require popular control of the government, the tentative nature of all political decisions and policy arguments that are susceptible to rational critique and empirical analysis.<sup>211</sup> Religious perspectives appeal to a higher authority, claim that there are eternal truths, and are not shared by absolutely everyone.<sup>212</sup> Consequently they run afoul of all three “requirements.” Professor Macedo argues that, the framers of the Constitution were engaged in “soulcraft,”<sup>213</sup> and that the state should adopt policies “to encourage popular enlightenment, the capacity for reflective and self critical deliberation, and broad

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208. *Id.*

209. *Id.* at 693.

210. *Cf. Morrison v. Bd. of Educ. of Boyd County*, 419 F. Supp. 2d 937, 943-44 (E.D. Ky. 2006) (noting that students exposed to sensitivity training alleged to inculcate positive view of homosexuality does not compel students to disavow their religious principles or endorse homosexuality). Most often, establishment claims are avoided by characterizing a refusal to move from a secular baseline as supported by an interest in avoiding the perception of religious endorsement or in avoiding religious controversy. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 76 (O'Connor, J., concurring); *Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617 (2d Cir. 2005).

211. Gey, *supra* note 29, at 1023-24.

212. *Id.* Even if the majority share common religious presuppositions, Professor Gey would believe this requirement unmet because the “majority” is not “the collective.” *Id.* at 1020.

213. Macedo, *supra* note 17, at 422.

forms of social cooperation.”<sup>214</sup> That these policies will have “nonneutral impacts on differing religious traditions” is not an unfortunate by-product of this soulcraft, but its very purpose.<sup>215</sup>

In the same vein, Professor Sullivan argues that a secular public order ends the war of “all against all,” ushering in social peace that would presumably be impossible if religious folk were permitted to get too pushy.<sup>216</sup> Too much religion, as Professor Gey would have it, risks the “unity of the graveyard.”<sup>217</sup>

Others have responded to this claim more fully than I can here.<sup>218</sup> It is not at all clear that religious claims are devoid of reason<sup>219</sup> or any more dependent on “inaccessible” first order principles than other forms of discourse.<sup>220</sup> The notion that all truth claims in a democratic society are or ought to be “contingent” is both normatively<sup>221</sup> and objectively<sup>222</sup> spurious.

214. *Id.* at 426.

215. *Id.* at 427. (“Not only is there no reason to try and correct for these nonneutral effects on religious and cultural communities, we count on the communities changing in ways that are supportive of liberal democracy.”).

216. Sullivan, *supra* note 17, at 199-201.

217. Gey, *supra* note 29. Professor Gey invokes Justice Jackson’s famous metaphor to argue (although he would not put it this way) that the one orthodoxy that may be prescribed is a rigorous public secularism. *See, e.g.,* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).

218. *See, e.g.,* STOUT, *supra* note 10, at 75; STEPHEN CARTER, *CULTURE OF DISBELIEF* (1992); Michael W. McConnell, *Five Reasons to Reject the Claim that Religious Arguments Should be Excluded From Democratic Deliberation*, 1999 UTAH L. REV. 639 (1999).

219. *See* Steven D. Smith, *Barnette’s Big Blunder*, 78 CHI. KENT L. REV. 625, 650 (2003) (observing that “Christians differ tremendously in which we might call the epistemological and existential routes they take to arrive at a ‘Christian’ outlook.”); *see also* Larry Alexander, *Liberalism, Religion And The Unity of Epistemology*, 30 SAN DIEGO L. REV. 763, 770, 775, 789 (1993). (believers often use reason to support theological positions). St. Thomas Aquinas famously emphasized the accessibility of much of the natural law through reason. 2 ST. THOMAS AQUINAS, “THE SUMMA THEOLOGICA,” Part I of Second Part, question 90, art 2, *reprinted in* 20 GREAT BOOKS OF THE WESTERN WORLD 209 (Robert Maynard Hutchins ed., 1952).

220. *See* Alexander, *supra* note 219, at 780, 796; Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453, 461 (2000) (“But establishmentarianism has had a rebirth – ironically, in the very name of pluralism, diversity and tolerance.”). The gimlet-eyed Justice Oliver Wendell Holmes conceded that even his thorough going legal positivism was corrupted by irreducible principles that he referred to as “can’t helps.” ALBERT W. ALSCHULER, *A Century of Skepticism*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 1, at 96.

221. It is not evident why a democracy should not be – and is not, in fact –

Nor is it evident that they are any more intolerant of dissenters<sup>223</sup> or less prone to extremism.<sup>224</sup>

In any event, as noted earlier, the Court has not accepted – and has expressly repudiated – the notion that the religion clauses establish a secular public order.<sup>225</sup>

## 2. Denial of Failure

Some scholars have argued that the tension between mandating secular government speech and establishing irreligion is not as acute as popularly claimed. They point out that groups with competing views of the role of religion in public life have agreed on broad statements of what type of religious discourse is permitted in public schools, including “objective” teaching about religion and respect for private religious expression by students. *Religion in the Public Schools: a Joint Statement of Current Law*, a statement issued by a variety of interested groups,<sup>226</sup> requires that references to religion be objective and that schools may teach “values” as long as they are not taught as religious tenets. This statement prompted Kathleen Brady to observe that, for many religious groups, “the effort to retain religious references in government settings has not only taken a back seat to private

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based upon certain settled principles such as freedom of speech, equal protection of the laws and the innate value of human life.

222. It is far from clear that first order principles such as tolerance, respect for certain forms of diversity, and assumptions regarding matters such as gender equality are open to “debate” in modern liberalism as the firestorm over Lawrence Summers recent remarks regarding the distribution of exceptional mathematical abilities between the genders demonstrates.

223. McConnell, *supra* note 218, at 453.

224. Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 MINN. L. REV. 1047, 1094 (1996). (“The twentieth century has produced Hitler, Stalin, Mao and Pol Pot and in our own country terrorist bombs on behalf of peace, environmentalism, the right to bear arms, and liberation of Puerto Rico.”).

225. See Part IV.F and accompanying notes.

226. This statement is available online at <http://www.ed.gov/Speeches/04-1995/prayer.html> [hereinafter *Joint Statement*]. Although the statement was joined by the Christian Legal Society, more typical signatories are separationist groups such as People for the American Way and liberal religious groups such as the Interfaith Alliance, National Council of Churches, Presbyterian Church (USA), Unitarian Universalist Association of Congregations and the United Church of Christ’s Office for Church in Society, as well as a number of minority religious groups who have traditionally seen separationism as the best guarantee of their own liberty.

religious speech, but has almost disappeared.”<sup>227</sup> As Professor Brady noted, Christian conservatives have endeavored to accurately state the law and, consequently, produced statements approximating the joint statement.<sup>228</sup>

But “conservatives” and “liberals” do not agree on what the law is or should be.<sup>229</sup> Nor, within settled law, do they agree on what speech is objective and what discussions of religion are “sponsored” by the government, and whether proselytizing speech must be prohibited.<sup>230</sup>

Given the continued frequency of litigation over religious expression in public schools, any declaration of peace may be premature. “Objective” teaching may not be, nor is not likely to be, neutral<sup>231</sup> and the nature of education is such that the voice of the state and those of its students are inherently unequal. The school is not, nor does it try to be, an objective mediator of competing ideas and methods. It takes positions, and the positions it takes matter. The notion that values can be divorced

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227. Kathleen A. Brady, *The Push to Private Religious Expression: Are We Missing Something*, 70 FORDHAM L. REV. 1147, 1195-96 (2002). Professor Brady attributes this, at least in part, to a recognition by conservative religious groups that their views might not prevail if the state were to be permitted broader leeway in endorsing religious views. *Id.* at 1156. Indeed many such groups now advocate withdrawal from the public sphere. *Id.* This, of course, suggests that nonendorsement, far from creating common ground has prompted some religious people, not merely to feel like outsiders, but to become refugees.

228. *Id.* at 1154. See generally Jay Alan Sekulow, James Henderson & John Tuskey, *Proposed Guidelines For Student Religious Speech and Observance in Public Schools*, 46 MERCER L. REV. 1017 (1995).

229. The Clinton Department of Education promulgated guidelines regarding reference to religion in public education (available online at <http://www.ed.gov/speeches08-1995/religion.html>), which were significantly modified by President Bush's Secretary of Education Rod Paige (available online at <http://www.ed.gov/policy/gen/guid/religionandschoolindex.html>). The revised guidelines have been bitterly criticized by Americans United for Separation of Church and State (available online at [http://www.au.org/she/docserver/public\\_school\\_guidance.pdf?docID=186](http://www.au.org/she/docserver/public_school_guidance.pdf?docID=186)).

230. See *supra* note 227 and accompanying text.

231. See, e.g., *Citizens for a Responsible Curriculum v. Montgomery Pub. Sch.*, No. Civ. A. AW-05-1194, 2005 WL 1075634, at 11 (D. Md. 2005) (discussing religious attitudes toward homosexuality found to be skewed against, and dismissive of, more conservative faith traditions); *Hansen v. Ann Arbor Pub. Sch.*, 293 F. Supp. 2d 780, 782-83 (E.D. Mich. 2003) (school sponsored panel discussion on religion and homosexuality excluded views critical of homosexuality).

from their religious foundations<sup>232</sup> without damage to those foundations is not obvious.

Just as significantly, much of the struggle over religious expression in schools is over whether to characterize particular expression as private or attributable to the government.<sup>233</sup> The Joint Statement itself recognizes that the current case law may require restrictions on even private religious speech to a “captive audience.”<sup>234</sup>

Where government maintains an open forum, it cannot engage in view point, as opposed to content, discrimination.<sup>235</sup> This may not apply, however, to school-sponsored speech, i.e., private speech that a school “affirmatively . . . promotes” as opposed to that it merely tolerates.<sup>236</sup> Lower courts, particularly in the context of public schools, have not been reluctant to uphold the exclusion of private religious speech from government fora where the government has exercised substantial or plenary control over the context of speech permitted in those fora,<sup>237</sup>

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232. See, e.g., Alan E. Garfield, *A Positive Rights Interpretation of the Establishment Clause*, 76 TEMP. L. REV. 281, 292 (2003) (“The state must simply ensure that its values are grounded not in religious beliefs [even if that might explain their origin] but in the secular values of equality and liberty.”).

233. Laycock, *supra* note 101, at 220; Steven W. Fitschen, *Religion in the Public Schools After Santa Fe Independent School District v. Doe: Time For a New Strategy*, 9 WM. & MARY BILL RTS. J. 433, 436, 439 (2001).

234. *Joint Statement*, *supra* note 226.

235. Ark. Educ. Television Comm’n. v. Forbes, 523 U.S. 666, 677 (1998) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985)); *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992).

236. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270-71 (1988). “[E]ducators do not offend the First Amendment by exercising editorial control over school-sponsored student speech so long as their actions are reasonably related to legitimate pedagogical concerns.” *Id.* at 273.

237. See, e.g., *Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617 (2d Cir. 2005); *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208 (11th Cir. 2004) (concluding that school’s elimination of religious content in a student painted mural was content, and not viewpoint discrimination, because it did not discuss secular topics from a religious perspective and because the school had a legitimate pedagogical concern in excluding religious expression to avoid “disruption”); *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979 (9th Cir. 2003) (upholding exclusion of religious expression from graduation speech because school exercises “plenary” control over commencement remarks); *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 925, 931-32 (10th Cir. 2002) (holding that school could refuse to permit religious



particularly in the realm of public education.

This threatens to give the game away. If private religious speech violates the Establishment Clause, whenever government encourages an opportunity to express it,<sup>238</sup> permits it in a context in which it has reserved the right to censor messages,<sup>239</sup> or arranges for its provision by a private party,<sup>240</sup> then private religious speech remains a step-child in the public square.

Perhaps, recognizing this dilemma, some scholars have suggested permitting, and have advocated the utility of, expanded tolerance for private religious speech in public settings. Professor Brady has argued that courts permit additional space for certain "grey area" speech that might be attributed to the state.<sup>241</sup> She has argued that, while schools themselves should refrain from religious speech, they ought to be permitted to tolerate, and even to encourage, private religious speech in contexts that, under current law, might be perceived as "attributable to the government" and, therefore, unconstitutional.<sup>242</sup> Others have called for greater leeway in permitting the schools to "objectively" discuss religion perspectives.<sup>243</sup>

Of course, to eliminate the tension, such discussions would have to be mandated, not required. If a secularist bias violates the Establishment Clause, it is hardly a sufficient response to "permit" the state to level the playing field.<sup>244</sup> Under current

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messages in Columbine memorial because "avoiding religious controversy" is a legitimate pedagogical concern); *Ashby v. Isle of Wight County Sch. Bd.*, 354 F. Supp. 2d 616 (E.D. Va. 2004) (upholding prohibition of nondenominational religious song that student chose to sing at graduation ceremony because school does not have "hands off" policy toward student expression at commencement); *Phillips v. Oxford Separate Mun. Sch. Dist.*, 314 F. Supp. 2d 643 (N.D. Miss. 2003) (holding that school may censor religious-themed message in student election campaign poster).

238. See *Wallace v. Jaffree*, 472 U.S. 38, 40 n.2 (1985); *Karen B. v. Treen*, 653 F.2d 987, 999 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913 (1982).

239. *Santa Fe Indep. Sch. Dist. v. Doe*, 590 U.S. 290, 305-06 (2000).

240. *Lee v. Weisman*, 505 U.S. 577, 581, 587-88 (1992).

241. See Brady, *supra* note 227, at 1152.

242. *Id.* at 1090.

243. Jay D. Wexler, *Preparing For the Clothed Public Square: Teaching About Religion, Civic Education and the Constitution*, 43 WM. & MARY L. REV. 1159, 1166 (2002).

244. Cf. *Doe v. Human*, 725 F. Supp. 1503, 1508 n.2 (W.D. Ark. 1989) (rejecting argument that bible classes should be permitted as a matter of balance because "even if defendants have established one religion (secular humanism) such conduct does not allow them to establish a second

notions of endorsement and of the need to ensure that no one is made to feel uncomfortable, we ordinarily do not regard the fact that students may contradict or supplement state indoctrination to vitiate Establishment Clause concerns.<sup>245</sup>

### 3. *Dismissal of the Failure*

Another response is dismissal. If religious people feel like political outsiders, they shouldn't. Returning to Justice O'Connor's formulation of the endorsement test, the argument is that a reasonable observer, familiar with the history and background of the First Amendment, would understand that the government is not endorsing secularism because, in effect, it has no choice. It must avoid religious perspectives and, therefore, no hostility toward religion or advocacy of secular approaches to life, should be read into its, well, secularism. A secular public sphere in this view is simply the Constitution's settlement of "the war of all against all" and religious folks need take no offense at their exclusion.<sup>246</sup> A reasonably informed observer would understand that we just do not talk about religion in public places.

But if one simply decides what actual people should or should not understand, as opposed to what they do understand,<sup>247</sup> one has merely proposed a contentless test that is unrelated to the harm that it is designed to avoid. It makes sense to impose a secularist view of the Establishment Clause on our objective observer, only if the Establishment Clause in fact mandates a secular public order. Thus the stronger version of this response reduces into the view of those for whom state promoted secularism

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(Christianity); *aff'd without opinion*, Doe v. Human, 925 F.2d 857 (5th Cir. 1990), *cert. denied*, 499 U.S. 922 (1991).

245. See, e.g., Gey, *supra* note 8, at 1891 (arguing that cases like *Lee* and *Santa Fe* prohibit "subtle psychological coercion to involuntarily endure the religious activities of others").

246. Sullivan, *supra* note 17, at 197.

247. As Justice Thomas has observed, a "reasonable observer" test may satisfy a few real people:

For the nonadherent, who may well be more sensitive than the hypothetical "reasonable observer," or who may not know all the facts, this test fails to capture completely the honest and deeply felt offense he takes from the government conduct. For the adherent, this analysis takes no account of the message sent by removal of the sign or display, which may well appear to him to be an act hostile to his religious faith.

*Van Orden v. Perry*, 125 S. Ct. 2854, 2867 (2005) (concurring opinion).

is not the problem but the solution. Many actual observers, reasonable or otherwise, do regard the exclusion of religious perspectives from schools and public services to evince a hostility toward religion and to be tantamount to an establishment of secularism. Whether properly informed or not, they do feel like political outsiders.

A variation of this approach, advanced by some commentators, is to argue that establishment of “non-religion” would require the express advocacy of an agnostic or atheistic position. As long, to quote one commentator, as the schools have not taught “that there is no God,” the fact that they have taught values and methods of reaching them incompatible with some students’ religious view is unproblematic.<sup>248</sup> Several lower courts, faced with an argument that the exclusion of expressions of faith from public life constitutes an establishment of secularism, have also emphasized the need for some active advocacy, as opposed to the mere assumption, of irreligion.

Consistent with this view, plaintiffs challenging government imposition of secularist perspectives or viewpoints that are contradictory of their religious viewpoints have been most successful when officials have slipped and let in a little religious discourse. In *Hansen v. Ann Arbor Public Schools*,<sup>249</sup> plaintiffs succeeded on Establishment grounds, again, at least in part, because school officials had invited clergy in to discuss the compatibility of homosexuality with religious faith, while not permitting the expression of an opposing view. In *Citizens for a Responsible Curriculum v. Montgomery Public Schools*,<sup>250</sup> the use

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248. Laycock, *supra* note 224, at 1082.

249. 293 F. Supp. 2d 780 (E.D. Mich. 2003).

250. No. Civ.A. AW-05-1194, 2005 WL 1075634 (D. Md. May 5, 2005). In *Harper v. Poway Unified School District*, in response to a school sponsored “Day of Silence” promoting tolerance for gays and lesbians, a student wore a homemade T-shirt expressing his disapproval of homosexuality on religious grounds. 345 F. Supp. 2d 1096 (S.D. Cal. 2004). Although the district court denied his motion for a preliminary injunction, he was found to have stated Establishment and Free Exercise claims (in addition to a free speech claim) at least in part because school officials had told him to “leave his faith in his car” and that Christianity was based on “love, not hate” and, therefore, he should not offend others. *Id.* at 1114. On appeal, however, a divided panel of the Ninth Circuit rejected his religion clause claims. *Harper v. Poway Unified Sch. Dist.*, 455 F.3d 1052 (9th Cir. 2006), *petition for rehearing en banc denied*, 2006 WL 2103580 (9th Cir. July 31, 2006).

of instructional materials advocating tolerance for gays and lesbians was enjoined on Establishment Clause grounds because the materials included what the court found to be a one-sided discussion of religious perspectives on the issue.<sup>251</sup>

While these outcomes make perfect sense, it is far from clear that the plaintiffs in any of these cases would have felt less offended or excluded or experienced more pressure to conform or that the issue would have been less divisive had school officials excluded or criticized their points of view on purely secular grounds.<sup>252</sup>

In any event, the distinction between active advocacy and the communication of a world view that marginalizes religious concerns seems chimerical. As Stephen Carter has observed, there is a logical sense in which the refusal to treat an idea as relevant is to treat it as false.<sup>253</sup> To argue that there is a meaningful distinction between advocacy of a set of ideas that are completely inconsistent with a proposition and express denial of the proposition is to insult the intelligence of the hearer.<sup>254</sup>

The Court has, from time to time, understood this. While *Abington* spoke of affirmative opposition or hostility,<sup>255</sup> the Court's later pronouncements have recognized that the exclusion of religious perspectives may send the forbidden message of exclusion to religious citizens. For example, in *Good News Club*,<sup>256</sup> the Court recognized that exclusion of religious programs from after school use of a school building is just as likely to create the appearance of hostility toward religion as inclusion of such programs is likely to create the perception of endorsement of religion. In *Rosenberger*,<sup>257</sup> the majority, in rejecting an

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251. *Citizens for a Responsible Curriculum*, 2005 WL 1075634 \*9. In general, the exclusion of religious expression in school sponsored fora has been unconstitutional only where schools have exercised insufficient control over the forum's content. See, e.g., *Kiesinger v. Mexico Academy and Cent. Sch.*, No. 5:00-CV-1356, 2006 WL 936143 (N.D.N.Y. Mar. 31, 2006); *Seidman v. Paradise Valley Unified Sch. Dist.*, 327 F. Supp. 2d 1098 (D. Ariz. 2004); *Tong v. Chicago Park Dist.*, 316 F. Supp. 2d 645, 654-58 (N.D. Ill. 2004).

252. In such circumstances, plaintiffs might still have a free speech claim.

253. See generally CARTER, *supra* note 3.

254. Smith, *supra* note 219, at 647.

255. *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963).

256. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 118 (2001).

257. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819,

Establishment Clause defense to the petitioners' free speech claim, observed that denying government support to student publications that are religious, while extending support to those which are not, would risk fostering a pervasive bias or hostility to religion, which would undermine the very neutrality that the Establishment Clause requires.

Nor, as noted earlier, is a rule that turns on express, rather than implicit advocacy consistent with the Court's treatment of government endorsements of religion. These have been prohibited without regard to whether there is a claim to exclusivity or the express negation of some competing point of view.<sup>258</sup>

The difficulty is not finessed by reference to the well-known rule that government is not barred from communicating a particular message simply because it is consistent or inconsistent with the tenets of a religion.<sup>259</sup> The problem is not simply that government has taken a position that happens to run afoul of a tenet of someone's religion or is simply consistent with an atheistic or agnostic world view. The problem is that government has systematically, whether by constitutional fiat, fear of litigation, or a secularist bent, ruled out religion as an approach to whatever information is being imparted or service being provided, effectively denying its relevance. The exclusion is neither happenstance nor partial.

Secularism makes no claims other than the irrelevance or absence of religious perspectives.<sup>260</sup> To communicate to believers that their God is unnecessary in forming beliefs about the origins

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845-46 (1995).

258. In *Edwards v. Aguillard*, 482 U.S. 578 (1987), for example, the Court held that a statute requiring the teaching of "creation science" along with evolution constituted the endorsement of religion notwithstanding the absence of express affirmation of any particular religious point of view. The invocation held unconstitutional in *Lee* involved nothing more than the speaker's invocation of monotheistic God. *McCreary*, although influenced by the Court's perception of the country's "true" intent, expressly involved a religious expression included in a display exhibiting secular perspectives as well.

259. See, e.g., *Harris v. McCrae*, 448 U.S. 297, 318-20 (1980); but see *Edwards v. Aguillard*, 482 U.S. 578 (1987) (teaching of creation science is an establishment because "religiously motivated").

260. William T. Cavanaugh, *The City: Beyond Secular Parodies*, in *RADICAL ORTHODOXY: A NEW THEOLOGY* (John Milbank, Catherine Pickstock & Graham Ward eds., 1999) ("[Secularism] ... is the substitution of one mythos of salvation for another.").

of life, when to have sex or how to make moral decisions is tantamount to saying that their God does not, or might as well not, exist.<sup>261</sup>

Professor Shiffrin argues that while this may be true as a matter of “logical entailment,” it is not as a matter of social meaning.<sup>262</sup> It is difficult to see, however, why the assignment of one social meaning is to be preferred over another. Shiffrin argues that there is a difference between saying “I am a Catholic” and establishing Catholicism as the state religion.<sup>263</sup> There may well be such a distinction (in fact, as I explain later, I believe that there almost certainly is), but when the government is the speaker, it is a distinction the Court has generally chosen to ignore. If we are to ignore it in the context of religious expressions, then we must also ignore it with respect to secular expressions excluding or contradicting religious points of view.

Finally, as we have seen, the idea that there is a readily negotiated distinction between beliefs about God and beliefs about how to live one’s life and regard public issues is itself not neutral in its view of religion, seeing faith as something which is essentially private and unconnected with the believer’s public persona. That is not religiously neutral.

#### 4. *Surrender to the Failure*

Finally, there is a strong temptation to surrender. The strongest argument against the notion that the exclusion of religious perspectives establishes secularism may be that recognition of the problem creates enormous practical difficulties.<sup>264</sup> It would be unlikely that a school could present each and every religious perspective on a question or that, even if it could, that doing so would not seriously undermine the pedagogical process.<sup>265</sup> Nor does it seem practical in this day and age, if it ever was, to say that schools may simply not discuss

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261. Steven H. Shiffrin, *Liberalism and the Establishment Clause*, 78 CHI.-KENT L. REV. 717, 726 (2003).

262. *Id.*

263. *Id.*

264. See, e.g., Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9, 78 (2004) (government could not function if it could not vitiate religious views).

265. *Id.*

those topics on which religious views are pertinent. Apart from the problem of defining those topics in a way which does not include – for at least some persons somewhere – everything, it seems that any possible definition will remove a great deal from public school curriculums and impair a great many governmental services.

But to suggest that a problem creates practical difficulties does not mean it is not a problem. In a sense, Establishment Clause jurisprudence may be hoisted on its own petard. The Court has traditionally defined establishment in a way which does not require coercion or an endorsement of anything like a comprehensive sectarian viewpoint. It can be merely the perception of endorsement and what is endorsed need not be very specific, comprehensive or controversial. When establishment happens so simply, it may be difficult for public institutions not to endorse secularism as they seek to avoid the establishment of religion.

Recognizing this, Professor Shiffrin suggests “a constitutional obligation to include [religious] materials in the curriculum.”<sup>266</sup> But, sensing the impossibility of maintaining neutrality, he believes that such an obligation would be “rightly judicially unenforceable.”<sup>267</sup> It is not clear why the sensibilities of the secular should be so enforceable while those of the religious may not, other than the inability to do both without abandoning the nonendorsement project altogether. It is to that abandonment that we now turn.

#### VII. TOWARD A MORE MODEST ESTABLISHMENT CLAUSE

It may be that the courts will continue to ignore the problem. Although the Supreme Court has not given much attention to the issue, it has never found an establishment of irreligion. In *Engel v. Vitale*, for example, the Court made clear that removing prayer from public schools in and of itself did not establish secularism.<sup>268</sup> In *Abington*, the Court similarly found that the exclusion of mandatory bible reading did not establish irreligion.<sup>269</sup> In more

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266. *Id.*

267. *Id.*

268. *Engel v. Vitale*, 370 U.S. 421, 425 (1962).

269. *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225 (1963).

recent cases, such as *Lee* and *Santa Fe*, the Court seemed unconcerned about the implications of a selective censorship of student discourse at graduation.<sup>270</sup>

These cases did not present the precise issue considered here. Removal of worship or of a religious affirmation is arguably distinct from expressing points of view or offering services to which religious perspectives are pertinent but excluded. Moreover, as noted earlier, in cases like *Zelman*, *Rosenberger*, and *Good News Club*, the Court has more recently observed that exclusion of religion from certain fora may raise Establishment Clause concerns. But, in general, courts have either not rigorously analyzed the issue or maintained that the exclusion of something is not its negation. They have failed to see that the norm of anti-Establishment can be violated just as readily by secularism as by public religiosity. And, as we have seen, lower courts have been generally, if not universally, unsympathetic.

However, if the government is not to take sides, a government that promotes only secular perspectives is not even-handed. If citizens are not to be made to feel like outsiders on the basis of religion, then telling them that their core beliefs are wrong or irrelevant cannot be saved by the expedient of not saying that the God that is being ignored does not exist.

The failure to apply the idea of nonendorsement across the board is not simply an inevitable doctrinal inconsistency, or a mere concession to practicality, but is itself a departure from neutrality that tilts the playing field in an area of life that the Framers thought deserved an extraordinary degree of liberty. If we wish to be rigorously neutral on religious questions, then we need to be rigorously neutral. To merely pretend to do so because true neutrality sets the bar too high distorts public discourse in ways that are not often acknowledged. This is, in many respects, more insidious than explicit bias. "The danger facing those who disagree with the state's view," as one scholar has noted, "most often, is not from any plausible fear of classic censorship – *i.e.*, overt punishment for offering views repugnant to state authorities – but, rather, from being drowned out of the marketplace by the

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270. *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992).



often superior resources of the state.”<sup>271</sup>

#### A. *The Demise of Nonendorsement*

It is unclear whether the endorsement test will exert as much influence as it has in the past following the retirement of Justice O'Connor. While all of the remaining Justices have, at one time or another, joined in opinions that purport to apply the test, its application seems to have been driven by Justice O'Connor's status as a likely swing vote.<sup>272</sup> For example, Justices Breyer, Souter, Stevens and Ginsburg, while sometimes using endorsement language, generally set the endorsements bar so low that virtually any government support for religion constitutes establishment.

It is, of course, possible that the Court may swing back toward a separationist view. Justices Stevens, Ginsburg, Souter and, notwithstanding his concurrence in *Van Orden*, Breyer, are largely separationist and may garner majorities either by attracting the vote of Justice Kennedy or of Chief Justice John Roberts or Justice Alito if either turn out to adopt something approximating a separationist view.

This seems unlikely. Justice Kennedy, as noted below, has a track record that, while not free of the doctrinal inconsistency noted here, is not separationist. While the new Chief Justice does not have an extensive record on church and state issues, it seems unlikely that he will turn out to be markedly more separationist than Chief Justice Rehnquist. Samuel Alito, seems just as, if not more, favorably disposed to accommodation than the jurist he would replace.<sup>273</sup> A thoroughgoing separationism would appear to be in sight, but out of reach.

In the other corner, at the end of the past term there appeared to be at least three justices willing to abandon or

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271. SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 79-80 (1998).

272. Justice Kennedy has also been a swing vote in establishment clause cases, but has not been a strong proponent of a rigorous “endorsement” analysis.

273. Jay A. Sekulow & Francis A. Marion, *The Supreme Court and The Ten Commandments: Compounding The Establishment Clause Confusion*, 14 WM. & MARY LAW REV. 33, 50 (2005). Although given that confirmation politics are currently driven by a policy of “you can ask, but I won’t tell,” there is no way to be sure.

substantially de-emphasize the test. As noted earlier, in *McCreary*, Justices Thomas and Scalia and Chief Justice Rehnquist argued for an Establishment Clause jurisprudence that would call for substantial deference to non-coercive governmental recognition, and even a limited form of endorsement, of monotheistic religion. In *Van Orden*, concurrences by Justices Scalia and Thomas called for non-preferentialist and coercion-based views respectively.

If the new members of the Court do join Justices Scalia and Thomas in adopting a more tolerant view of government discourse regarding religion, Justice Kennedy will, at least for awhile, be the most likely “swing vote.” Although he voted with the majority in *Santa Fe* and wrote the opinion of the Court in *Lee*, he has not been a prominent supporter of the endorsement test.<sup>274</sup> While he has joined in opinions in which it has been adopted,<sup>275</sup> he has, at other times, at least acknowledged the ultimate futility of the inclusiveness which the endorsement test seeks to achieve.

Concurring in the judgment and dissenting in part from the Court’s majority opinion in *Allegheny*, Justice Kennedy wrote, that when it comes to Christmas displays, “[j]udicial invalidation of governments attempts to recognize the religious underpinnings of the holiday would signal not neutrality but a pervasive intent to insulate government from all things religious.”<sup>276</sup> For Justice Kennedy, treating “what is orthodox . . . [as] what is secular . . .” raises Establishment Clause concerns just as the imposition of religious orthodoxy.<sup>277</sup> Writing in *Lee*, he observed that “sometimes to endure social isolation and even anger may” be the price of nonconformity and that “[t]o endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society . . . .”<sup>278</sup> In short, he has been skeptical of the notion that the state can present a public face that is inoffensive to all.

But while Justice Kennedy has favored broader leeway for

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274. *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992).

275. *McCreary County, Ky. v. ACLU of Ky.*, 125 S. Ct. 2722, 2733 (2005).

276. *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 663 (1989) (Kennedy, J., concurring in part, dissenting in part).

277. *Id.* at 678.

278. *Lee*, 505 U.S. at 596, 597-98.

governmental involvement with religion, emphasizing, at times, coercion as the lynchpin of analysis of governmental religious speech,<sup>279</sup> his view of coercion arguably elides into the right to be free of exposure to religious views with which one disagrees. On the ground this looks quite a bit like nonendorsement.

As noted earlier in *Lee v. Weisman*, for example, Justice Kennedy observed that “by the time they are seniors, high school students no doubt have been required to attend classes and assemblies and to complete assignments exposing them to ideas they find distasteful or absurd or all of these.”<sup>280</sup> He concedes that such students “may consider it an odd measure of justice to be subjected during the course of their educations to ideas deemed offensive and irreligious, but to be denied a brief, formal prayer ceremony that the school offers in return.”<sup>281</sup> Still, he concludes, that to sit quietly while others pray is “too high an exaction to withstand the test of the Establishment Clause.”<sup>282</sup>

Justice Kennedy has generally voted to uphold state accommodation of religion in other contexts.<sup>283</sup> It seems unlikely, then, that he will provide a decisive vote to abandon the notion of nonendorsement.<sup>284</sup>

#### B. *A Return to Nonestablishment*

So while our Establishment Clause jurisprudence may be momentarily in equipoise, Justice O'Connor's retirement may bring us closer to a reexamination of nonendorsement. What might such a new Establishment Clause jurisprudence look like?

It is a presupposition of those who advocate separationist, or what are termed “neutrality” based approachments to the Establishment Clause, that there is a need, at some level, to

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279. *Id.* at 597.

280. *Id.* at 591.

281. *Id.*

282. *Id.* at 598.

283. *See, e.g.*; *Van Orden v. Perry*, 125 S. Ct. 2854 (2005); *McCreary County, Ky. v. ACLU of Ky.*, 125 S. Ct. 2722 (2005); *Zelman v. Simmons-Harris*, 536 U.S. 638 (2002); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

284. *Lee*, 505 U.S. at 592.

quarantine religion from the state. While they may differ on just how extensive this quarantine must be and where it ought to start, they share the idea that, at some point, serious religious references and practices may not be expressed from fora or by speakers too closely associated with the state. More significantly, this proscription applies whether or not these references or practices are coercive, proselytizing, or marked by claims of exclusivity or of condemnation of nonadherents. None of this is self evidently true.

1. “*No establishment*” means . . . *no establishment*

Justice Scalia, in those portions of his *McCreary* dissent joined by the Chief Justice and Justice Thomas, drew on historic practices in rejecting the notion of strict neutrality between religion and nonreligion.<sup>285</sup> Invocation of God, he argued, is not an establishment and, in the view of the dissenters, the Establishment Clause resolves the tension inherent in the impossibility of a neutrality in favor of the promotion of monotheistic religion.

[I]n the context of public acknowledgments of God there are legitimate *competing* interests: On the one hand, the interest of that minority in not feeling “excluded”; but on the other, the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication *as a people*, and with respect to our national endeavors. Our national tradition has resolved that conflict in favor of the majority.<sup>286</sup>

In a recent historical survey, Father Thomas Curry argues that eighteenth century establishment was understood to refer to a church which the government funded and controlled and in

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285. *McCreary*, 125 S. Ct. at 2756.

286. *Id.* at 2756 (Scalia, J., dissenting) (footnote omitted) (emphasis supplied). See also *Engel v. Vitale*, 330 U.S. 425, 445 (1947) (Stewart, J., dissenting) (“I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation.”). The *McCreary* dissent nevertheless suggests that government may not endorse any particular form of monotheism. If, however, government is to continue to involve itself in aspects of life with which religion is concerned, and on which it offers different answers, even this more limited form of neutrality may not be possible.

which government uses its coercive power to encourage participation.<sup>287</sup> Professor Gedicks has made the same point, i.e., a classic eighteenth century establishment was a state church supported by taxation and, to which, perhaps allegiance was either required or rewarded with concrete privileges.<sup>288</sup>

It is hardly the mark of an unthinking originalism or of a capitulation to the judgment of those who are long dead to suggest that such an establishment – or something that looks an awful lot like it – is at the core of the First Amendment's protection. Although much of modern Establishment Clause jurisprudence and theory has reacted to the changed role of the contemporary state by expanding the reach of disestablishment as the government's role has grown, there is no logical necessity to do so. The expansion of the modern state reflected a change in notions regarding not just the scope but the purpose of government. Coming to see disestablishment as a guarantee of secularized public space or a requirement of a public neutrality rather than as a bulwark against coercion is also a conceptual change, but one that is distinct and not necessarily compelled by the first. Put another way, the imperative separation may have been necessary and workable as applied to the activities of seventeenth century government.<sup>289</sup> It may be neither today.

While neither Father Curry nor Professor Gedicks argue for the precise approach taken by Justices Scalia or Thomas, or the approach advocated here, might there not be a sense in which establishment requires government support of religion that surpasses a certain threshold, i.e., that risks the creation of an institutional establishment or of the harm thought to be associated with it?

Most fundamentally, the Establishment Clause requires an institutional separation of church and state. The government may

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287. THOMAS J. CURRY, *FAREWELL TO CHRISTENDOM: THE FUTURE OF CHURCH AND STATE IN AMERICA* (2001).

288. Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV. 1071, 1093-94 (2002).

289. See, e.g., Kevin Pybas, *Does The Establishment Clause Require Religion To Be Confined To The Public Sphere?*, 40 VAL. U. L. REV. 71, 85 (2005) (asking whether "given that Jefferson's and Madison's views on religious liberty were part of a set of beliefs that also included belief in limited government, does it make sense to invoke the former when we have rejected the latter").

not proclaim that Christianity is the official religion of the United States, directly fund churches, discipline or regulate clergy, prescribe ecclesiastical rules, etc. It ought not to be in the business of running churches.

This does not mean as *Zelman* and *Rosenberger* demonstrate, that government funds can never be used to subsidize religious activities through, for example, the mechanisms of individual choice or the state's maintenance of open fora.

Although some argue that the *sine qua non* of disestablishment is the prohibition of the direct or indirect allocation of tax dollars for religious purposes,<sup>290</sup> this, too, cannot survive the expansion of government. It is difficult to see how an agnostic is any more aggrieved by funding a nondenominational prayer, than an evangelical might be by the knowledge that her tax dollars are used to fund thoroughly secular approaches to areas of life in which she believes that faith is indispensable. If liberty of conscience is threatened by requiring one to fund proselytizing for a God that does not exist, then why is it not similarly threatened by diverting tax funds to promote, or at least model, the notion that a comprehensive life view, or attention to life's most difficult questions, can and are routinely answered without a God who one believes to be sovereign?

## 2. *No establishment means no coercion*

Concurring in *Van Orden*, Justice Thomas argued that establishment requires "actual legal coercion."<sup>291</sup> While coercion may not always be necessary,<sup>292</sup> it should certainly be sufficient. Beyond the creation of a straight forward establishment, the government must avoid coercion. The core concern of the Establishment Clause is, and ought to be, religious liberty,<sup>293</sup> i.e.,

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290. FELDMAN, *supra* note 189, at 247.

291. *Van Orden v. Perry*, 125 S. Ct. 2854, 2865 (2005) (Thomas, J., concurring). See *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty.").

292. I have already argued that there must be an institutional separation of church and state. It is also possible for government actions that present direct and substantial threats to religious pluralism to constitute Establishment.

293. Consideration of the historical and philosophical underpinning of this

the ability of each person to form beliefs and to act on religious matters without interference from his government. If being exposed to a nondenominational prayer or to a valedictorian's attempt at religious proselytization, however unpleasant, does not significantly interfere with that liberty, the Establishment Clause is not implicated.

Some have argued that these rights of conscience are adequately protected by the Free Exercise clause and, therefore, the Establishment Clause cannot be concerned with coercion.<sup>294</sup> Disestablishment, the argument goes, must apply to something more than that which interferes with free exercise. But, it seems just as plausible to conclude, with Professor Feldman, that the two clauses are concerned with preventing the state from stopping a person from what she wishes to do (Free Exercise) and preventing it from compelling her to do what she does not wish to do (Establishment).<sup>295</sup>

While one could regard both as incorporated in the concept of free exercise (making one profess or endorse that which he does not wish to arguably infringes his freedom of conscience),<sup>296</sup> there is no logical reason that one must do so and little or no historical evidence that the framers so intended.

One might just as easily argue that Free Exercise subsumes not only compelled professions of faith, but also compelled support of a religious perspective or, for that matter, mere exposure to an officially endorsed religious viewpoint.<sup>297</sup> Although the historical

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view is beyond the scope of this article. See, e.g., Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 350 (2002) (arguing that both rationalists and evangelicals argued that the purpose of nonestablishment was to protect liberty of conscience from the coercive power of government); Mary Ann Glendon, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1497-91 (1990) (religion is privileged because it is an obligation owed to a higher sovereign).

294. Justice Kennedy, for example, has argued that government actions that constitute establishment need not violate free exercise because "the Establishment Clause has a specific prohibition in forms of state intervention with no precise counterparts in the speech provision." *Lee*, 505 U.S. at 591.

295. FELDMAN, *supra* note 189, at 49-50.

296. Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 922 (1986) ("If coercion is also an element of the Establishment Clause, establishment adds nothing to free exercise.").

297. For example, one might just as readily argue that a believer is under

record may not be clear on whether there was a consensus regarding whether the notion of “establishment” did or did not include nonpreferential aid to religion or even endorsement of nondenominational religion with freedom for dissenters, it is clear that most of the antipathy toward establishment centered on notions of compulsion.<sup>298</sup>

On the other hand, coercion must be properly understood and cannot be tantamount to being made to feel comfortable. We cannot make “the social world . . . acceptable to every last individual.”<sup>299</sup> Justices Kennedy<sup>300</sup> (and Jackson before him)<sup>301</sup> observed that the Constitution was not intended to and cannot protect minorities from feeling like, well, minorities. While these observations may be, on some level, “insensitive,” there is no less insensitivity involved in the exclusion of religious people and their perspectives. It is far better to abandon the charade that everyone’s discomfort can be avoided. There is a difference between being free to dissent and claiming the right to pretend that one is not a dissenter.<sup>302</sup>

Professor James Beattie has attempted to root this distinction

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a religious duty to avoid contamination by exposure to the unholy. See, e.g., Stolzenberg, *supra* note 204, at 611 (plaintiffs in *Mozert* claimed that mere exposure is a form of value inculcation); 2 Corinthians 6:14 (“Be ye not unequally yoked together with unbelievers”), or that being made to “feel like an outsider” as the price of one’s religious practices is an impairment of free exercise.

298. THOMAS C. BERG, *THE STATE AND RELIGION IN A NUTSHELL* 53 (1998).

299. JEREMY WALDRON, *LIBERAL RIGHTS: COLLECTED PAPERS, 1981-1991*, at 36-37 (1993).

300. *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 655 (1989) (“[I]t borders on sophistry to suggest that the ‘reasonable’ atheist would feel less than a ‘full member of the political community’ every time his fellow Americans recited, as part of their expression of their patriotism and love for country, a phrase he believed to be false.”) (Kennedy, J., concurring in part, dissenting in part).

301. *Illinois ex rel McCollum v. Bd. of Educ. of Sch. Dist. No. 71, Champagne County, Ill.*, 333 U.S. 203, 232-33 (1948) (Jackson, J., concurring) (doubting the constitution can be construed “to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or class”).

302. Lisa Shaw Roy, *The Establishment Clause and the Concept of Inclusion*, 82 OR. L. REV. 1, 36 (2004) (“By advocating what has traditionally been termed a ‘religion of secularism,’ defenders of the religious minority aim to transform the public square into one in which dissent is no longer required.”).



in John Stuart Mill's notion that government regulation can only be justified as the prevention of harm and the ancillary idea that the existence of moral distress is not harm. He writes:

To justify political regulation there must be a dimension of preventing harm to others, and the feelings of others do not count as harm. If, on the other hand, endorsement means something more, namely that government puts in place some form of sanctions or penalties backed by force of law – viz, those citizens that the regulation penalizes are “outsiders” and those who are not are “insiders” – then only the most imprecise use of language allows us to claim that government is sending a “message” of endorsement. In this scenario, government is sending a sheriff, not a message.<sup>303</sup>

Even if we accept the curious modern notion that one should be offended by exposure to that with which one does not agree, offense is not tantamount to being coerced. If merely hearing something we do not like or being reminded that most others believe differently than we do amounts to coercion, then we are back where we started. Except that this time, if we are honest about the non-neutrality of a secularist baseline, we have adopted a rule of near-paralysis, precluding government from speaking on any topic about which religion may have something to say. We will have fallen into the very trap that has caused so many to urge that we overlook endorsement of the secular.

### 3. *Nonestablishment Means Respect For Religious Pluralism*

This is not to suggest that the only way in which the government can run afoul of the Establishment Clause is to put its citizens to the fire.

Professor Ravitch has advocated a “substantial facilitation” test. He would ask whether a state action substantially facilitates religion (and would set the bar on that question relatively low).<sup>304</sup> Perhaps what we need is a test focused upon whether a state action creates a “substantial risk” of suppressing religious

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303. James R. Beattie, Jr., *Taking Liberalism and Religious Liberty Seriously: Shifting Our Notion of Toleration From Locke to Mill*, 43 CATH. LAW. 367, 402 (2004).

304. See Ravitch, *supra* note 33, at 546-47.

differences.

Evaluating the nature of the threat may be aided by resort to the concept of a "free market" in religious ideas. Government is, of course, free to engage in political speech without impinging upon the First Amendments protection of free speech.

But the Establishment Clause does place limits on its ability to engage in religious speech or in speech that might affect its citizen's religious choices. Although it is not possible, at least given our modern notions regarding the role of government, for it to completely refrain from such speech, it may not act in a way that poses a substantial risk of distorting the religious choices of its citizens. This is a form of "substantive neutrality," but a more modest form. It seeks only rough justice. Government action becomes "practically coercive" when it creates a substantial threat to religious pluralism or of suppressing religious differences.<sup>305</sup>

Minorities will feel like minorities. This is inevitable. What is not inevitable is the government's use of its power and prestige to make continued adherence to a minority faith – or no faith at all – untenable. Government may acknowledge the religious sentiments of the majority, but it may not attack, or act to extirpate or to penalize, those of the minority.

The proponents of endorsement neutrality also claim to be acting in the interests of religious pluralism. The difference, it seems to me, lies in defining what constitutes such a threat. The question cannot be whether nonadherents are made to "feel" like outsiders. This, as we have seen, is a standard that is incapable of even-handed application.

It bears repeating that an attack upon the religious sensibilities of its citizens may lie in government promotion of secularism as well as in the promotion of a particular religion or religion in general. Mary Ann Glendon has argued that the Bill of Rights was designed to protect and empower intermediate associations and "the diverse local arrangements that the citizens of the several states had made with respect to religion."<sup>306</sup> "The people," she concluded, are "protected, not only in their solitary

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305. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 102 HARV. L. REV. 1409, 1516 (1990).

306. Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 543 (1991).

individual religious beliefs and practices, but in the associations and institutions where those beliefs and practices were generated, regenerated, nurtured, promoted, and transmitted.”<sup>307</sup>

If one subscribes to a post liberal conception of religion and believes that faith is affected by the surrounding culture and requires communal expression, then an increasingly large – and largely secular – public sphere compelled by force of law is problematic. When schools, social services and public gathering spaces are increasingly provided by the state and, for that reason, are increasingly secular, it becomes far more likely that faith itself will be crowded out or secularized.

It is for this reason that neither rigorous neutrality nor nonendorsement is possible. Government will inevitably promote views that are not religiously neutral or that it will be reasonably perceived as placing its imprimatur on some concept related to God or His absence. It engages in establishment, however, only when it substantially burdens dissent, not when it merely makes it uncomfortable.

There are government actions that, while stopping short of compelled worship or confessions of belief, are so overbearing and such substantial interferences with the religious life of its citizens that they are tantamount to coercion. One can imagine efforts by the government in support of one religion that may so overwhelm individuals’ exercise of their religion as to be practically coercive. For example, a concerted government campaign critical of a particular faith group – or of atheists – might violate the Establishment Clause<sup>308</sup> as might a campaign that threw the weight of the state’s authority and treasury behind a particular religion.<sup>309</sup>

How would this change Establishment Clause jurisprudence? Much of the litigation regarding private religious expression in

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312. *Id.*

308. Thus the Establishment Clause would prohibit something like the Nazi policy of *Gleichshaltung*, consisting of state vilification of Jews and labeling as undesirable (*Auschaltung*) Jews and other undesirables. This policy, while combined with coercive policies, was distinct from and facilitated them. See generally CLAUDIA KOONTZ, *THE NAZI CONSCIENCE* (2003) State vilification of non-believers would be equally problematic. This does not mean, however, that government may never criticize a religious position.

309. As noted earlier, however, Justice Scalia would permit preferential endorsement of monotheism.

government forums is about whether the communication can be attributed to the state. If a school permits its valedictorian to include a religious message within her commencement speech, does that mean that the school has endorsed that message? Is the state “advancing” religion when it posts a student’s artwork or essay which he has chosen to center upon a religious theme? These questions, while not entirely inapposite under the approach argued here, are of less importance because, only expressions, that even if they might be attributed to the government, threaten religious pluralism or risk the creation of an establishment are constitutionally problematic.

It would no longer be necessary to plumb the intricacies of the *Lemon* test. While it would certainly matter whether a government action had a religious, secular (or secularist) purpose, whether it advanced or inhibited religion and the extent to which it entangled the church and state, these would become constitutionally problematic only when they created the risk of an institutional establishment, amounted to coercion, or constituted a substantial threat to religious pluralism.

This approach may not entirely satisfy the religious. It will not ensure that irreligious messages are not advanced by the government, at least not until they rise to the threat of an establishment of secularism or a threat to religious liberty. An illustrative example is the Ninth Circuit’s decision in *American Family Association v. San Francisco*.<sup>310</sup> In that case, the San Francisco Board of Supervisors passed a resolution condemning an organization that had run ads expressing the view that homosexuality is a sin from which one can – and ought to – turn away.<sup>311</sup> In response, the Board passed resolutions calling upon local television stations to boycott the ads (which they did) and associating the ads with the murder of a gay man in Alabama.

Although the Ninth Circuit rejected the Association’s free exercise and Establishment Clause challenges, the case was a tough one under notions of nonendorsement. Certainly, in that case, the government could be said to have taken a position on a religious point of view in a way that made its adherents feel like political outsiders and the mere fact that it did not focus on the

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310. 277 F.3d 1114 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 129 (2002).

311. *Id.* at 1119.

religious etiology of the view it condemned did not make that any less the case.

Although one could argue that the resolutions condemning the faith-based message of an evangelical Christian organization is a threat to religious pluralism, it does not seem sufficiently systematic nor comprehensive to pose any real risk of distorting the free market for religious ideas.<sup>312</sup>

But the rigorously secular will not be satisfied either. Under this approach, it seems clear that *Lee* and *Santa Fe* were wrongly decided. However uncomfortable a nonadherent may have felt at exposure to brief prayer, it beggars reality to suggest that this threatens religious pluralism.

Nor do displays of the Ten Commandments, recitation of the words "under God" in the Pledge of Allegiance,<sup>313</sup> or, for that matter, moments of silence (or perhaps even voluntary prayer) violate the Establishment Clause.

#### VIII. CONCLUSION

One might characterize this approach as one which permits greater leeway for government religious speech as long as it does not go "too far." I acknowledge that and recognize that defining that point at which government has gone "too far" is difficult and inevitably imprecise. But the difficulty of line drawing hardly justifies the zero tolerance policy that is more characteristic of our current approach.

Because a policy of nonendorsement cannot be evenly applied, our current jurisprudence does not accomplish what it sets out to do. It most decidedly does not prevent the state from making some "feel like outsiders" on the basis of their religion. It does not communicate to all that the government is "theirs." These are goals that cannot be achieved. It is time to give up.

The approach advocated here would not necessarily result in

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312. The outcome may be different if, for example, the Board of Supervisors had threatened to pull city business from, or boycott the news departments of, any station running the ads.

313. *Newdow v. Cong. of the United States*, 292 F.3d 597, 614 (9th Cir. 2002) (Fernandez, J., concurring in part, dissenting in part) ("In God We Trust,' and 'under God' have no tendency to establish a religion in [the United States] or to suppress anyone's exercise, or non-exercise, of religion, except in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our policy.").

more religion in public places. In parts of our nation characterized by substantial religious diversity or by a secular consensus, public classrooms and spaces may look much as they do today. But if so, they will not be lodged in a hypocritical and implausible claim of neutrality.

But elsewhere there will be more room for organic, noncoercive and limited expression of faith in places and on topics where it is natural to do so. While Establishment Clause litigation will not be eliminated, it will lose much of its trivial character. It will no longer be concerned with the extirpation of slight and innocuous religious references – a project that does little to advance religious freedom and much to suggest to the public at large that our constitutional exegesis is no longer concerned with serious questions.

If that is all we can do, it may be enough.